INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. This week we have contributions from Richard Harwood QC (on the past, the present and the future of Council meetings) and Katherine Barnes (on a practical application of the precautionary principle in the HS2 tree felling injunction case).

We can confirm our Pilot Briefings service is still available for use. As a reminder, to utilise the service we will require a short email detailing the issues at hand and the questions you would need addressing. On receipt, a 15 minute time slot will be arranged with a member of our established team, who will be able to discuss the legal query you have. As before the service will be free of charge.

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FROM VIRTUAL TO HYBRID? THE PAST, THE PRESENT AND THE FUTURE OF COUNCIL MEETINGS?

Richard Harwood QC

For years councillors have met in public, in buildings in or close to the council area, making the important decisions for their locality. In England meetings were held under the Local Government Act 1972 or the executive arrangements made under the Local Government Act 2000.

The Covid pandemic brought an immediate threat to this process of physical meetings. The 'stay at home' mantra in what has subsequently become known as 'Lockdown 1' was particularly fierce, and fiercely complied with. Even where they needed personnel in buildings, businesses and other organisations were trying to adopt quickly to Covid-secure procedures.

The central and local government response was commendably swift.

Section 78 of the Coronavirus Act 2020 allowed the relevant national authority to make regulations providing for virtual meetings in local authorities, including the Greater London Authority, district, county and unitary councils, parish councils, national park authorities, conservation boards and school admissions appeal panels. 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 2020 Regulations") were made, coming into force on 4th April, only 12 days after the first lockdown had been announced.[1] Those authorised meetings to be held without all participants being in the same place, allowing remote access by video or audio means. Not only could councillors join in remotely, but the regulations allowed public speaking arrangements to be continued. It was an essential part of such meetings that the public were allowed to watch or listen to the proceedings remotely by a live feed.

These procedures were very quickly adopted by local authorities and proved a great success. They avoided the severe democratic deficiencies which would have been associated with a wholesale transfer of decision making to officers or single executive members. But they also brought local decision-making to a far wider audience. Some local authorities had previously webcast meetings, but even so tended only to cover those in the council chamber, such as full council and sometimes planning committees. From April 2021 all council decision making and scrutiny meetings were not only broadcast live but usually put on local authority YouTube channels.

The Coronavirus Act allowed the virtual meetings regulations to apply only to meetings held before 7th May 2021. In March 2020 that seemed a safe distance away. Time however marches on, and measures against the pandemic are still not concluded. What then for virtual meetings?

On 25th March 2021 the Local Government Minister, Luke Hall MP, wrote to local authorities saying that the current provisions would not be extended. As lockdown 3 unwound, the Minister encouraged councils to continue broadcasting. He launched a consultation into what should happen next.

Many local government bodies were not happy. Several had been asking the government for months to extend the virtual meeting powers. The Local Government Association said the decision was 'extremely disappointing'.

The Present

From 7th May 2021 the virtual meetings regulations cease to have effect and the previous legal position resumes. What that position is suddenly became contentious. For years the consensus had been that the English legislation had required physical meetings. In November

1 See *Virtual Local Authority Meetings* (Richard Harwood, 3rd April 2020) for a discussion of these provisions.

2016, the Department for Communities and Local Government published a consultation paper Connecting Town Halls: Consultation on allowing joint committees and combined authorities to hold meetings by video conference which assume that physical presence was required and only contemplated virtula meetings for joint or combined bodies. The Government responded to the consultation in July 2019, maintaining the view that the legislation presently required meetings in person but deciding to carry out further consultation on the topic. By contrast specific Welsh and Scottish legislation had allowed for remote meetings since 2011 and 2003 respectively. The Welsh Assembly has recently added detail to the regime in the Local Government and Elections (Wales) Act 2021.

When the government signalled its unwillingness to extend the Covid virtual meetings legislation the professional bodies for council lawyers and committee administrators, Lawyers in Local Government, the Association of Democratic Services Officers had with Hertfordshire County Council made an application to the High Court for a declaration that councils already had the powers needed to hold online meetings. Supporting them, ultimately, was the Secretary of State. The Minister's team included 39 Essex Chambers' Rose Grogan.

The case was determined by a Divisional Court[2] of the High Court, comprising the President of the Queen's Bench Division, Dame Victoria Sharp, and Mr Justice Chamberlain: *R(Hertfordshire County Council) v Secretary of State for Housing, Communities and Local Government*.[3] The Court noted the previous consensus that physical meetings had been required in England.[4] It is hard to avoid the impression that the Court were sceptical of a change of legal view arising because it was viewed as practically necessary to have remote meetings. They also drew attention to the specific Welsh and Scottish legislation being seen as necessary and the detailed provisions in them. The Court recognised, correctly, that any council meetings require specific provisions, in particular for public access.[5] That would be lacking in simply reading the 1972 Act as allowing remote meetings.

The Court considered how far legislation would keep up with technological developments. Considering whether there is an 'updating construction' of the legislation the Court followed Leggatt *J in R(ZYN) v Walsall Metropolitan Borough Council:*[6] 'each case where relevant circumstance has changed since the legislation was enacted it is a question of interpretation whether it is reasonable to attribute to the legislature the intention that the words used should be interpreted and applied in a way which takes account of that change'. In some contexts, including companies law, it was considered that meetings could be held remotely.

However, what 'meeting' meant in a statute depended on its context. The Local Government Act 1972 provided for meetings to be held "at such place, either within or without their area", to publish "notice of the time and place of the intended meeting" and to send out "a summons to attend the meeting". A 'place' is inconsistent with the meeting taking place at multiple venues, for example, the homes of all participants.[7] Where a place for a meeting was specified, being present would ordinarily mean physically going to that place.

This was not determinative of the question whether Parliament intended an updating

2 A Divisional Court is any sitting of the High Court with two or more judges. Apart from adding judicial firepower, their significance is that a Divisional Court judgment may only be departed from by the High Court if it is considered to be clearly wrong, rather than merely being persuasive for other High Court judges.

3 [2021] EWHC 1093 (Admin).

4 At para 49.

5 See paragraphs 50 to 53.

6 [2014] EWHC 1918 (Admin), [2015] 1 All ER 165.

7 At para 76.

construction to be applied, 'The terms used ("meeting", "place", "present" and "attend") are relatively general, and – as Leggatt J said in ZYN – this could indicate that Parliament intended the meaning of the terms to be capable of evolving as technology evolved'.[8] However there was a need for certainty about what happened, including whether someone was in attendance and how votes were conducted.[9] That concern of the Court might have been overplayed – attendance of councillors and voting at remote meetings does not seem to have been problematic, but a need for certainty in the does militate against the casual widening of the legislation to remote meetings.

In any event the Court considered that interpreting 'the 1972 Act purely on the basis of what was intended in 1972, we would read "meeting" as referring to an in-person meeting taking place at a particular geographical location and "attend" and "present" as connoting physical attendance or presence at that location'.[10] If the legislation had been ambiguous then the subsequent legislation was a legitimate tool in construing it, and pointed to the need for new legislation before remote meetings could take place.[11] Consequently under the England local government legislation 'meetings must take place at a single, specified geographical location; attending a meeting at such a location means physically going to it; and being "present" at such a meeting involves physical presence at that location'.[12] Whether and how remote meetings were to be allowed was a matter for Parliament rather than the Courts.[13]

The Divisional Court delivered a further judgment on whether the right of the public to attend meetings required them also to be able to be physically present at the meeting.[14] They held that as council meetings had to be held in one location, physically, the public were entitled to physically attend the meeting. The Court emphasised that:[15] 'None of this, of course, prevents a local authority from broadcasting or live-streaming some or all of its meetings so as to allow wider public access. But such broadcasting or live-streaming does not, on its own, satisfy the requirement for the meeting to be "open to the public" or "held in public". '
The requirements therefore are that council meetings, including committee meetings, must be held in one place with the councillors who sit on that body or committee being present in person. The public must also be able to attend in person, although their numbers may in practice be limited by Covid procedures. Persons who are merely addressing the meeting, such as ward councillors, persons using public speaking rights, or applicants and objectors on planning applications, can do so in person or remotely. Officers who are advising the meeting may do so remotely. There are no restrictions on the council broadcasting any public part of the meeting.

The Covid legislation does not prevent face to face council meetings. The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 do not prohibit meetings indoors which are reasonably necessary for work or voluntary services, so council meetings can be held, with public attendance (see schedule 1, Part 1, exception 3 of the regulations). Indeed essential meetings could always have been held.[16] The social distancing expected for Covid-secure meetings would though usually mean that full council meetings (so with all members) could not take place in the council chamber. Rooms normally used by parish councils might also be too small. New venues would have to be sought.

8 At para 77.
9 At para 78.
10 At para 83.
11 At para 85.
12 At para 89.
13 At para 90.
14 [2021] EWHC 1145 (Admin).
15 At para 9
16 See, for example, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 7(b).

Council meetings may therefore take place, and move towards normality.

The effect on planning inquiries, hearings and other events

In the Covid pandemic many other meetings have moved from the physical to the virtual world. Some of these have been formal hearings, held under legislation. The Hertfordshire judgments bring into sharp focus whether these can be held remotely.

Planning appeals may be considered at a local inquiry, a hearing or on the basis of representations in writing.[17] Primary legislation says that inquiries shall be 'local inquiries' and 'oral evidence shall be heard in public'.[18] Participation by video or audio links is not prohibited by the Planning Inquiries and Hearings Rules but those rules do require notice of the 'place' where those events are held.[19] An Inspector may require any person appearing or present at an inquiry who, in his opinion, is behaving in a disruptive manner to leave and prohibit them from returning.[20] Inspector may from time to time adjourn an inquiry and, if the date, time and place of the adjourned inquiry are announced at the inquiry before the adjournment, no further notice is required.[21]

Similarly objectors to a local plan have a right to 'appear before and be heard by' the Inspector.[22] Notice of the 'place' of examination hearings (taken to be the first one) has to be given.[23]

Whilst the primary legislation seems to be less problematic, the need for notice of the place of the inquiry or hearing raises real doubt, at least, whether the relevant rules or regulations permit remote hearings. Rules are made by the Lord Chancellor and regulations by the Secretary of State for Housing, Communities and Local Government.

This issue had been raised with government since the start of the pandemic. The Ministry of Justice ministers agreed in response to a question from Sir Bob Neill MP at the Justice Select Committee on 4th May to assist the Inspectorate by making any necessary rule changes. In the event, no rule changes have been made. It is prudent for the matter to be revisited.

The future of council meetings

The approach to take to council meetings, as the country comes out of lockdown, and into the future, is bound to be nuanced and subject to a range of opinion.

More than most organisations, local authorities benefit from face to face meetings with councillors and officers. Councils are unusual creatures. Senior decision making is put in the hands of elected members who are meant to be using their spare time, although leaders and some senior executive members may in reality be part or virtually full time. In the normal way of things, councillors are not in the council offices all the time or indeed meeting their fellow members. Relations between councillors and officers need to be developed and continued. The ability to have informal chats with officers and members at the fringes of meetings is vital to make authorities run effectively. Information which would not other be told, will be passed on. Other problems can be sorted out without fuss. Councillors will find they have more in common with the opposition than they might expect, often with a similar view of management issues and the demands of constituents.

17 Town and Country Planning Act 1990, s 319A.

18 Town and Country Planning Act 1990, ss 320(1), 321(2).

19 For example, Town and Country Planning (Inquiries Procedure) (England) Rules 2000, r 10(3). A place to hold a public inquiry is occasionally required by primary legislation, see for renewable energy safety zones in Energy Act 2004, Schedule 16, para 6(5).

20 For example, Town and Country Planning (Inquiries Procedure) (England) Rules 2000, r 15(9).

21 Town and Country Planning (Inquiries Procedure) (England) Rules 2000, r 15(13)

22 Planning and Compulsory Purchase Act 2004, s 20(6).

23 Town and Country Planning (Local Planning) (England) Regulations 2012, reg 24.

Unlike most businesses and central government, councils are not organisations where the key people are working closely together on a day-to-day basis, nor are they a team assembled for a specific project, which will disband once it is completed. Instead councillors are brought together mainly for decisionmaking. Politics is part of local government and political debates can be fierce. But it is better that they are conducted by people who help each other to the milk during tea breaks, than by keyboard warriors who see each other only through screens.

May 6th saw two years' worth of elections in one go. There will be an influx of new councillors and continuing councillors are likely not to have seen each other face to face for over a year.

Good governance really does require councillors to start meeting together and with officers face to face.

How then to take forward the benefits of virtual meetings whilst promoting local cohesion? Simply rolling forward the current provisions has the potential to embed a remote culture which is destructive of good local government. However there have been very real benefits from allowing virtual participation and observation.

One possibility is to allow hybrid meetings in which some councillors may attend remotely, provided that a certain proportion are physically present. This could accommodate councillors whose work, family or childcare arrangements might prevent them attending particular meetings in person, and may be more efficient for some of the longer unitary counties, such as Cornwall. It would though be a matter of management, particularly political management, to avoid individual councillors becoming semi-detached.

The law has never prevented speakers who are not members of the particular body from taking part remotely. So, for example, a councillor could speak at a cabinet meeting on a ward matter through a video link. Physical attendance would solely be concerned with the members of the cabinet themselves. Similarly officers could attend remotely, which might be useful for an officer with only a minor role on a single item. Where public speaking is allowed, that could also be done through a remote link, although speakers would usually prefer to be there in person.

Finally broadcast and subsequent playback of all meetings, whether in person or hybrid could be required. This will embed the greater public access and knowledge of local democracy which the last 12 months enforced experiment has brought.

Local government must not be remote from the people it serves. To do that it must not be remote from itself.

HS2 TREE FELLING INJUNCTION DISMISSED: A PRACTICAL APPLICATION OF THE PRECAUTIONARY PRINCIPLE

Katherine Barnes

Environmental lawyers will no doubt be aware that on 16 April 2021 Lang J granted an interim injunction prohibiting "works or other activities" in an area of approximately 0.7 hectares of ancient woodland which will need to be felled to facilitate phase 1 of HS2. This was on the basis of an argument by the Claimant, an environmental campaigner opposed to HS2, that Natural England had acted unlawfully in granting a licence permitting the felling of trees in the relevant area. The Claimant's primary argument was that Natural England had erred in the test for the grant of the licence, and specifically that it had failed to apply in a manner which reflects the precautionary principle the test in Regulation 55(9)(b) of the Habitats Regulations 2017 ("the Regs").

On 23 April 2021 Holgate J dismissed the interim injunction and found the claim to be unarguable on all grounds *(R (Keir) v Natural England* [2021] EWHC 1059 (Admin)). In so doing, he provided a useful summary of how the precautionary principle operates in practice by reference to Regulation 55(9)(b).

In terms of the legal framework, Reg 42 contains various species of bat which are "European protected species". These include the barbastelle bat which was present on the site. By Reg 43, it is a criminal offence to deliberately disturb, damage or destroy a breeding site or resting place of such an animal. However, Reg 55 allows for the grant of a licence for certain purposes (including "imperative reasons of overriding public-interest, including those of a social or economic nature"). As per Reg 55, anything done in accordance with such a licence is not an offence under Reg 43. The final part of the test in Reg 55 provides (emphasis added):

"(9) The relevant licensing body must not grant a licence under this regulation unless it is satisfied —

(a) that there is no satisfactory alternative; and

(b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range."

It was common ground that Reg 55(9)(b) had to be interpreted and applied to reflect the precautionary principle. Holgate J stressed that this did not require "certainty". Rather, Natural England had to be satisfied that there was "no reasonable scientific doubt" of the relevant detrimental effect. This was ultimately an assessment to be made by Natural England which, as a matter of expert scientific judgment, meant that it enjoyed a wide margin of appreciation. Further, the fact that there was some scientific evidence available which indicated that the test was not met did not mean that Natural England was not entitled to reach such a conclusion. On the facts, Holgate J did not consider that Natural England had unlawfully substituted the correct "no reasonable scientific doubt" test with a test of mere "likelihood".

James Strachan QC and Victoria Hutton of 39 Essex Chambers acted for the Second Interested Party, High Speed Two (HS2) Ltd.

CONTRIBUTORS

Richard Harwood OBE QC
richard.harwood@39essex.com

Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

Jonathan Darby
jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

Katherine Barnes
katherine.barnes@39essex.com

Katherine practises in all areas of planning and environmental law, including the specialist areas of town and village greens, assets of community value and highways. Her clients include developers, local authorities, NGOs, community groups and individuals. She is listed as one of the 'Highest Rated Planning Juniors Under 35' by Planning Magazine. To view full CV click here.

KEY CONTACTS

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843