

VIRTUAL LOCAL AUTHORITY MEETINGS

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Meetings of councils and their committees tend to involve a lot of people and a variable quality of biscuits. They are though vitally important as the democratic and very public part of local government. They are how significant decisions in a locality are made.

In the existing legislation the meetings have to occur at a 'place'[1] and decisions are taken 'by a majority of the members of the authority present and voting'. [2] There is no judicial imagination sufficient to allow a councillor to be present by phoning into a meeting taking place in the council chamber, let alone for the whole meeting to occur remotely. In the current Covid-19 crisis such meetings are unwise and cannot be carried out, except by dramatically reducing the number of councillors attending and banning the public, without undermining the social distancing strategy.

It has been essential therefore to bring in virtual meetings. In technology terms, local authorities have been well placed. Many webcast council meetings and officers have been adept at using video conferencing. The law has needed to catch up.

Section 78 of the Coronavirus Act 2020 allows 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") have been made. These apply to local authorities in England and police and crime panels in England and Wales. Welsh and Northern Irish provisions have not yet been made. The Regulations apply to meetings held, or required to be held, before 7th May 2021, so concern the specific effects of lockdown and potential continuing social distancing measures.

Provisions for calling meetings, enabling the public to be present and making documents available are contained in two principal pieces of legislation: the Local Government Act 1972, ss 100A to 100K for meetings of the full council and for non-executive committees; and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 for executive meetings, in particular cabinet. The 2020 Regulations provides stand-alone powers and amends these provisions to address the various issues which arise.

Notice of the meeting

Notice usually has to be given of meetings, but in the current circumstances they may need to be rearranged, or moved online very quickly. So by regulation 4(1) of the 2020 Regulations local authorities may hold, move or cancel meetings 'without requirement for further notice'. Of course, authorities will want to give as much notice as possible, and its publication policies or fairness might require it to do so.

Virtual meetings and the attendance of members

By regulation 5(1) a meeting 'is not limited to a meeting of persons all of whom, or any of whom, are present in the same place'. One of the places does not need to be the council offices, or indeed the committee chair's kitchen table. A place includes 'electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers'.

A person, whether a councillor or member of the public, may attend such a meeting 'by remote access'. Remote access is 'to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming'.^[3] Two important points follow from this. The meeting can be visual and audio, or simply audio. The former would be preferable, but either is possible. The second is that the examples of attendance all concern live attendance. That is obvious for a councillor, but the public would only attend by remote access if they are able to observe in real time. Having the meeting recorded and broadcast only later (a catch-up service), is not sufficient.

A member will be 'in remote attendance' where they are able to hear and where practicable see, and be similarly heard or seen by, the other members in attendance and any members of the public who are attending to exercise a right to speak at the meeting.^[4] They must also be able to be heard and, where practicable, be seen, by any other members of the public attending the meeting to observe.^[5]

A member must therefore be able to fully engage with the meeting. No reference is made to officers who will invariably attend to advise members. They must be able to hear and be heard, and where practicable, seen, along with those other participants.

Regulation 5 applies notwithstanding any prohibition or restriction in the authority's standing orders or other rules.^[6] It means that authorities do not have to draft revisions to their constitutions and have them approved by full council before starting virtual meetings. They are though empowered to change their standing orders and rules to address remote attendance,^[7] but the legislation does not require them to do so. There will be a need to draw up some

processes, in particular how public participation is facilitated, and to operate in a rational and fair manner.

Participation by the public in the meeting

The public are quite often allowed to take part in council meetings. Pre-arranged oral representations at planning committees are fairly standard and some authorities have public question times in full council meetings. Other committees may have the public attending to make representations or give evidence, in particular scrutiny committees.

The virtual meeting provisions assume that the public may still have such roles in meetings. An authority would have to make its own decision if it was going to cut back on public speaking. The first matter is one of practicality. Provided that the public speakers are identified in advance of the meeting (which for planning matters at least they would be), they can be given the joining details and then be able to log in. Any decision to reduce the public role would need to be justified by any technical problems and fairness. In such cases a question might arise as to whether items should be deferred until normal meetings can resume. Authorities really ought to strive to keep their present public involvement.

Public observation of the meeting

A critical element of the legal regime for council meetings is that the public and press are able to attend and observe, unless the meeting has resolved to go into private session to deal with confidential or exempt information. Section 100A(1) of the Local Government Act 1972 begins 'A meeting of a principal council shall be open to the public ...'.^[8] That legal right is retained by the 2020 legislation. 'Open to the public' is given a wider meaning to allow purely remote access:^[9]

"a meeting being "open to the public" include access through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming and where a meeting is accessible to the public through such remote means the meeting is open to the public whether or not members of the public are able to attend the meeting in person."

There is a quirk in the drafting, that 'remote access'^[10] expressly includes 'telephone conference' whilst the 'open to the public' definition does not. It is not apparent why there is that difference; it may have been assumed that telephone conference participants cannot be confined to simply listening. However this text does not alter the effect of the legislation. In all the definitions the means are merely inclusive examples. A meeting can be held by purely audio means and so public attendance can be purely audio.

The most obvious means of allowing remote access is to webcast the meeting, which involves adapting the arrangements which many authorities already have in place.

Access to documents

Of course, there is not much value in a member of the public being able to log in to a meeting if they do not know what everyone is talking about. Access to the papers relating to the meeting is therefore vital. In practice local authorities already publish the agenda and accompanying reports on their websites in advance of meetings.

The legal duties are firstly that ‘copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council’.[11] Additionally for executive meetings there was already a duty to publish the reports on the authority’s website ‘if it has one’.[12] Authorities are also required to make background papers available. These are:[13]

“those documents relating to the subject matter of the report which:

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works.”

Background papers must be available for inspection at the offices of the local authority and, for executive meetings only, on that authority’s website, if it has one.[14]

Access to the reports and background papers not only allow the public to be informed, but to take part by making written representations to councillors and officers in advance of the meeting and also assisting the preparation of oral representations.[15] A breach of these provisions is significant: see *R(Joicey) v Northumberland County Council* per Cranston J:[16]

“The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. “

In some cases local authority offices are closed, and it is certainly undesirable to require people to attend council offices to inspect reports and background papers for social distancing reasons.[17] Age or risk status mean that many members of the public are under advice to stay at home. The 2020 regulations address this difficulty by providing that for non-executive meetings:[18]

“a document being “open to inspection” includes being published on the website of the council; the publication, posting or making available of a document at offices of the council include publication on the website of the council.”

For council executive meetings the requirements to make reports and background papers available is now complied with by 'publishing that notice, agenda, report, or document on that authority's website'.^[19]

The change from the previous local authority duties and practice is that background papers for non-executive meetings must now be published on the authority's website. In respect of planning committee meetings that should not be problematic for authorities which already publish planning application documents, consultation responses and public representations. They will need to ensure that internal council documents relating to the application which are relied upon to a material extent in preparing the report or an important part of the report are also published. Whilst redactions of telephone numbers, signatures and the like for privacy reasons are permissible, it is important that information material to the decision is not redacted, such as the identity of someone providing an expert or informed opinion.^[20]

Policies and practices of public involvement

Local authorities often have published procedures for public speaking at council and committee meetings. Sometimes these will be constitutionally adopted procedures. Where those interfere with the operation of the 2020 regulations then they are set aside by regulation 5(5). Otherwise procedural rules should be followed or changed.

Public speaking at planning committees in particular tends though to be addressed by published guides or by the authority's Statement of Community Involvement.^[21] Promises in such documents as to how the authority will enable persons to take part in the process or access documents will give rise to a legitimate expectation.^[22] These include promises to notify persons of a committee meeting, enabling them to ask to take part.^[23] A legitimate expectation may be departed from for good reason, although the Courts will be astute to ensure that is justified.^[24]

Authorities may need to adapt those processes, in particular giving notice of meetings by email and emailing or texting links to join meetings or observe. There would though need to be a clear decision taken, for a sound reason, not to give effect to a legitimate expectation. Particularly where the legitimate expectation is contained in an adopted document, it is not possible to set it aside by a new, inconsistent practice.^[25]

In the end though, local authorities are pretty good at technology. They are using it to keep running and to keep the public informed. The 2020 Regulations enable important decision making to continue, by elected councillors, with public involvement.

[1] For example, see Public Bodies (Admission to Meetings) Act 1960, s 1(4).

[2] Local Government Act 1972, Schedule 12, para 39.

[3] Reg 5(6)(c).

[4] Reg 5(3)(a),(b).

[5] Reg 5(3)(c).

[6] Reg 5(5).

[7] Reg 5(6).

[8] See also Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 4(1).

[9] Local Government Act 1972, s 100L(a), inserted by the 2020 Regulations, reg 15; Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 2, text inserted by the 2020 Regulations, reg 16(2).

[10] In regulation 5.

[11] Local Government Act 1972, s 100B(1); and to the same effect see Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 7(1)(a).

[12] Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 7(1)(b).

[13] Local Government Act 1972, s 100D(4); Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 2(1) has a definition to similar effect.

[14] Local Government Act 1972, s 100D; Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, reg 15.

[15] This issue is being considered by the Planning Court in *R(Holborn Studios Ltd) v London Borough of Hackney* (2020, judgment pending)

[16] [2014] EWHC 3657 (Admin), [2015] PTSR 622 at para 47.

[17] A need to leave home to inspect time sensitive documents can be taken to be a reasonable excuse under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6.

[18] Local Government Act 1972, s 100L(c),(d), inserted by the 2020 Regulations, reg 15.

[19] 2020 Regulations, reg 16(4),(5).

[20] See *R(Holborn Studios Ltd) v London Borough of Hackney* [2017] EWHC 2823 (Admin).

[21] Adopted under Planning and Compulsory Purchase Act 2004, s 18.

[22] *R(Majed) v London Borough of Camden* [2009] EWCA Civ 1029, [2010] JPL 621.

[23] *R(Kelly) v London Borough of Hounslow* [2010] EWHC 1256 (Admin).

[24] For example, see *R(Trillium (Prime) Property GP Ltd) v London Borough of Tower Hamlets* [2011] EWHC 146 (Admin) and *R(Silus Investments Ltd) v London Borough of Hounslow* [2015] EWHC 358 (Admin).

[25] *R(SAVE Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137.