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Rt Hon. Robert Jenrick MP
Secretary of State for Housing, Communities and Local Government
MHCLG
2 Marsham St
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15 April 2020

By email

Dear Secretary of State

COVID-19 and Planning Measures

The City of London Law Society ("CLLS") represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The Law Society of England and Wales is the wider professional body for the solicitors' profession in England and Wales, representing around 190,000 registered legal practitioners. The Society represents a wide range of property practitioners, including members acting for buyers and sellers of new build properties, buyers and sellers in the second-hand market, developers, investors and lenders.

The role of both the City of London Law Society Planning & Environmental Law Committee (CLLS PELC) together with the National Law Society Planning and Environmental Law Committee (LS PELC) is to keep under review, and to promote improvements in, planning law, practice and procedure. The CLLS PELC and the LS PELC have together been closely monitoring the recent changes in planning legislation and guidance and we applaud the speed with which the Government has responded to the current unprecedented situation.

The construction industry is vital to the economy and planning plays an essential role in the continuing delivery of development both during the crisis and in the months beyond. There is also the more immediate need for additional emergency facilities such as temporary hospitals that is likely to intensify across the UK over the coming months.

The CLLS PELC and the LS PELC would accordingly like to offer our combined support and assistance to the Government during these difficult times. However, with Parliament in recess, and the prospects of reduced or remote sittings on its return, we acknowledge that amendments to primary legislation could suffer from more restrictive parliamentary time. As such, we have looked at the appropriateness of temporary development changes and where these can be made using secondary legislation or non-legislative guidance.

Accordingly, we set out below our joint suggestions for planning measures that could assist in managing the impact of COVID-19 which cover:

1. Remote council meeting regulations
2. Hot food takeaway PD rights
3. Temporary development
4. Appeal process

5. Determination periods
6. Expiry of planning permissions
7. Section 106 obligations
8. Community Infrastructure Levy (CIL)

Please also note that whilst this letter is primarily focused on the position under the Town and Country Planning Act 1990, all of these principles and particularly those relating to consultation and expiry of permissions, apply equally to the nationally significant infrastructure project regime under the Planning Act 2008 and compulsory purchase process.

1) Remote council meeting regulations

We welcome the speed at which *The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020* have been brought into effect but would also welcome guidance to assist local authorities on how best to implement them. Much will depend on how local authorities want to operate and the extent to which their own delegated authority is sufficient to determine planning applications, thereby avoiding the need to hold remote planning committee meetings. The effectiveness of the Regulations needs to be kept under review, with a possible extension of the current end date of 7 May 2021.

On a technical point, we would query whether the definition of "local authorities" extends to Mayoral Development Corporations such as the LLDC? If not, this omission should be corrected.

2) Hot food takeaway PD rights

Again, we welcome the speed at which *The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020* has been brought into effect. However, the amendment should be kept under review and consideration given to whether there is a case for extending the change or making the change permanent in the longer term after 23 March 2021.

There is also a separate issue to consider in respect of those businesses who may wish to take advantage of relying on the new permitted right under Class DA but have a planning condition within their extant planning permission preventing takeaway hot food. Although it is unlikely that local authorities would be likely to enforce this type of breach in the current climate it would nonetheless be useful to have some express guidance to this effect.

An amendment to the NPPG introducing issues arising from COVID-19 as material considerations when assessing the proportionality and expediency of enforcement action for a temporary 12 month period, for example, might be a way forward and could include some form of caveat that this weighing of the planning balance should operate towards leniency unless there were compelling reasons to the contrary (such as unacceptable amenity impact).

The medium-term method would be to amend Article 4 of the GPDO.

3) Emergency development

On 30th March, the Welsh Government issued The Town and Country Planning (General Permitted Development) (Amendment) (Wales) Order 2020 which introduced a new permitted development right for local authorities to construct emergency buildings on land they own or lease for a temporary period of 12 months.

The Town and Country Planning (General Permitted Development) (Coronavirus) (England) (Amendment) Order 2020 implements similar provisions in England but covers both local authorities and health services. However, although the list of health service providers is fairly extensive it does not cover the wide range of private providers assisting the NHS directly or indirectly that could also benefit from limited and proportional permitted development rights.

Other privately-owned health care business such as nursing homes, pharmacies and related businesses such as funeral homes might additionally benefit from temporary relaxation of restrictive planning conditions eg hours of use conditions and maybe limited permitted development rights to expand capacity.

An interim solution to assist could be to issue guidance as to the appropriateness of enforcement action.

Other possible amendments to consider are:

- To extend the rights granted by the order (which currently expire on 31 December 2020) to be coterminous with (or at least no less long lasting than) other CV-related PD rights and therefore extend to 23 March 2021;

- To relax some of the conditions which seem to be unduly restrictive if there is only a change of use as opposed to operational development.

4) Appeal process

The Planning Inspectorate (PINS) has a difficult task in having to balance processing casework whilst still ensuring the safety and well-being of staff. As such the decision was made to temporarily postpone hearings, inquiries and site visits until the end of April.

Various barristers have made representations that public inquiries could continue to proceed using video and telephone conferencing technology whilst still complying with the legal principles of fairness and public participation. We support that view as we would also support the greater use of key issues being determined by an Inspector's review of written representations (with the parties agreement) with these topics then subjected to remote hearings if the Inspector decides one is required.

More recently, *The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020* came into force on 4th April and this allows council meetings to be held and accessed remotely. Whilst we should all support virtual appeals where the parties consent, where one party fears substantial prejudice from not being able to cross examine face to face, they should have the option in extremis to delay. It is likely that a case by case discussion will be needed with all the parties to ensure a solution can be found that works for all involved. That said it is also important to recognise that personal circumstances will vary between parties, advisors and witnesses and in the current exceptional circumstances these need to be taken into account and may mean a remote inquiry is not always feasible. Another suggestion is that where proceedings are conducted this way that they should be recorded so that if after the event there is an allegation of procedural defect or unfairness there is a proper record of what went on. It is important to recognise that personal circumstances will vary between parties, advisors and witnesses and in the current exceptional circumstances these need to be taken into account and may mean a remote inquiry is not feasible.

Furthermore, we would urge a flexible approach for any medium or long term change as not everyone will have access to remote conferencing facilities.

The procedures already being deployed by the Examining Authority in a DCO context, for example the Examining Authority's request on the A38 improvement scheme that representations are to be invited from interested parties on the use of teleconferencing and/or video conferencing technologies for Hearings, indicate that flexibility can be introduced into the system without prejudicing public participation. The procedural flexibility in the NSIP regime to allow for adaptations to timetable and processes shows an effective way forward for the CPO inquiry and planning appeal inquiry process. The Development Consent Order examination regime presents a workable current example of the combined written representations and specific remote hearing process suggested above.

5) Determination periods

It is inevitable that planning applications currently in the system or submitted in the next few months will be delayed. Such is the scale of the current crisis that for practical reasons, it should not be left to applicants and local authorities to agree extensions of time to allow for this delay on a case by case basis. In our view there are sound reasons for the Government to extend (via amendments to the *Development Management Procedure Order*) both the statutory determination periods for planning applications and the time limit for appealing refusals or deemed refusals of planning permission even if by just a few weeks: to reduce the burden on local authority resources, to allow time for internal reorganisation of decision making structures within local authorities and to allow for prudent consultation by way of online methods. This is the approach being taken in Ireland through Section 251A of the *Planning and Development Act 2000*, which has been introduced by the *Emergency Measures in the Public Interest (COVID-19) Act 2020*.

Consideration ought also to be given to the determination periods for prior approval applications (particularly where a nil response becomes approval), deadlines for judicial review and s288 challenges, deadlines for CIL appeals, responding to enforcement notices, plus other sorts of appeal/challenge deadlines across environmental legislation as well as planning – although it is accepted that the Government does not bear responsibility for all of these.

Having said this, we would caution against an excessive relaxation. Notwithstanding the present difficulties it ought to remain possible for planning applications to be validated and determined in much the same way as before and we would not want there to be any suggestion that the process should slow down significantly.

6) Expiry of planning permissions

This is an issue of real concern for developers and one where an urgent fix is required. When social distancing restrictions are lifted, the economy needs the development industry to have sites ready to be built out without them having lost the benefit of the investment made into previously obtained consents. In particular, given the widely acknowledged need for new homes across England, we cannot afford to see planning permissions lapse and consented homes lost.

We have numerous examples within our membership of permissions where works are now not able to proceed on site. Where permissions will soon lapse, this may cause the unnecessary expense and unsafe practice, in contravention of Government guidelines, of contractors being engaged to go to site simply to undertake works to save the permission. In some instances, different contractors are having to be engaged at the last minute as the committed teams are not able to work, which is adding further complications. In other instances, it may not be possible to secure contractors to undertake any works at all.

There will be many legitimate reasons why works have not been undertaken earlier and have to take place close to the expiry of a planning permission instead, including the substantial time involved in securing discharge of all pre-commencement conditions, seeking confirmation of the Community Infrastructure Levy payments due in advance of commencement, the need for pre-lets or off-plan sales before funding can be committed, etc.

This same issue was considered after the 2008 economic downturn, which resulted in guidance and secondary legislation to provide for a streamlined application system to apply for replacement planning permissions where the original had been granted on or before 1 October 2009 (later changed to 1 October 2010). At the time, the guidance suggested that there was no other way of extending permissions. Some of the below options may, therefore, have been considered in 2009 and discarded, but in our view, given the widespread disruption to the planning system and the urgent need to save planning permissions which are about to expire, all potential options need to be considered.

In addition to the issues around planning permissions expiring, we're seeing issues around the deadline for submissions of reserved matters approval. Logistically it is difficult for the work necessary to prepare an RMA to be carried out and in commercial terms there are concerns on the part of developers about incurring the associated costs. In addition to means to extend the life of a planning permission, the Government should also look for ways to extend the period for submission of reserved matters approvals.

Potential fixes:

What the industry really needs is a blanket extension such that all permissions expiring in the next few months are automatically deemed to have their limits extended by a period of time – we would suggest a minimum of 6 months. This is the approach being taken both in Scotland (through schedule 7, para 9 of the *Coronavirus (Scotland) Bill)* and Ireland (through the *Emergency Measures in the Public Interest (COVID-19) Act 2020* and new Section 251(A) of the *Planning and Development Act 2000)*.

For this to be achieved in England we see the following options:

- Primary legislation to amend Sections 91 and 92 *Town and Country Planning Act 1990 (TCPA)* which regulate the time limits on planning permissions. Unfortunately, the speed with which it was necessary to pass the *Coronavirus Act 2020* meant that on that occasion this opportunity was missed. We also appreciate that there may be limited Parliamentary time over the next few weeks to bring forward more primary legislation to deal with this. If amendments are to be made to primary legislation this may also be an opportunity to consider permanently removing the restriction in S73(5) on time extensions.

- Amendments to the *General Permitted Development Order* to provide for a new class of permitted development (perhaps by adding to the list in Article 3(12)) to allow development to be undertaken within six (or more) months of the expiry of planning permission. This permitted development right would need to be conditioned to ensure that the conditions from the original planning permission continue to apply and to extend any planning obligations e.g. by requiring a deed under Section 106 *TCPA* (applying the planning obligations to the permitted development right) to be submitted to the local planning authority before commencement. The possibility of development having previously been subject to environmental impact assessment (EIA) would also need to be addressed; we would advocate not requiring a further EIA given the very limited time extension of the permission to undertake the works. This could be achieved in a number of ways – perhaps by adding a prior approval requirement to allow the LPA to consider whether further environmental information is required (but alongside guidance to clarify that the expectation is that ordinarily this will not be the case).

Short of this, we consider the Government should at least facilitate the extension of time limits on planning permissions on a case by case basis. The options that we would urge the Government to consider include:

- Guidance to remind LPAs that they have discretion under sections 91 and 92 of the *TCPA* to extend the default three year period when granting new planning permissions at this time.

- Guidance to confirm that in these exceptional circumstances an extension of the time limit imposed on a permission by way of condition may be considered to be non-material for the purposes of S96A of the *TCPA*.

- If the Government was to consider use of S96A, it may be prudent to simultaneously progress legislative change such that the S96A 'fix' was temporary only. Legal challenge to such a use of S96A cannot be ruled out, but even if

introduced only for a temporary period, this would demonstrate the Government's clear intent to fix the problem and work with the development industry.

- The same route could be adopted now as in 2009 with an amendment to the *Development Management Procedure Order* to allow for applications to be made for replacement planning permissions. Whilst effective and tested, there remains a significant burden on developers and LPAs and this won't assist permissions that are expiring in the short term.

- S97 of the *TCPA* provides LPAs with the power to modify planning permissions. Whilst this may offer a solution, it is also unlikely to be a neat one. The LPA would need to make an order, which would then be required to be advertised in accordance with sections 98 or 99. Again, challenges could be brought on the basis that the *TCPA* was not intended to be used in this manner.

7) Consultation and Deposit of Documents

A number of planning processes, such as the EIA process (inter alia Regs. 20 and 23, *Town and Country Planning (Environmental Impact Assessment) Regulations 2017* and Article 15, *Town and Country Planning (Development Management Procedure) (England) Order 2015)* and CPO process (inter alia s.11 Acquisition of Land Act 1981), require that site notices are erected and that copies of documents are made available in the locality for public inspection for a period of time as part of public consultation.

The Welsh Government's letter to all Chief Planning Officers on 27 March 2020 confirmed that the Welsh Government was considering changes to the DMPWO to remove the need for site inspections and the need for documents to be deposited locally. It also advised that all pre-application publicity and consultation should be undertaken online where there was no option to delay projects.

We consider that similar amendments should be considered in England, particularly in relation to the need to deposit documents in the locality because the accessible locations where documents would be deposited (such as public libraries) are no longer available. We would suggest that relevant legislation, such as the *Acquisition of Land Act 1981* and the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*, is amended to make it expressly clear that the deposit of documents in the locality need not be a physical location and that it could also be a virtual location (so that this is an either/or obligation). We are mindful that not all parties have access to online information and that moving to a purely online consultation process may lead to a consultation deficit, so would also suggest that this includes contact details for those who do not have access to request hard copy documentation where there is no physical location. This addresses the current purpose of the legislation and will prevent delay to major schemes. We do not consider that this needs to be a temporary amendment.

We would welcome confirmation in any guidance that the continued erection of site notices pursuant to Article 15 *Town and Country Planning (Development Management Procedure) (England) Order 2015* is appropriate and that no further steps need to be taken in addition to the erection of such site notices notwithstanding the current COVID19 measures (such as reissuing notices when lockdown measures are relaxed).

In the context of CPO, we would also recommend that the *Acquisition of Land Act 1981* should be made consistent with the Inquiry Rules where the start point is that notices can be served electronically (and that this is only disapplied where a party opts out of receipt by electronic means). This will alleviate current concerns about the inability to print and physically serve documents.

8) Section 106 obligations

Liability for compliance with section 106 obligations may arise whilst construction has ceased as a result of COVID-19. For example, financial contributions may be payable on an annual basis or affordable housing or other works may need to be provided by a specified date, irrespective of whether development is ongoing. Viability review mechanisms may apply because developers have been unable to start on site within a specified window.

A section 106 obligation can be varied at any time by deed of variation entered into by the landowner and enforcing local authority. MHCLG should issue guidance requiring local authorities to be flexible in considering applications to vary section 106 obligations to defer current and future liabilities and to extend periods for viability review, so as to take account of the COVID-19 period. The guidance should apply to ongoing negotiations of section 106 obligations.

For many property deals, the grant of planning permission is required to facilitate completion. In order to keep deals moving and ensure that the industry is ready to advance quickly once the current crisis is over, it is vital that the government helps ensure that planning permissions continue to be granted speedily. Guidance in PPG (Use of Planning Conditions para 19) suggests that a negatively worded condition limiting the development that can take place until a planning obligation has been entered into can be appropriate in exceptional circumstances.

We endorse the BPF suggestion that the government could confirm that the current position constitutes "exceptional circumstances". However, if so, the government should also reconfirm the guidance that this should be discussed with the

applicant before permission is granted and the heads of terms or principal terms ideally agreed prior to permission being granted in the interests of transparency. In many circumstances, developers may prefer the certainty provided by a section 106 obligation. Local authorities should be reminded that conditions can be used to secure a wide variety of matters including affordable housing.

Once the COVID-19 period has come to an end, it is foreseeable that viability of numerous schemes may be affected before market normality returns.

Section 106B *TCPA* (which operated on a temporary basis following the last recession to allow affordable housing obligations to be renegotiated on the basis of viability) could be reinstated for a given period. That would also allow an appeal into any refusal.

It would be preferable for the provisions to be adapted to allow wider consideration of viability and deliverability beyond affordable housing (backed by appeal provisions). The provisions could be "switched on" during any relevant period of need. Further guidance around assessment of viability before market normality returns may be helpful.

9) Community Infrastructure Levy (CIL)

CIL payments may fall due during the COVD-19 period or before market normality returns. Provision in the CIL Regulations to allow CIL to be reassessed after commencement are limited.

To enable more flexibility, the CIL Regulations could be amended to allow automatic deferral of unpaid payments falling due in the COVID-19 period. The payments could be deferred by a specified period or by the period during which works on site have ceased - or there could be flexibility to allow bespoke rescheduling of payments on application. Interest should not apply. Liability and demand notices should be reissued by authorities on request by developers. The provisions allowing for appeal to the District Valuer could apply.

Payment of the community infrastructure levy is negotiable only if "exceptional circumstances" apply under the CIL Regulations subject to limitations, including that there must be a section 106 obligation in place.

The CIL Regulations could be amended to allow the government to specify that exceptional circumstances apply during such periods as it sees fit. Ideally the provisions would allow CIL to be reassessed in those periods and appeals to be made, notwithstanding commencement of development on site.

Conclusion

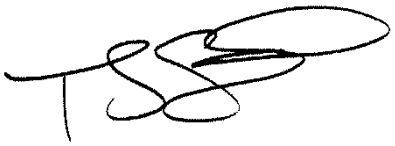
There is no doubt that just as we have all had to adapt how we work, so too must the planning system evolve. Technology allows for a fast response but it is important to find sustainable legal solutions that work not just for the 'here and now' but also for the future. As such, we believe that it is particularly important to build greater flexibility into planning legislation.

We hope the above suggestions will be actively considered and would be happy to engage in any discussions.

Yours sincerely

Stephen Webb
Chair
City of London Law Society Planning & Environmental Law Committee

and



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