

COVID-19: LOCAL AUTHORITY EXECUTION OF REGISTRABLE DEEDS AND S.106 AGREEMENTS IN ENGLAND AND WALES DURING THE COVID-19 CRISIS

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London Real Estate Alert

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BACKGROUND

We have been asked by Local Authorities to provide clarification on the execution of s.106 agreements, registrable leases, deeds and transfers by companies and partnerships that a Local Authority owns and also by the Local Authorities themselves and if the use of electronic signatures or alternatives to affixing Council seals can be of assistance during this period of isolation.

EXECUTION BY A COMPANY OR PARTNERSHIP

Where a Local Authority has set up companies or partnerships and wishes those companies or partnerships to enter into a lease for more than 7 years, a transfer or any other registrable deed, it will need to follow the usual position at law and the requirements of the Land Registry. The Land Registry's position in respect of signatories on such documents is that they will only accept "wet ink" signatures and therefore no electronic signatures can be used on leases of more than 7 years, transfers or any other registrable deeds.

Prior to isolation beginning during this COVID-19 crisis it was our practice to provide a full hard copy of the document to the relevant company or partnership owned by the Local Authority for signature, documents were then signed and witnessed and returned to us in preparation for completion.

However, in these times of isolation where the main method of sending large documents is via email the procedure below must be followed by the signatories:

- Receive and review the complete document to be signed;
- Print the signature pages;
- Sign the signature pages (this can be done in counterparts for each company/partnership but where there are two directors/members signing they need to sign the same physical page and therefore using one director/member and a witness is likely to be preferable, the witness should be an independent person and sign the same physical page as the director/member);
- Scan the signature pages in and email them with the rest of the document back to their solicitor; and

- Physically post the original wet ink pages to their solicitor (so that they have the wet ink pages for their confirmation to the Land Registry).

It is appreciated that during the isolation we are currently experiencing, there are issues with obtaining signatures, independent witnesses and physically posting pages. However, there has been no relaxation of the rules set out by the Land Registry and therefore to correctly execute a document this process must be followed where a full hard copy of the document cannot be printed, posted, signed and returned.

EXECUTION BY A LOCAL AUTHORITY

It is usual practice for Local Authorities to affix a seal to a registrable document in order to execute that document. In addition to the affixing of the seal the Local Authority requires either one or two authorised signatories and in some cases the noting of the seal number in the document, these requirements are all particular to each Local Authority and often set out in their constitution.

At present many Local Authorities have vacated their buildings with everyone working from home but the seal machine remains in the office. Local Authorities have therefore been requesting clarity on alternative methods of execution.

It is now possible to use an electronic seal for some documents, however, the use of an electronic seal for leases of more than 7 years, transfers or any other registrable deeds is not accepted by the Land Registry.

Another solution for Local Authorities is to delegate authority of the execution of deeds and documents to senior officers, this is only if it is permitted under a Local Authority's constitution.

As an example the constitution might have wording which states: "The Common Seal of the Council shall be kept in a safe place in the custody of the Council Solicitor. A decision of the Council, or any part of it, shall be sufficient authority for sealing any document necessary to give effect to the decision. The Common Seal shall be affixed to those documents, which in the opinion of the Council Solicitor should be sealed. The affixing of the Common Seal shall be attested by the Council Solicitor, a Deputy Council Solicitor or some other person so authorised by the Council Solicitor. Where the affixing of the Common Seal follows a decision of the Council it may instead be attested by the Mayor and Chief Executive." This particular constitution does appear to allow for delegation, however, each constitution will need to be checked to see if a "Council's Solicitor" could direct that documents are signed by authorised signatories rather than sealed.

If the Local Authority is to delegate authority for execution of deeds and documents their own internal processes for this delegation will need to be correctly followed and properly authorised and evidence of this delegation will need to be provided to the Land Registry.

We have also considered whether it would be possible to execute the documents by following the Local Authority's usual process for sealing including inserting the seal number and having the documents signed by the authorised signatory but affixing the actual seal later following a relaxation of the isolation. However, we consider that it would be arguable that the document had not been validly executed and in addition we do not consider that the Land Registry would accept the documents without confirmation that the seal had been applied prior to completion.

POWERS OF ATTORNEY

A further alternative for the signing of documents is for a company, partnership or Local Authority to grant to a solicitor power of attorney, so that the solicitor may sign on their behalf. However, there are some issues with powers of attorney:

- Many Local Authorities are not permitted under their constitution to grant such powers;
- Many firms of solicitors have a policy not to accept powers of attorney (however, a collective of City firms are currently reviewing the position on this matter in the current circumstances); and
- As powers of attorney are also deeds, the need for execution as set out in this note would need to be followed.

S.106 AGREEMENTS

Normally section 106 agreements are completed before a Local Authority will issue the associated planning permission. This provides absolute certainty for all parties concerned. However, given the current difficulties sealing documents, one option available to Local Authorities still wanting to issue planning permissions, is to make the permission subject to a condition requiring the applicant to enter into a section 106 agreement prior to commencement.

Planning Practice Guidance (PPG) provides for this stating: "in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk."

In addition to the requirements of this paragraph of PPG, a Local Authority will also need to consider:

- Whether the condition satisfies the usual six requirements for planning conditions (necessary, relevant to planning, relevant to the development being permitted, enforceable, precise and reasonable in all other respects).
- The form of the section 106 agreement. We recommend that the final version (complete with all attachments and plans) is attached to the permission, and that the condition is tightly worded to refer to a section 106 agreement in the form attached only.
- Once a section 106 agreement is completed, the applicant can only vary it with the local authority's co-operation (unless the applicant waits for 5 years). It is far easier to appeal against the inclusion of a planning condition. Therefore there is a risk that applicants who want to change the form of a section 106 agreement will appeal against the inclusion of the condition.
- Historically Local Authorities have not taken this approach, and there is a risk of setting a precedent going forward.
- PPG requires the delivery of the development to be at 'serious risk' to use the condition. This term has not been tested in the courts and so is open to interpretation. Given this, and the fact this mechanism is rarely used, there may be a heightened risk of judicial review.

Our view is that this approach is worth considering for all Local Authorities wanting to keep their development control function going during these times.

SUMMARY

We have therefore considered various options and our advice is that:

- if a company or partnership set up or owned by a Local Authority wishes to execute a document it must use a wet ink signature and provide this to its solicitor following the steps set out above; and
- if a Local Authority itself wants to complete any deeds, leases of over 7 years or transfers the documents either need to be sealed in the ordinary course or there needs to be a proper delegation to authorised signatories to sign the documents rather than affixing a seal and then such signatories will need to use a wet ink signature and provide this to their solicitor following the steps set out above.

We understand that some Local Authorities are continuing to seal documents once a week with someone attending the office to do so.

Please contact the authors if you require assistance with any of these matters.

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