

Insights

EV CHARGING INFRASTRUCTURE – CONSTRUCTION, PROJECTS, PLANNING AND TAX ISSUES

May 12, 2022

SUMMARY

In the third and final blog in our series looking at common queries on the roll out of EV infrastructure (see our previous blogs on [progress and challenges](#) and [landlord and tenant issues](#)) we focus on construction, planning and tax aspects.

Question: Is planning permission required to install EV charging points in an existing building?

The installation of charging points is “development” for the purposes of the [Town and Country Planning Act 1990](#). However, permitted development rights may be available under the [Town and Country Planning \(General Permitted Development\) \(England\) Order 2015](#) (Schedule 2, Part 2, Classes D and E) (PD rights) that grants deemed planning permission for EV charging points and associated infrastructure and which requires no prior approval.

Whether or not PD rights can be relied on will depend on the type and size of the charging points, their location in relation to the highway and whether or not they are located on or within heritage assets, and provided there is no [Article 4 Direction](#) in place that withdraws these rights.

In order to rely on the PD rights, the EV charging points must be installed in an off-street car park and, if wall mounted, be less than 0.2 cubic meters. If floor mounted, they must be under 1.6m (if located within the curtilage of dwelling or block of flats) or otherwise under 2.3m, provided that upstands are limited to one for each parking space. For both floor and wall mounted charging units they must be located more than 2m from a highway and not within or on a heritage asset.

If the units do not satisfy these conditions then planning permission will be needed. Rapid charging units are larger than standard or fast chargers and are generally taller than 1.6m and so are more

likely to require planning permission. Where express planning permission is required, the proposed development will need to accord with local development plan policies.

Developers should also consider whether any associated works, for example dropped kerbs, access areas, resurfacing, vehicle barriers and power upgrades are needed in connection with the installation of charge points and whether these fall within the scope of separate PD rights or whether express planning permission will be needed for them.

QUESTION: HOW CAN A DEVELOPMENT BE FUTURE-PROOFED TO ACCOMMODATE SUBSEQUENT CHANGES IN EV CHARGING TECHNOLOGY AND REQUIREMENTS?

New residential and commercial buildings and those undergoing major renovations with on-site parking must install the requisite number of EV charge points specified in the *Building Regulations etc (Amendment) (England) (No 2) Regulations 2021* that come into force on 15 June 2022. The charge points will also need to be installed with smart functionality if they fall within the scope of the *Electric Vehicles (Smart Charge Points) Regulations 2021* that applies from 30 June 2022.

Planning drawings must show the location of the charge points, which should be compatible with the Building Regulations. However, because the technology is rapidly developing, to accommodate short and longer-term regulatory, market and technological changes, planning permissions should ideally include flexibility to accommodate future changes to avoid post-grant amendments to a permission. The best way to mitigate this risk is to ensure planning drawings show the EV charge points “for illustrative purposes only”. This should allow an element of flexibility as to their location and type of equipment to be installed.

Schemes that fall outside the scope of the current Building Regulations may nonetheless want to install EV charge points at a later date. As it is more cost effective to install cable routes for future connections during the initial development rather than retrofitting later on, it would be prudent at the design stage to consider the location of cable routes and other design features to accommodate the future charging of EVs, for example concrete plinths to install equipment or footings.

Planning conditions on draft planning permissions and *section 106 obligations* should also be carefully checked to ensure that these won't limit or prevent the installation of EV charge points in the future.

QUESTION: WHAT KEY INITIAL CONSIDERATIONS SHOULD EMPLOYERS HAVE REGARD TO WHEN ENGAGING CONTRACTORS TO INSTALL EV CHARGING POINTS?

Early engagement with contractor

The key for employers is early engagement with the contractor who will be responsible for installing the charge points to ensure the requirements for installation can be considered early in the project

planning and factored appropriately into the programme (including allowances for *delays* and challenges) and costed.

The employer should ensure that the charge point installer holds the appropriate accreditations and should (as usual) follow up references.

Early engagement with DNO

Early engagement with the relevant *Distribution Network Operator* (DNO) will be required to fully understand how the connection from the grid to the charge points will be delivered and to explore what other provisions may need to be taken into account. For example, consideration may need to be given to grid reinforcement works, capacity constraints, facilitation of export as well as import and any on-site battery storage facilities.

Employers may want to procure any contestable elements of the connection works through an independent connections provider (ICP) who may be appointed direct, by the main contractor, or as a sub-contractor to the charge point contractor.

Don't underestimate the timescales

It is essential to understand the timescales involved. If the DNO decides that a new or upgraded connection is required, the time taken to deliver such a connection will depend on the size of the connection and the complexity of the work.

Be mindful of shortages

Early thought should also be given to the procurement of materials and labour, particularly in the current market where shortages of both are prevalent. The new mandatory Building Regulations requirements that come into force in June (see above) may exacerbate these shortages as the market adjusts to increased demand.

Building contract

When negotiating any main building contract, consider making provision for the following:

WHO BEARS THE RESPONSIBILITY FOR SECURING CONSENTS?

Unless the contract expressly provides otherwise, the default position at common law is that the *employer is responsible* for using all due diligence to obtain planning approval or other necessary consents.

However, such a term will not always be implied and, in any event, relying on *implied terms* can be a dangerous game, so best practice is for the parties to ensure their contract expressly states:

- Who will be responsible for securing which consents. Any consents the employer will apply for or has obtained should be stated in the Employer's Requirements. The contract should also state whether the contractor is responsible for obtaining any other consents needed for the works;
- Identifying who is responsible for appealing any decisions and in what circumstances they must appeal; and
- Including express terms allocating the risk that necessary consents may not be obtained.

WHAT IF THE DNO DELAYS WORKS?

The parties should consider what happens if the DNO delays the works and risk should be allocated accordingly.

Some employers may want the contractor to take the entire risk of delay caused by the DNO but this tends to be controversial and many contractors will not accept this because they do not ultimately have control as to when the DNO will carry out such work.

A frequent compromise is an obligation on the contractor to take reasonable steps to procure that the DNO carries out the work in accordance with the programme and in co-ordination with the works. If the DNO still delays the works then the contractor will receive extra time.

DNOs are generally reluctant to commit to binding delivery times. To the extent any contestable works are carried out by the employer's own ICP as opposed to the DNO this will give the employer much more control as to the delivery of a significant portion of the overall connection works.

QUESTION: SHOULD AN INDIVIDUAL FIT AN EV CHARGING POINT AT HOME – IS THERE A VAT DIFFERENCE?

Yes there is. If the individual is buying the electricity rather than generating it themselves and they charge their car at home, the rate of VAT will be 5% where the usage is less than 1,000 kWh per month. This contrasts with the standard rate of VAT of 20% outside the home. Some are therefore campaigning for the rate of VAT outside the home to be reduced to 5%, but the *government stated on 20 April 2022* that there were no current plans to change this.

However, if the individual is an employee and is reimbursed by their employer for the cost of charging the vehicle for business use, different rules apply to an employer seeking to recover the VAT cost of charging the vehicle. If an individual is an employee and hoping to be reimbursed the cost of charging their electric vehicle for business use, they should check the rules before deciding whether to charge up at home or outside of the home.

This article first appeared on the Practical Law Construction blog dated 11 May 2022.

MEET THE TEAM



Mark Richards

London

mark.richards@bclplaw.com

+44 (0) 20 3400 4603



Kenneth Addly

London

kenneth.addly@bclplaw.com

+44 (0) 20 3400 4846



Gareth Stringer

London

gareth.stringer@bclplaw.com

+44 (0) 20 3400 4761

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.