

These notes refer to the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010 (c.7) which received Royal Assent on 26 March 2010

Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

21. A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

Section 1: Functions to include power to enter contracts

This section clarifies the power of councils to enter into contracts for the provision of assets or services (or both) for the purpose of discharging any of their functions. Although this provision enables councils to enter into PPP/PFI type contracts, it is not restricted to such contracts. The section also enables councils to enter into separate or collateral contracts with the financiers, or insurers of or trustees for the financiers, of the contracts. This will give a third party, who provided finance to a contractor, “step-in” rights in the event that the contractor produces an unacceptably poor performance, becomes insolvent or is otherwise unable to honour the contract.

Section 2: Certified contracts to be intra vires

This section is the first of a two-staged approach providing “safe harbour” protection from legal challenge to private sector contractors and their financiers. It does so by introducing a presumption that a certified contract is legal for private law purposes. The section provides that, even if a council had no power at all to enter into a contract or had abused a power it did have, a certified contract is presumed to be legal unless it is successfully challenged by means of a public law review (i.e. by judicial or audit review).

Section 3: The certification requirements

This section sets out the certification requirements a council must satisfy for a contract to be a certified contract. One of the requirements is that the contract will operate, or is intended to operate, for a period of at least five years. The section also provides that the Department may make regulations concerning certain certification requirements.

Section 4: Certified contracts: supplementary

This section provides that, where a council has satisfied the certification requirements in respect of a certified contract, the certificate that is issued will have effect and is not invalidated by anything in the certificate which is inaccurate or untrue.

Section 5: Special provision for judicial reviews and audit reviews

While section 2 introduces the presumption that a certified contract is lawful, this section preserves the right to challenge the lawfulness of such a contract. Such a challenge is restricted to public law challenge by means of judicial review or audit review. Section 5 also provides the second stage in giving “safe harbour” protection to private sector contractors and their financiers. It does so by providing that where, on public law challenge, a court takes the view that a certified contract is unlawful (because the council did not have the power to enter into the contract or had exercised any power improperly), the court may nevertheless decide that the contract can continue to have effect. In reaching such a decision, the court may take into account a number of factors, in particular the likely consequences for the financial position of the council and the provision of services to the public if a decision were made that the contract should not have effect.

Sections 6 and 7: Relevant discharge terms and Absence of relevant discharge terms

These sections provide for special terms (i.e. relevant discharge terms) of a certified contract, whether the main or collateral contract, which come into play in the event that a court finds the contract to be unlawful and that it should be set aside. Section 6 provides for terms to be agreed between the parties for this eventuality and section 7 provides for the situation where no discharge terms have been agreed or where the court finds that such terms are unenforceable.

Section 10: Control of disposals and contracts of existing councils

This section sets out a system of controls on disposals of land, and capital and non-capital contracts being entered into, by the existing 26 district councils in the period leading up to their dissolution and the establishment of the 11 new district councils. The section enables the Department to direct that a council must obtain consent from its statutory transition committee before disposing of any land or entering into a contract above specified values.

Section 12: Consideration to be taken into account for purposes of direction

This section provides that in determining whether a proposed disposal of land or contract being entered into exceeds the specified values, account is to be taken of any other disposals of land or contracts entered into after a specified date.

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Section 13: Referral to Department where consent refused or granted subject to conditions

This section permits an existing council to refer a decision of its statutory transition committee not to give consent to a proposed disposal or contract, or where consent is given but subject to conditions, to the Department for decision.

Section 15: Statutory transition committees: constitution

This section makes provision for the Department to make regulations to establish a statutory transition committee, which will be a body corporate, for each new council. The regulations will provide for the membership of the committees, their governance arrangements and their procedures.

Section 16: Statutory transition committees: functions

This section provides that the functions of a statutory transition committee are essentially to prepare for, and give full effect to, the reorganisation of local government. It also enables the Department to make regulations to confer powers on or impose duties on statutory transition committees, including the making of rates and the appointment of staff for the new councils.

Section 17: Power to modify existing legislation

While sections 15 and 16 set out specific provisions in relation to the making of regulations for the establishment and operation of statutory transition committees, this section provides a power for the regulations to apply (with or without modification) or to disapply the provisions of relevant local government or rating legislation.

Section 18: Guidance to statutory transition committees

This section permits the Department to issue guidance to statutory transition committees in relation to the exercise of any of their functions and requires committees to have regard to such guidance.

Section 19: Severance payments to councillors

This section confers a power on the Department to make regulations providing for the making of severance payments to councillors who resign as councillors before the end of a specified period and who meet such other criteria as the Department may specify. The section also amends section 4 of the Local Government Act (Northern Ireland) 1972 to provide that a person who has received a severance payment is disqualified from being elected, or being, a councillor.

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Section 20: Power to modify legislation in connection with local government re-organisation

This section permits the Department to make subordinate legislation which would modify local government legislation and rating legislation in connection with the reorganisation of local government.

Section 21: Acquisition of land otherwise than by agreement

This section provides that councils may vest land for any of their purposes in Part 2 of the Waste and Contaminated Land (Northern Ireland) Order 1997.

Section 22: Exercise of waste management functions of councils

This section clarifies the powers of councils concerning the granting or the provision of warranties and indemnities. This section also makes provision for a district council to enter into an agreement with one or more councils for the exercise of specified waste management functions, to enter into waste contracts on their behalf or to acquire and hold land on behalf of and in the name of other councils.

Section 23: Application of certain provisions to certain joint committees constituted as bodies corporate

Northern Ireland councils have formed themselves into 3 joint committees (Waste Management Groups) to address waste management issues. Two of the joint committees have been constituted as bodies corporate by orders made by the Department. This section amends those orders to apply certain provisions of the Act to those bodies. The amendments will permit arc21 and SWaMP2008 to enter into certified contracts, vest land for waste management purposes and provide warranties or indemnities in relation to contracts.

Section 24: Regulations and orders

This section essentially sets out the means by which the Department may make different regulations as provided for in the Act.