

**EXPLANATORY MEMORANDUM TO**  
**THE LOCAL GOVERNMENT (STRUCTURAL CHANGES) (TRANSFER OF**  
**FUNCTIONS, PROPERTY, RIGHTS AND LIABILITIES) REGULATIONS 2008**

**2008 No. 2176**

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

**2. Description**

- 2.1. These Regulations deal with the transfer of functions, property, rights and liabilities between local authorities in consequence of orders made under section 7 of the Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”). Orders under section 7 provide for the establishment of single tier local government in particular areas. There is a single tier of local government where there is a sole principal authority for the area (a “single tier council”). Although the Regulations are of general application, they will apply, in the first instance, to local government reorganisations in Bedfordshire, Cheshire, Cornwall, County Durham, Northumberland, Shropshire and Wiltshire. In each of those areas the provision of all local government services on and after 1 April 2009 will be a matter for a single tier council that is a county council (without district councils), or a district council (without a county council).
- 2.2. The Regulations provide for the functions of a county or district council that will be abolished on the reorganisation date by order under section 7 of the 2007 Act (a “predecessor council”) to transfer to one or more successor councils. A “successor council” is the single tier council or councils to which a predecessor council’s functions, property, rights and liabilities transfer on the reorganisation date. References to a successor council prior to the reorganisation date are references to existing district or county councils or to a newly constituted body (a shadow council) (which does not become a local authority until the reorganisation date) which will be the future single tier council or councils on the reorganisation date. In some cases, all functions will transfer to an existing county council and, in other cases, to one or more new councils or to a combination of existing and new councils.
- 2.3. It is expected that most of the property, rights and liabilities of county or district councils that will be abolished will be transferred in accordance with agreements between the councils concerned, for which section 16 of the 2007 Act provides. The Regulations deal with the transfer of property, rights and liabilities of councils that will be abolished by the order only where the councils concerned have not been able to reach such agreement.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1. None

## 4. Legislative Background

- 4.1. Part 1 of the 2007 Act provides for the making of local government structural and boundary changes in England. So far as is relevant to the Regulations that are the subject of this Memorandum, sections 14 and 15 enable regulations of general application to be made for the purposes or in consequence of any orders under section 7. Section 240(10) of the 2007 Act enables different provision to be made for different cases.
- 4.2. Section 16 of the 2007 Act provides that any public body affected by an order under section 7 (or section 10) of the Act can make agreements between themselves with respect to any property, income, rights, liabilities and expenses so far as they are affected by the order. Section 16(2) provides that such an agreement can provide for the transfer of such property etc and also provide for the making of payments between the bodies involved in connection with the transfer of the property etc Section 16(3) provides that disputed matters can be referred to an arbitrator either appointed as agreed between the parties or appointed by the Secretary of State.
- 4.3. Seven section 7 orders have been made to date, as follows:
  - 4.3.1. Five orders providing for the existing county council for an area to be established as a single tier council (Cornwall (S.I. 2008/491); Durham (S.I. 2008/493); Northumberland (S.I. 2008/494); Shropshire (S.I. 2008/492); and Wiltshire (S.I. 2008/490)).
  - 4.3.2. Two further orders, one providing for the establishment of two new single tier district councils for Cheshire (S.I. 2008/634); and one providing for the existing Bedford Borough Council to be established as a single tier council and for a new single tier council for Central Bedfordshire (S.I. 2008/907).
- 4.4. Further details about the section 7 orders made to date can be found in the Explanatory Memoranda which were laid alongside the draft orders<sup>1</sup>. In this document ‘single tier council(s)’ has the same meaning as ‘unitary council(s)’ in the Explanatory Memoranda previously laid alongside those orders. The term “single tier council” is the term used in the Regulations to describe what is commonly known as a unitary council, and reflects the 2007 Act’s description of unitary local government as “a single tier of local government” (section 1(2) of the 2007 Act).
- 4.5. The Regulations draw on provisions contained in the Local Government Changes for England (Property Transfer and Transitional Payments) Regulations 1995 (S.I. 1995/402, amended by S.I. 1995/2796 and 1996/312 and 2825) (“the 1995 Regulations”), which were made in the context of orders made under section 17 of the Local Government Act 1992 (c.19) (“the 1992 Act”). A major difference relevant to the drafting of the 1995 Regulations and the Regulations that are the subject of this

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<sup>1</sup> The Explanatory Memorandum for each of the five county Orders can be found at: [http://www.opsi.gov.uk/si/si2008/draft/em/ukdsiem\\_9780110808154\\_en.pdf](http://www.opsi.gov.uk/si/si2008/draft/em/ukdsiem_9780110808154_en.pdf). The Memorandum for Cheshire is at [http://www.opsi.gov.uk/si/si2008/em/ukdsiem\\_20080634\\_en.pdf](http://www.opsi.gov.uk/si/si2008/em/ukdsiem_20080634_en.pdf), and for Bedfordshire at [http://www.opsi.gov.uk/si/si2008/em/ukdsiem\\_20080907\\_en.pdf](http://www.opsi.gov.uk/si/si2008/em/ukdsiem_20080907_en.pdf)

Memorandum is that there was no provision in the 1992 Act equivalent to section 16 of the 2007 Act. As a consequence, regulation 5 of the 1995 Regulations made provision for the councils concerned to make agreements for the transfer of property, rights and liabilities. The Regulations that are the subject of this Memorandum do not need to make comparable provision. Agreements for the transfer of property, rights or liabilities may be concluded under section 16 of the 2007 Act before the coming into force of these Regulations.

## **5. Territorial Extent and Application**

5.1. This instrument applies in relation to England.

## **6. European Convention on Human Rights**

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### The Transfer of Functions, Property, Rights and Liabilities Regulations: general

7.1. These Regulations, which are of general application, apply to local government reorganisations which have been provided for by an order under section 7 of the 2007 Act. They provide for the transfer of certain functions, property, rights and liabilities from a predecessor council to one or more single tier councils, the successor council(s).

7.2. The Department's discussion document "Councils' Proposals for Unitary Local Government: An Approach to Implementation"<sup>2</sup> (August 2007) set out the Department's initial intentions as to the approach to be adopted for implementing any proposals for single tier local government. The document generally dealt with higher level issues than those addressed in these Regulations, but the general objective as regards the transfer of functions, property, rights and liabilities was to provide a "light touch" approach, keeping regulations to a minimum.

7.3. This "light touch" approach recognises that solutions are likely to differ from area to area, and possibly between different classes of property, rights and liabilities. A blanket approach to transfer was considered to be insufficiently flexible to allow authorities to tailor their approach to local circumstances. The "light touch" approach was also influenced by section 16 of the 2007 Act which enables authorities to make agreements about the transfer of property, rights and liabilities.

7.4. Broadly, these Regulations provide that in those areas where there is to be a sole single tier council, all of the functions, property, rights and liabilities of the predecessor councils for the area for which that single tier council will cover, transfer to that sole single tier council. In relation to the orders already made under section 7 of the 2007 Act, this will occur in Cornwall, County Durham, Northumberland, Shropshire and Wiltshire. The continuing county councils will generally be able to exercise all functions

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<sup>2</sup> <http://www.communities.gov.uk/publications/localgovernment/unitarycouncilsimplementation>

that are currently exercisable by their constituent district councils and inherit such of their constituent district councils' property, rights and liabilities as are not expressly transferred elsewhere (for example to Charter Trustees or a parish council).

- 7.5. In those areas where structural change orders provide for more than one single tier council for the area, i.e. the splitting of an existing county area, as in the section 7 orders for Bedfordshire and Cheshire, the transfers are necessarily more complex. Most of the functions of the predecessor councils transfer to the new single tier councils, and the Regulations provide for the functions to be exercisable by each of them independently of the other. The Regulations also expressly provide for the transfer of functions under local Acts, some of which may be exercisable in relation to only part of a predecessor council's area. Where such functions are limited to the area of only one of the successor councils, they will transfer to that council alone.
- 7.6. To the extent that particular property, rights and liabilities of councils that are to be abolished are not transferred by agreement made under section 16 of the 2007 Act before the date that falls three months before the reorganisation date ("residual matters"), the Regulations provide for their transfer on the reorganisation date to one or more "caretaker councils". The caretaker councils are successor councils to be nominated by the Secretary of State. Where more than one caretaker council is nominated, the nomination will specify the residual matters for which each caretaker council is to be responsible. It is expected to make any such nomination as early as practicable prior to the reorganisation date, so that successor councils are clear well before that date which residual matters are being transferred to them. It is necessary to confer this power on the Secretary of State in this way as the Regulations are of general application and therefore it would not be appropriate to name the caretaker councils in these Regulations. There are separate arrangements for the transfer of property held exclusively for charitable purposes and the transfer of property in the form of a predecessor council's financial reserves (see paragraph 7.22 and 7.23).
- 7.7. The Regulations, without being overly prescriptive, facilitate constructive and effective local negotiations, by setting a period (subject to local agreement as to its extension) by the end of which details of relevant contracts, actions or proceedings and other information relating to predecessor councils' property, rights or liabilities have to be provided to successor councils. In the case of contracts etc entered into prior to the section 7 order coming into force, this period is the period ending six months before the reorganisation date. In the case of other contracts etc details must be supplied as soon as practicable and no later than the earlier of, the reorganisation date and four months after the contract was entered into. So far as the councils affected by the current section 7 orders are concerned, this will ensure that successor councils are fully aware of the asset and liability base they will be inheriting on 1 April 2009 and enable them to begin the budget-setting process for 2009-10.

#### Discussions with Stakeholders

- 7.8. As indicated in paragraph 7.2, the Department's discussion document "Councils' Proposals for Unitary Local Government: An Approach to Implementation" (August 2007) set out initial intentions as to the general approach to implementation. As explained in paragraph 7.2 these initial intentions envisaged a "light touch" approach to

the transfer of functions, property, rights and liabilities, centred on councils making agreements under section 16 of the 2007 Act wherever possible. Since the publication of this discussion document, and in particular since the coming into force of the seven section 7 orders made to date, the issues addressed in these Regulations have been the subject of extensive discussions between the Department and the Joint Implementation Teams (JITs) for each area, formed of senior officers of the affected authorities, and led by the Chief Executive, acting Chief Executive, or lead officer of a successor council. The policy that is implemented by way of these Regulations has been refined in the light of contributions and comments received from stakeholders during this ongoing dialogue. In addition to a range of minor and drafting comments, the stakeholders raised a number of substantive issues to which the Department has responded as described in paragraphs 7.9-7.13 below. In the majority of cases these were raised by one stakeholder or stakeholders representing one area.

- 7.9. Regulation 3 has been redrafted following a request to provide for local discretion with regard to the date by which details or information are to be provided. This is in recognition of the fact that there may be circumstances where both the predecessor and successor councils agree that details of certain contracts, actions or proceedings or other information about predecessor councils' property, rights or liabilities, are not a priority at this stage. The redrafted regulation 3 enables details to be provided at some agreed date later than the end of the period specified in the Regulations but not later than the reorganisation date.
- 7.10. The Department also received a request for local discretion as to the contracts, actions or proceedings of which details should be provided in advance to successor councils. The Regulations do not provide for any such discretion. Instead, they require details of all contracts etc entered into by the predecessor council which may affect the successor council. This approach was adopted because an open-ended discretion, exercisable by councils which are not continuing after the reorganisation date, could leave their successor councils "in the dark" in relation to matters of significance for budget-setting purposes. And leaving predecessor councils to decide on the contracts etc or categories of contract about which to supply details, would amount to unlawful sub-delegation.
- 7.11. Regulation 6(2) has been included following a request for clarity, so that there can be no confusion as to the application of regulations 9 to 13 (property held exclusively for charitable purposes, property consisting of financial reserves, agreements in relation to property, etc: supplementary provision, vesting of property, etc to which agreements relate and transfers to caretaker councils), which only apply where there is more than one successor council for an area.
- 7.12. Regulation 13 has been redrafted following requests from affected authorities to allow more time for predecessor and successor councils to reach agreement on the transfer of particular property, rights or liabilities ahead of the default position of transfer to a caretaker council. The regulation now provides that, where no agreement has been reached in relation to the transfer of particular property, rights or liabilities by the date that falls three months before the reorganisation date (31 December 2008 in the case of authorities affected by existing section 7 orders), transfer is to one or more caretaker councils on the reorganisation date. Successor councils must continue to use their best endeavours to reach agreement before the reorganisation date.

7.13. Regulation 13 has also been redrafted to allow the Secretary of State to nominate more than one council as caretaker council for an area being reorganised. This resulted from concern expressed by affected authorities that, if only one council was nominated as the caretaker council for an area, it could become unduly powerful, with control over a large proportion of what could be sizeable assets (albeit on trust for all of the successor councils). In addition to providing for the nomination of more than one caretaker council for an area, the regulation also ensures that, where there is more than one caretaker council, the Secretary of State's nomination specifies the class or description of residual matter that is to transfer to that particular caretaker council. This is to prevent classes or descriptions of related residual matters being split inappropriately between caretaker councils.

#### The Transfer of Functions, Property, Rights and Liabilities Regulations: details of the provisions

7.14. Section 14(3) of the 2007 Act provides for regulations under section 14 to have effect subject to any provision included in an order under section 7 or 10. Regulation 1(2)(a) provides for the Regulations to have effect subject to any provision included in—

- other regulations under Chapter 1 of Part 1 of the 2007 Act (which may make provision for the transfer of specific functions, property, rights and liabilities between authorities affected by orders under section 7),
- an order under section 20 of the 2007 Act (which, so far as relevant to the Regulations, enables mistakes in section 7 orders to be corrected if they cannot be corrected by the making of amending orders under that section),
- an order under section 86 of the 2007 Act or regulations under section 97 of the 2007 Act or an order under Part 2 of the Local Government and Rating Act 1997 (transfers relevant to parish councils), or,
- regulations under section 7 of the Superannuation Act 1972 (relevant to pension schemes of local government employees).

7.15. Regulation 1(2)(b) provides that the Regulations do not affect transfers of property, rights or liabilities for which provision is contained in an agreement made under section 16 of the 2007 Act (agreements between councils about incidental matters).

7.16. Regulation 2 defines terms used in the Regulations.

7.17. Regulation 3 contains provisions relevant to the supply of information by a predecessor council to the appropriate successor council. Some aspects of these provisions have been considered in paragraphs 7.9 and 7.10. The regulation also provides that an authorised person of the successor council can inspect or copy records of the predecessor council relating to any relevant contract, action or proceeding or any information relating to the predecessor council's property, rights or liabilities. A relevant contract etc is one entered into by the predecessor council which may affect the successor council.

7.18. Part 2 of the Regulations (regulations 4 and 5) provide for the transfer of functions. Where the predecessor council is succeeded by only one successor council, its

functions transfer to that council on the reorganisation date. Where there is more than one successor council for a predecessor council's area, most of the predecessor council's functions transfer on the reorganisation date to the successor councils and become exercisable by each of them independently of the other or others. A function of a predecessor council that relates to a particular area (likely to arise under local Acts) will transfer to the successor council whose area consists of or includes that area, and that function will continue to be exercisable only in relation to that area.

- 7.19. Part 3 of the Regulations deals with the transfer of property, rights and liabilities. Regulation 6 defines terms used in Part 3.
- 7.20. Regulation 7 provides for transfers of property, rights and liabilities where there is only one successor council.
- 7.21. Regulation 8 introduces regulations 9 to 13 which make provision for the transfer of property, rights and liabilities where a predecessor council is succeeded by more than one successor council. It makes separate arrangements for the transfer of property which is held exclusively for charitable purposes and property which is financial reserves. It also provides that property, rights and liabilities of a predecessor council that are the subject of an agreement under section 16 of the 2007 Act or of an arbitrator's award in the arbitration of a disputed matter under subsection (3) of that section made before the reorganisation date, are unaffected by the provisions of this Part (and therefore transfer in accordance with the agreement or the award). Where regulation 13 applies with respect to some of a predecessor council's property, rights or liabilities that is a disputed matter within the meaning of section 16(3) of the 2007 Act, regulation 8(4) provides that regulation 13 applies only until the matter is resolved by the making of a default award (the award made by the arbitrator agreed on by the parties or appointed by the Secretary of State under section 16(3) of the 2007 Act).
- 7.22. Regulation 9 provides for the transfer of property of a predecessor council that is held exclusively for charitable purposes. In essence, property held exclusively for charitable purposes by a predecessor council will vest on the reorganisation date in the successor council whose area comprises the whole or the greater part of the predecessor council's area, or if the property was held in relation to a specified area the whole or greater part of that specified area. Such vesting as provided for by regulation 9 will have no financial implication for charitable bodies. Property which is not vested in this way will vest on the reorganisation date in one of the successor councils, as may be agreed between them, not later than 3 months before that date, or in the absence of agreement, in the successor council determined by the Charity Commissioners.
- 7.23. Regulation 10 provides that property in the form of a predecessor council's financial reserves (defined in regulation 6) vests in a successor council nominated by the Secretary of State (the "nominated council"). The nominated council holds the reserves on trust for itself and the other successor council(s) for the relevant area until agreement is reached, or a determination made, as to the division of the reserves between the successor councils. If agreement is not reached within three months or such longer period as may be agreed between the successor councils, the division of the reserves is to be determined by such person as the Secretary of State shall appoint.

- 7.24. Regulation 11 provides that successor councils shall use their best endeavours to reach agreement as to the transfer of property which is not associated property or relevant shares, or surplus land and the distribution among the successor councils of receipts from the disposal of surplus land. Regulation 12 provides that, where agreement has been reached, property, rights and liabilities of the predecessor council vest in the successor councils in accordance with the agreement.
- 7.25. Regulation 13 provides for transfers to a caretaker council. Where there is more than one successor council for an area and there has been no agreement between the successor councils as to the transfer of particular property, rights or liabilities of the predecessor council three months before the reorganisation date, then these matters will transfer on that date to the caretaker council. As indicated in paragraph 7.13, the Secretary of State may nominate more than one successor council to be a caretaker council and, where he does so, must specify the property, rights or liabilities, or the classes or descriptions of property, rights or liabilities for which each caretaker council is to be responsible. Successor councils must continue to use their best endeavours to reach agreement before the reorganisation date.
- 7.26. Regulation 14 deals with the disposal of surplus land i.e. land which is identified as surplus to the requirements of the successor councils in the exercise of their functions. The Department recognises that there may be land which is surplus to the requirements of the successor councils so the regulation provides for its disposal. Every successor council (including a caretaker council), in which surplus land is vested on the reorganisation date (a “custodian council”) is required to use its best endeavours to dispose of surplus land as soon as reasonably practicable. Except with the consent of the Secretary of State, no such council is to dispose of surplus land for a consideration which is less than the best that can reasonably be obtained. Any net proceeds are to be shared and deficits to be borne by the successor councils concerned.
- 7.27. Regulation 15 makes provision for caretaker and nominated councils (councils nominated in accordance with regulation 10 see paragraph 7.23) to recover expenditure and distribute surpluses. These councils may recover from the other successor councils concerned such proportion of the eligible expenditure incurred by them in carrying out their caretaker or nominated council functions as is agreed or determined. Where a caretaker or nominated council has surplus funds at the end of a financial year attributable to carrying out its functions as caretaker or nominated council these are to be distributed between the successor councils (including the caretaker/nominated) as is agreed between successor councils or determined by a person appointed by the Secretary of State.
- 7.28. Regulation 16 provides for access to records.
- 7.29. Regulation 17 provides for the resolution of disputes as to the interpretation or application of any of the provisions of the Regulations. Disputes are to be resolved by a person agreed on by the parties concerned or, if they cannot agree, by a person appointed by the Secretary of State. In the case of a question relating to charitable property, disputes are to be resolved by the Charity Commissioners.



## **8. Impact**

- 8.1. An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.
- 8.2. There will be no additional impact on the public sector above that already identified in the Impact Assessments accompanying the seven section 7 orders providing for the creation of the nine new single tier councils, which were based in figures provided by the local authorities in their proposals

## **9. Contact**

- 9.1. Joanne Allison at the Department for Communities and Local Government, Tel: 020 7944 4267 or e-mail: [joanne.allison@communities.gsi.gov.uk](mailto:joanne.allison@communities.gsi.gov.uk) can answer any queries regarding the instrument.

Department for Communities and Local Government

13th August 2008