

CONTROL OF DISPOSALS, CONTRACTS AND RESERVES

GUIDANCE NOTE

1. The direction which this note accompanies is made under section 24 of the Local Government and Public Involvement in Health Act 2007 (the Act) and must be read in the context of sections 24 to 30 of that Act.

Context

2. The proposals for restructuring that are being implemented by the five orders which came into force on 26 February 2008 were put forward by local authorities themselves. The proposals reflect their own local circumstances in terms of service delivery, representation and engagement with local communities. The approach the Government has adopted is intended to build on the need for relevant authorities to work together through the Implementation Executive established under the orders and, indeed, successful implementation of the new unitary authorities depends upon this. This direction is intended to further that approach, with local authorities co-operating ever more closely and working towards a common goal.
3. It is essential that all the affected local authorities (which are subject to this direction) are able to continue delivering high quality services to the public and run their day-to-day business in the period prior to 1 April 2009.
4. It is also of great importance that those local authorities having the main transitional function of preparing for and facilitating the transfer to the new unitary authority are able to do so on a firm basis.
5. Any significant changes to level of assets or reserves of one of the district councils could change the financial situation that the new unitary authority could reasonably expect to inherit when it takes on the functions of district councils in its area. Furthermore, if there are significant changes, the financial situation of the district council could be different to the one on which the original proposal was predicated.
6. The Secretary of State has, therefore, made the enclosed direction to ensure the implementation process can proceed on a clear and sound basis.

Specified person/authority whose consent is required

7. The direction specifies which person is required to give consent in relation to the matters covered in the direction. For certain disposals of land, the Secretary of State is the specified person. For all other matters, the relevant county council is specified.

8. As explained in the following paragraphs, any references to a county council with regard to the giving of consent are to be taken to mean, wherever there is an Implementation Executive, the county council exercising its function of giving consent through the Implementation Executive.
9. Where the giving of consent rests with the relevant county council, the Government considers that this function comes within the main transitional function as defined in the orders of “preparing for and facilitating the economic, effective, efficient and timely transfer of the district councils’ functions, property, rights and liabilities”. The Government therefore expects that this function will be exercised through the Implementation Executive.
10. Under section 24(4) of the Act, the direction specifies the county council as the person whose consent is required (for most matters), rather than the relevant Implementation Executive of the county council. This is because the Implementation Executive is not a person in law but a committee of the executive of the county council. Subject to paragraph 11 below, references in the direction and in this document to the county council in relation to the function of giving consent for the purposes of the direction should, therefore, be taken to mean the county council exercising that function through the Implementation Executive.
11. As provided for in the relevant orders, elections to councils of County Durham and Northumberland will take place in May 2008 (when their Implementation Executives will cease to exist). References in this letter and in the direction itself to the county council in relation to the function of giving consent should, therefore, be read as referring in the case of County Durham and Northumberland to the Implementation Executives for such time as they exist in those areas and thereafter to the newly mandated councils.
12. Since the function of giving consent is to be exercised through the Implementation Executive, in accordance with the orders, section 21 of the Local Government Act 2000 (overview and scrutiny committees) shall not apply and scrutiny may instead take place as provided for in the relevant order.

General consents

13. In the interests both of its own efficient administration and also to allow the affected local authorities to continue to fulfill their day-to-day functions, the county council may wish to consider giving general consents in relation to matters specified in the direction.
14. Under section 26(2) of the Act, consent may be given:
 - a. in respect of a particular disposal or contract, or in respect of disposals or contracts of any description;
 - b. unconditionally or subject to conditions.

15. In practice, this means that the county council could for example, issue a general consent for all non-capital contracts with a value not exceeding £100,000 which are for similar descriptions of matter (such as all leisure or cultural services contracts) or it could give consent in relation to specific programmes or projects (perhaps at the same time as approving a business plan and the expenditure associated with it).

Delegating this function

16. The orders provide that the Implementation Executive may arrange for the discharge of its functions by an officer of the authority (see section in orders entitled “Discharge of Functions by Implementation Executive”). Where the function of giving consent is exercised through the Implementation Executive, that function can be delegated to the Joint Implementation Team if the Implementation Executive wished to do so. Similarly, where there is not an Implementation Executive (namely, in County Durham and Northumberland after the May 2008 elections), the function of giving consent will be a function of the newly mandated council’s executive and can also be delegated to the Joint Implementation Team.

Matters where consent is reserved to the Secretary of State

17. Paragraph 1(a) of the direction provides that any disposal of land that a relevant authority is required to make under an enactment requires the consent of the Secretary of State. The purpose of this provision is to remove any uncertainty around the obtaining of consent required for a disposal that an authority is required to make by law. Together with this direction, the Secretary of State has simultaneously issued a general consent (enclosed with this Guidance Note) for any disposal which is required under an enactment. This ensures that when the local authority is required to dispose of land for example under the Right to Buy provisions of the Housing Act 1985 or by reason of a compulsory purchase order, those disposals will, in practice, be unaffected by the direction.

Large Scale Voluntary Transfers

18. Paragraph 2 provides that the consent of the Secretary of State is required for the Large Scale Voluntary Transfer (LSVT) of housing stock that Berwick upon Tweed Borough Council is planning to undertake as part of the current Communities and Local Government Housing Transfer programme. It is the intention that the Secretary of State will issue consents for this council’s disposals of housing stock in parallel to the relevant consents ordinarily given under Part 2 of the Housing Act 1985. In this way, key partners who have been involved in the detailed negotiations for the transfer of the housing stock in these three areas can have confidence that the directions will have no practical effect on the process.

Disposals

19. Paragraphs 1(a) and (b)(i) and paragraph 2 of the direction which all relate to disposals of land should be read in conjunction with section 27(1) of the Act.
20. In effect, this means that the threshold of £100,000 is cumulative so that, for example, a disposal of land would require the consent of the county council under paragraph 1(b)(i) if that disposal brought the total value of disposals of land by the authority after 31 December 2006 over £100,000.

21. Section 30(2) of the Act provides that “disposing of land” includes the disposing of a freehold or leasehold interest in property, entering into a contract to do so or granting an option to acquire land or an interest in land. The word “land” covers buildings on land.

Capital contracts

22. Paragraph 1(b)(ii) of the direction should be read in conjunction with sections 27(2) and (3) of the Act.

23. In effect, therefore, the £1m threshold is cumulative from after 31 December 2006 for any capital contract with the same person or relating to “the same or a similar description of matter”. Whether or not a contract relates to another of the “same or similar description of matter” will be a question of fact and degree in each case.

Non-capital contracts

24. Paragraph 1(b)(iii) of the direction should also be read in conjunction with sections 27(2) and (3) of the Act so that for any non-capital contract which extends beyond 1 April 2009 or which contains a provision allowing the term of the contract to be extended beyond that date, the £100,000 threshold is cumulative from 31 December 2006 for any such contract with the same person or relating to “the same or a similar description of matter”. Again, it will be a question of fact and degree in each case as to whether two contracts relate to the same or a similar description of matter. So a contract to collect domestic waste might not be in the same category as park maintenance services, although both are broadly environmental services, but a contract for the supply of office chairs may well fall within the same category as another contract for the supply of other office equipment.

25. New contracts of employment come within the scope of this direction and as a category of contracts relating to a similar matter, i.e. employment, the threshold of £100,000 may be reached quite quickly. In valuing the consideration of such contracts, the salary and financial value of other benefits (such as provision of a car) over the fixed term, would need to be taken into account. Once the threshold is reached, the county council may wish to consider giving a general consent for employment contracts entered into in the usual course of business where the salary does not exceed a certain amount or for example up to a certain point on set pay scales. More generally, a county council and the district councils together with the Implementation Executive may wish to consider agreeing a local protocol about the filling of vacancies during the transitional period(s).

Use of reserves

26. Paragraph 1(b)(iv) of the direction provides that consent is also required “to include an amount of financial reserves in a calculation under section 32(2) or 43(3) of the Local Government Finance Act 1992”. The direction applies to any such calculations made once the direction is in force.

27. The county council may wish to give a general consent for the use of reserves up to a certain amount in such calculations, or for use of financial reserves of a particular description.

Interaction with other consent regimes

28. As stated in section 26(4) of the 2007 Act, the issuing of a consent by the Secretary of State or a relevant county council in relation to this direction does not remove any requirement on any authority to seek separate consent from any relevant person under any other applicable consent regime. Such other regimes are for example those relating to consent required under Part 2 of the Housing Act 1985 (e.g. for voluntary disposals, including Social HomeBuy) or under section 123 of the Local Government Act 1972.

In the event of a disagreement

29. In the event that the person seeking consent and the person whose consent is required under this direction fail to reach agreement as to the value of any consideration which might be covered by the direction, in accordance with section 26(6) of the Act, the matter is to be referred to the Secretary of State so that the value may be determined.

Co-operating and consulting – all authorities

30. The arrangements under the direction and this guidance on how they should be carried out should be seen as the minimum level of co-operation that is desirable between affected local authorities in this period of preparing for and facilitating the transition to unitary local government. In accordance with the duty to co-operate, all authorities should seek to share such information as may be useful to the Implementation Executive or, in County Durham and Northumberland after the elections in May 2008, the council responsible for effecting the transition.

31. District councils, for example, may wish to consider informing the Implementation Executive at the earliest possible opportunity of any contracts that may reach their term during this period or shortly after 1 April 2009. This would enable the contracts to be considered in good time and a wider schedule of work to be agreed.

32. Decisions taken by the county council in respect of significant disposals of land, contracts entered into and use of reserves might also have an effect on the situation of the new unitary authority.

33. The existing county council should, of course, take into account the impact its decisions will have on the new unitary authority.

34. Such a council, including its executive, might wish to consider the extent to which it would wish to commit to providing information about significant transactions to the Implementation Executive as a courtesy.

Immediate practical implications of this direction

35. On the coming into force of this direction on 4 March 2008, the relevant authorities will be required to seek consent for a wide variety of transactions according to the criteria above. This will, undoubtedly, include a large number of routine transactions that authorities undertake on a regular basis. In order to ensure these can continue unhindered, the Government recommends that the issuing of general consents by the county council be considered as an urgent priority. This may include general

consents for the granting of housing tenancies (which will fall under disposals) and the purchase of raw materials or essential operational and/or office equipment (which are likely to be done under contract). Local authorities should also ensure they check whether any key contracts may be due for renewal, so that consents can be considered in good time.

The Government recommends county councils put in place the necessary arrangements, including an early meeting of the Implementation Executive, to put in place any additional delegation to officers that may be needed and to put in place any general consents, as may be most appropriate to the local circumstances.

Conclusion

36. The Government expects that relevant authorities will engage with their Implementation Executive constructively and in a timely manner to facilitate the process of complying with this direction, consistent with preparing for and facilitating the successful creation of a new unitary authority.
37. We also expect Implementation Executives to take pragmatic decisions regarding requests for consent, dealing with them in an efficient and timely manner and considering, where appropriate, the issuing of a general consent and/or use of delegation powers to ensure the affected authorities are able to continue to carry out their day-to-day functions without undue difficulty.