

## **BABERGH DISTRICT COUNCIL**

### **PROPOSED LOCAL GOVERNMENT REORGANISATION**

#### **ADVICE**

1. The Cabinet of Babergh District Council (“Babergh”) has resolved to “provisionally endorse” the creation of a new larger district council by combining<sup>1</sup> with Mid Suffolk District Council (“MSDC”). I have been asked to consider whether decisions potentially ultimately leading to a request being made to the Secretary of State for Communities and Local Government (“the SoS”) to exercise his powers under s.15(1) of the Cities and Local Government Devolution Act 2016 (“the 2016 Act”) to make regulations creating the new combined council (“the Request”) are to be made by the full Council or by the Cabinet.

#### **The Position to date and later stages.**

2. Following a strategic review by the joint Chief Executive and SLT, on 13<sup>th</sup> October 2017 the Cabinets of both authorities have “provisionally endorsed” option B – namely dissolving the two district councils and creating a new larger district council (“the October Resolution”). This is the first step towards possibly asking the Secretary of State (“the SoS”) to make regulations under s.15 of the 2016 Act.
3. Under the October Resolution, the next stage was agreed to be stakeholder, public and staff engagement, and subject to the outcome of that engagement, preparation of a business case to be considered by each council (resolution para 1.2a) prior to making any request to the SoS.
4. The October Resolution was therefore only a preliminary decision to “provisionally” endorse option B. There will be many more stages before a Request may be made. The next stage is public engagement to test option B. Dependent on the outcome of that work, a full business case would be prepared and considered by each council. It is only at the end of that process that the Request may be made to the SoS. The Secretary of State would then decide whether to exercise his s.15(1) powers to make Regulations. He would need the “consent” of the local authorities to the draft Regulations<sup>2</sup>.
5. The October Resolution was “called in” to the Overview and Scrutiny Committee of Babergh which referred the matter back to cabinet for further consideration including more detailed financial information and further consideration of the public engagement to be undertaken (“the Call In Decision”) with a request to refer the matter to the full Council for debate before the Cabinet reconsiders the October Resolution.

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<sup>1</sup> The precise mechanism for creation of the new council is not important at this stage - but it would be likely to be the dissolution of the existing councils and the establishment of a new council (s.11(3) of the Local Government and Public Involvement in Health Act 2007)

<sup>2</sup> S.15(4) (under s.15(5) the SoS can make orders where only one council gives its consent)

6. The Cabinet of 7<sup>th</sup> November agreed to refer the issues contained in the October Resolution to a meeting of the full Council for debate (not decision).
7. On 21<sup>st</sup> November, the full Council considered a more detailed report addressing the matters requested in the Call In Decision. It was during this meeting that the resolution was made, upon which I have been asked to advise. Is it for the full Council or the Cabinet to decide each of the steps up to the making of any Request to the SoS?

### **The Statutory Scheme for Local Government Reorganisation**

8. Section 15 of the 2016 Act provides a simplified and “fast track” – see explanatory memorandum to s.15 – route for the SoS to make regulations concerning structural and boundary arrangements. The relevant powers are in s.15(1)(c) and s.15(3)(b). S.15(1)(c) provides that:

***“The Secretary of State may by regulations make provisions about-***

***...***

***(c) the structural or boundary arrangements, or electoral arrangements, in relation to local authorities under Part 1 of the Local Government and Public Involvement in Health Act 2007 [“the 2007 Act”] or under Part 3 of the Local Democracy, Economic Development and Construction Act 2009 [“the 2009 Act”].***

9. S.15(3)(b) provides that:

***“Regulations under this section may in particular make provision –***

***...***

***(b) about any of the matters listed in section 11(3) or (4) of the [2007 Act]...”***

10. S.11(3) of the 2007 Act includes the constitution of a new local government area and the abolition of any existing local government area.
11. It is therefore clear that s.15 of the 2016 Act gives to the SoS the power to make regulations to merge the Councils. That power can only be exercised by the SoS. It is not vested in and cannot be exercised by either of the Councils.
12. Thus, under the statutory scheme, it is for the SoS to make regulations combining local authorities. There is no statutory provision governing the making of Requests to him by the Councils. Such Requests are only a means to get the SoS to consider exercising his powers.

13. The only relevant direct *statutory* function of the existing Councils<sup>3</sup> under s.15 is to give (or to withhold) their consent to the making of the regulations by the SoS under s.15(4) – at the end of the process now embarked on.
14. That is an executive function:
- a. it is not a function listed in schedule 1 of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 and therefore is not reserved to the full Council: reg 2(1);
  - b. it is also not a function in schedule 2; and
  - c. it follows that it is an executive function – see s.9D(2) of the Local Government Act 2000 and para 1.9 of Babergh’s Constitution.
15. The position is thus clear. I note that in other similar situations the SoS has confirmed that this is his view too.

### **The Secretary of State’s Approach**

16. However, in other similar situations, the SoS has made clear that, given the significance of the issue, he will expect any Request to him to demonstrate “buy in” from the full Council. Thus, whilst the s.15(4) function at the end of the process is an executive function, the practical reality is that the SoS will require some demonstration of the full Council’s support prior to reaching the s.15(4) stage. It is for the SoS to determine the level and nature of the support that he requires.

### **Steps Prior to Consent under s.15(4)**

17. Thus the final step of giving consent to Regulations (s.15(4)) is an executive function but well before that stage is reached “buy in” will be required from the full Council.
18. The question remaining therefore is whether *prior* decisions are for the Cabinet or the full Council. Such prior steps include decisions as to preferred options, consultation and the development of the business case.
19. S.9D(2) of the Local Government Act 2000 provides as follows:

*“ Subject to any provision made by this Act or by any enactment which is passed or made after the day on which this Act is passed, any function of the local authority which is not specified in regulations under subsection (3) is to be the responsibility of an executive of the authority under executive arrangements.”*

20. The steps up to and including the making of a Request are not specified in the 2000 Regulations made under s.9D(3). There is no other provision in the 2000 Act which means that the full Council is to exercise those steps. There are a number of matters which are reserved to the full Council by the 2000 Act (helpfully summarised in Article 4 of the

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<sup>3</sup> Of course - any new Council will have reserved to it (rather than exercisable by the cabinet) all the central requirements of the 2000 Regulations as summarised I para 4.1 of Babergh’s Constitution.

Constitution) but none of them cover or encompass the prior steps referred to above. The setting of the new Constitution will be for any new Council not for the existing Councils.

21. Further, to put the matter beyond doubt, the Constitution itself is clear that the Leader and Cabinet will carry out all of the functions which are not the responsibility of any other part of the Council “whether by law or under this constitution”. The prior steps are not the responsibility of any other part of the Council under the law or under the Constitution and therefore are expressly for the Cabinet.

### **The Correct Approach**

22. I regard the above position as entirely clear in law. Each of the prior stages and the ultimate giving of consent under s.15(4) are executive decisions for the cabinet.
23. However, I repeat paragraph 12 above. Before a Request is made to the SoS, it is necessary to consult, to engage and to secure broad political “buy in”. Whilst I do not think that the full Council of either Council has a veto (and indeed the effect of s.15(5) and of the omission of s.15(4) from sch 1 is that there is in law no such veto) absent such “buy in” the SoS may decline to exercise his powers.
24. The appropriate approach adopted by authorities in similar situations is therefore for the issues to be referred to full Council for deliberation (but not a binding vote) and for the Cabinet to then make its executive decisions taking on board the views expressed by the full Council.

David Forsdick QC

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27<sup>th</sup> November 2017