

EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (STRUCTURAL CHANGES) (FURTHER
TRANSITIONAL ARRANGEMENTS AND STAFFING) REGULATIONS 2009

2009 No. 486

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. **Purpose of the instrument**
 - 2.1. The Local Government (Structural Changes) (Further Transitional and Supplementary Provision and Miscellaneous Amendments) Regulations 2009 (S.I. 2009/276) (“the third transitional Regulations”) were the third in a series of Regulations making provision of general application as regards the transition to a single tier of local government for areas in England for which an order is made under section 7 of the Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”). There is a single tier of local government where there is a sole principal authority for the area (a “single tier council”).
 - 2.2. An order which establishes a single tier council under section 7 of the 2007 Act (a “section 7 order”) will provide for a specified reorganisation date on which the functions of one or more of the existing councils are transferred to the new single tier council, and these existing councils may be abolished.
 - 2.3. These Regulations (“the fourth transitional Regulations”) make further provision for the transition to single tier local government in those areas for which a section 7 order is made. They concern matters relevant to councils which will be abolished on the reorganisation date (“predecessor councils”), to councils which will become the sole principal authority for their area on that date (“successor councils”) and to the single tier councils that will succeed them. A successor council may be an existing district or county council (a “preparing council”) or a newly constituted body which does not become a local authority until the reorganisation date (a “shadow council”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1. None
4. **Legislative Context**
 - 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 these transitional Regulations, it enables provision to be made by a section 7 order for the

restructuring of an area in which there are two tiers of local government (a county council and district councils) into a single tier of local government (a county council or a district council). Section 1(2) provides, for the purposes of Chapter 1 (structural and boundary change), that there is “a single tier of local government” for an area if “there is a county council and no district councils for that area or there is a district council and no county council for that area”.

4.2. Seven section 7 orders have been made to date, as follows:

- 4.2.1. Five orders providing for the existing county council for an area to be established as a single tier council (Cornwall (SI 2008/491); Durham (SI 2008/493); Northumberland (SI 2008/494); Shropshire (SI 2008/492); and Wiltshire (SI 2008/490)).
- 4.2.2. Two further orders, one providing for the establishment of two new single tier district councils for Cheshire (SI 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 (SI 2008/907)).

4.3. Further details about the section 7 orders made to date can be found in the Explanatory Memoranda which were laid with the draft orders. In this document ‘single tier council(s)’ has the same meaning as ‘unitary council(s)’ in those Explanatory Memoranda. The term ‘single tier council’ is the term used in the fourth transitional 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)).

4.4. Section 14 of the 2007 Act gives the Secretary of State power, by regulations of general application, to make incidental, consequential, transitional and supplementary provision for the purposes or in consequence of any structural change orders, or for giving full effect to such orders. Section 14(2) provides for subsection 14(1) to be read with section 15 of the 2007 Act. Section 15 provides that references to incidental, consequential, transitional or supplementary provision include, in particular, reference to provisions for the transfer of functions from a local authority for an area to another local authority whose area consists of or includes the whole or part of that area and for treating any body to whom a transfer is made for some or all purposes as the same person in law as the body from whom the transfer is made. Section 15(2)(a) provides that regulations under section 14 may modify, exclude or apply (with or without modifications) any enactment. The 2007 Act also provides that regulations made under that Act may make different provision for different cases (section 240(10)).

4.5. The fourth transitional Regulations are made under section 14 (to be read with section 15) and section 240(10) of the 2007 Act. Their purpose is to make provision about the functions of predecessor and successor councils during the transitional period after the making of a section 7 order (and after the coming into force of the fourth transitional Regulations, if that date is later) until the

reorganisation date, and about the functions of single tier councils for a further transitional period following the reorganisation date.

5. Territorial Extent and Application

5.1. This instrument applies 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

Transitional Regulations

7.1. Between February and March 2008, seven orders under section 7 of the 2007 Act came into force, implementing from 1st April 2009 a single tier of local government in the county areas of Bedfordshire, Cheshire, Cornwall, Durham, Northumberland, Shropshire and Wiltshire. As the Explanatory Memoranda to those orders explained, they also made provision for arrangements affecting the implementation of the structural change. This included making provision about the executive arrangements of the preparing and shadow councils, which by virtue of a section 7 order will become the new single tier councils on the reorganisation date, (i.e. about who has responsibility for implementation of the structural change by that council), and as to the joint teams of council officers supporting these executives.

7.2. On 29th August 2008, the Local Government (Structural Changes) (Transitional Arrangements) Regulations 2008 (S.I. 2008/2113) – the first set of transitional Regulations – came into force. Those Regulations, which are of general application to areas affected by a section 7 order, make provision in relation to the following matters:

- Responsibility for functions;
- Governance;
- Local area agreements and joint strategic needs assessments; and
- Electoral administration.

7.3. On 28th November 2008, the Local Government (Structural Changes) (Transitional Arrangements) (No.2) Regulations 2008 (S.I. 2008/2867) - the second transitional Regulations – came into force. Those Regulations, which are also of general application to areas affected by a section 7 order, make provision in relation to the following matters:

- Continuity and responsibility for functions;
- Electoral matters;
- Statutory plans, reviews, schemes, statements and strategies;
- Membership of certain licensing and planning committees;
- Functions relating to town and country planning;
- Functions relating to education;
- Miscellaneous transitional provisions; and
- Consequential amendment of the Local Government (Changes for England) Regulations 1994.

7.4. On 11th March 2009, the third transitional Regulations will come into force.

These make provision relating to the following issues:

- Exercise of certain education functions;
- Councillors' conduct;
- The final accounts of predecessor councils and related financial matters;
- Changes of name of area; and
- Amendment of Regulations.

7.5. The fourth transitional Regulations make provision in respect of the following issues:

- Continuity and local authority categorisation;
- Councillors' conduct; and
- Port health authorities

7.6. The fourth transitional Regulations, like the previous three sets of transitional Regulations, are of general application. The Government's intention in making these Regulations, following extensive discussions with the councils concerned, is to ensure that

- for a further transitional period after the reorganisation date, the single tier councils are able to enjoy certain freedoms and flexibilities in relation to the new functions they are assuming, where their predecessor councils enjoyed those freedoms and flexibilities, thereby ensuring the single tier councils have a transitional period in which to prepare for the ending of the specific entitlement or exemption;
- the single tier councils and their monitoring officers have powers in relation to any allegation of misconduct made against a member of a predecessor council under the previous conduct regime (which was replaced by a new regime on 8th May 2008 – see paragraph 7.16 below) on which action remains to be taken at the reorganisation date; and
- employees of port health authorities that are reconstituted as a result of the move to a single tier of local government in some areas are protected by virtue of the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the TUPE Regulations”) (S.I. 2006/246).

Timing of the fourth transitional Regulations

7.7. The fourth transitional Regulations are being laid now to ensure they are in force before the reorganisation date, in order to allow the successor councils and their monitoring officers to undertake limited but necessary measures in relation to councillors' conduct, to ensure that the transfer of port health authority ("PHA") functions from a predecessor council or a joint board to a single tier council on the reorganisation date is treated as a relevant transfer for the purposes of the TUPE Regulations, and to provide certainty and continuity in respect of certain freedoms and flexibilities enjoyed by predecessor councils.

7.8. Whilst these Regulations will only come into force shortly before the reorganisation date, the Department has been engaged in ongoing and lengthy discussions with those leading preparations in the areas affected about the provisions contained in the fourth transitional Regulations. Most of those provisions have been inserted at the request of those who have been leading preparations. The monitoring officers of predecessor councils will be made aware of the provisions relating to councillors' conduct and the requirement to provide the necessary information to the monitoring officer of the related new single tier council by the reorganisation date.

Provisions of the fourth transitional Regulations

Part 2 – Local authority categorisation

7.9. Regulation 3 makes provision so that the continuity provision made by regulation 4(1) of the second transitional Regulations shall not apply to the categorisation of a predecessor council or to anything which that council was entitled to do, or exempt from having to do, by virtue of that categorisation (commonly known as "freedoms and flexibilities"). The freedoms and flexibilities include, for example, exemption for certain high-performing councils from the requirement to produce various plans and reports, and allowing some councils to undertake commercial activity ("the power to trade"). The effect of regulation 3(2) and 3(3), therefore, is that a single tier council is only entitled to freedoms and flexibilities in relation to functions it is assuming on the reorganisation date if it would be entitled to those freedoms and flexibilities by virtue of its own categorisation – except as provided for in regulations 4 and 5 (or other regulations made under section 14 of the 2007 Act). This provision has been included to prevent the situation arising that a single tier council inherits a particular freedom and flexibility from two of its predecessor councils but not from another, thereby resulting in the single tier council being under a statutory duty to prepare a plan, for example, for one third of its area.

7.10. Regulation 3(4) ensures that a home energy conservation report prepared by a predecessor council is brought within the scope of the provisions of regulation 14 of the second transitional Regulations, so that it continues to have

effect after the reorganisation date as if it had been prepared by the related single tier council. If this provision were not made, such reports would arguably lapse on the reorganisation date.

7.11. Regulation 4 provides a transitional period for any single tier council which, on and after the reorganisation date, would be required to produce certain plans and reports by virtue of being a local authority responsible for all local authority functions in its area, but where one or more of its predecessor councils did not produce such a plan or report as it had the benefit of an exemption under the Local Authorities' Plans and Strategies (Disapplication) (England) Order 2005 (SI 2005/157) as a result of its categorisation. In order to enable the preparing and shadow councils to focus in these final few weeks on critical frontline services and key internal systems in the transition, regulation 4 allows a single tier council a transitional period of 12 months (for a home energy conservation report or air quality action plan) and 24 months (for a rights of way improvement plan) in which to prepare those plans. The circumstances referred to in regulation 4 of the fourth transitional Regulations include those where in part of a single tier council's area such reports and plans are in place but in other parts they are not.

7.12. Regulation 5 makes provision in respect of those single tier councils which do not have a categorisation under section 99(4) of the Local Government Act 2003 as before the reorganisation date they are shadow councils. The regulation provides that, in such cases, where one or more predecessor councils was permitted, by virtue of regulations made under section 96 of the Clean Neighbourhoods and Environment Act 2005, to use its fixed penalty receipts for the purposes of any of its functions, the related new single tier council may then also use its fixed penalty receipts for the purpose of any of its functions, for a period of 12 months from the reorganisation date. Single tier councils which are local authorities prior to the reorganisation date (and therefore which have a categorisation) will be able to use their fixed penalty receipts for the purposes of any of their functions by virtue of their own categorisation if appropriate, in accordance with regulation 3(3).

7.13. Regulation 5(3) makes provision relating to the power to trade. Single tier councils which, before the reorganisation date, are shadow councils and, as such, will not have been categorised under section 99(4) of the 2003 Act, as they become local authorities for the first time on the reorganisation date. Where any predecessor council which is related to a new single tier council was authorised to do things for a commercial purpose under section 95 of the 2003 Act, the related single tier council is similarly authorised to do things for a commercial purpose for a transitional period of 24 months from the reorganisation date. The Department considers this provision to be necessary to ensure that existing service provision can be continued, following representation from the Joint Implementation Teams ("JITs") (formed of senior officers of the preparing and other affected authorities, and led by the Chief Executive of a preparing or

shadow council).

- 7.14. The Department will shortly be commencing discussions with local government partners and other stakeholders concerning the future of freedoms and flexibilities following the replacement of Comprehensive Performance Assessment with Comprehensive Area Assessment (“CAA”) on 1st April 2009, as under CAA there will be no overall categorisation to which freedoms and flexibilities can be linked.

Part 3 – Code of conduct matters

- 7.15. Part 3 of the fourth transitional Regulations makes provision relating to councillors’ conduct. Part 3 of the Local Government Act 2000 (“the 2000 Act”) establishes the conduct regime for local authority members, including the requirement for each local authority to adopt a code of conduct which its members must observe and to establish a standards committee.
- 7.16. Part 3 of the 2000 Act was amended by Part 10 of the 2007 Act, introducing a new devolved conduct regime, in which allegations are assessed by the standards committee of the local authority with whose code of conduct a member is alleged to have failed to comply (“the new devolved conduct regime”), whereas previously such allegations were assessed initially by the Standards Board for England (“the former regime”). The relevant provisions of the 2007 Act introducing the new devolved conduct regime were commenced on 8 May 2008 (see the Local Government and Public Involvement in Health Act 2007 (Commencement Order No. 6 and Transitional and Saving Provision) Order 2008 (SI 2008/1265).
- 7.17. The third transitional Regulations made provision relating to allegations that a member of a predecessor council had failed to comply with that authority’s code of conduct under the new devolved conduct regime. Those Regulations protect the right of the public to make allegations, on and after the reorganisation date, that a member of a predecessor council had failed to comply with the authority’s code of conduct, by providing that such allegations could be made to the related new single tier council’s standards committee, which would then consider the allegation. The third transitional Regulations also provide that any allegation which had been received but not fully resolved by the predecessor council’s standards committee by the reorganisation date should continue to be considered by the related single tier council’s standards committee.
- 7.18. The Department subsequently became aware that action still remained to be taken by the monitoring officers of a number of predecessor councils in respect of allegations which had been received by the Standards Board for England and referred to monitoring officers under the former regime which ended on 8th May 2008. Under the former regime, it was open to the Board, in certain circumstances, to refer allegations it had received to councils’ monitoring

officers for them and their councils' standards committee to resolve. Such referred cases are then wholly the responsibility of the councils and monitoring officers concerned to resolve, although the Standards Board has nevertheless sought to monitor councils' performance on these matters. While it is a matter of concern that these councils and their monitoring officers have not resolved certain allegations referred to them, the Department considers that provision must be made to ensure that investigations of such allegations can be completed and, where appropriate, sanctions imposed.

- 7.19. Regulation 6 of the fourth transitional Regulations therefore requires the monitoring officer of each predecessor council to provide to the monitoring officer of the related single tier council on the day before the reorganisation date, details of any such allegation in respect of which action remains to be taken. The Standards Board will, on the basis of its monitoring information, write to draw this requirement to the attention of the monitoring officers concerned in advance of the Regulations coming into force. Regulation 6(3) provides for those concerned to be informed that the allegation has been transferred to the single tier council's monitoring officer and regulation 6(4) then empowers the monitoring officer and standards committee of the new single tier council to take any remaining action in relation to that allegation. The process will be conducted under the former regime and sanctions available to the predecessor council under that regime will be available to the single tier council.

Part 4 – Port health authorities

- 7.20. Part 4 makes provision so that employees of port health authorities that are reconstituted on the reorganisation date (by virtue of the transition to single tier local government in their area as provided for by a section 7 order) will be protected by the TUPE Regulations.
- 7.21. A port health authority has functions relating mainly to the protection of public, animal and environment health in the port area. A port health authority may be constituted either as a single authority (if the port lies wholly within the area of a single local authority) or as a joint board (where the port is located in or adjoins several local authorities) by an order under the Public Health (Control of Disease) Act 1984 or the Public Health Act 1936.
- 7.22. Separate provision is being made in the Local Government (Structural Changes) (Miscellaneous Amendments and Other Provision) Order 2009, which was laid before the House in draft on 2nd March 2009, for those port health authorities which are affected by section 7 orders that have already been made: these are Blyth; Falmouth and Truro; Fowey; and Penwith; where the single tier councils in Northumberland (for Blyth) and Cornwall (Falmouth and Truro; Fowey; and Penwith) will be constituted as the port health authority, on and after the reorganisation date. Amendments are also made in that Order to the membership of the Manchester and Plymouth port health authorities, essentially

allowing the appointment of representatives of the new single tier councils, though the authority remains a joint board.

- 7.23. The Department has consistently been clear that all local authority employees in each area affected by restructuring should be treated fairly, within a clear framework providing certain basic protections. It is considered that the application of the TUPE Regulations provides a benchmark of basic protections for employees, and a clear and familiar framework for the councils concerned.
- 7.24. The Local Government (Structural and Boundary Changes) (Staffing) Regulations 2008 (S.I. 2008/1419) (“the Staffing Regulations”) therefore made provision associated with the transfer of functions from a predecessor council to a single tier council by virtue of a section 7 or a section 10 order, so that employees of a predecessor council would be protected by the provisions of the TUPE Regulations (separate provisions were made for heads of paid service). See in particular the provisions of regulation 3 of the Staffing Regulations.
- 7.25. The Department considers that employees of the port health authorities which will, on and after the reorganisation date, be reconstituted under the authority of the single tier council for their area, should be entitled to become employees of that single tier council (providing their terms of employment provide for continued employment after that date) and for their terms and conditions of employment to be protected on transfer, in the same way as employees of the predecessor councils. Regulation 7 of the fourth transitional Regulations therefore provides that a transfer of port health authority functions by or in consequence of a structural change made by a section 7 order from a predecessor council or a joint board to a single tier council shall be treated as a relevant transfer within the meaning of the TUPE Regulations. This provides clarity and reassurance for the small number of employees of affected port health authorities about their rights in relation to the reorganisation.

8. Consultation outcome

- 8.1. The fourth transitional Regulations make provision in respect of those matters Government and stakeholders (in particular, the councils affected by section 7 orders), consider necessary to facilitate and ensure the smooth transfer to the new single tier councils. The issues addressed in these Regulations have been the subject of discussions between the Department and the JITs for each area. In respect of regulation 7, the JITs were asked to discuss the transfer with port health authority employees. The JITs have also had an opportunity to comment on a draft of these Regulations during the drafting process.
- 8.2. The policy intentions behind these Regulations were specifically discussed at two of the monthly meetings held in London with the leaders of each JIT, all of whom were content with the proposed approaches, and indeed many of the

provisions implement representations the Department had received over the previous weeks from the JITs themselves.

8.3. The substantive comments received from the JITs on each of the matters covered by these Regulations, and which are reflected in them, are as follows:

Continuity and local authority categorisation

- The provisions of regulations 4 and 5 relating to a transitional period for the use of fixed penalty receipts and trading powers for those new single tier councils which become local authorities for the first time on the reorganisation date have been included following representations recently received from the JITs;

Code of conduct matters

- The provisions of Part 3 relating to allegations received by the Standards Board for England under the former conduct regime prior to 8 May 2008 that a member of a predecessor council had failed to comply with the code of conduct have been included following recent representations from the JITs and discussion with the Standards Board for England following the making of the third transitional Regulations;

Port health authorities

- The provisions of regulation 7 which effectively ensure that employees of affected port health authorities will become employees of the new single tier council for their area on the reorganisation date and have their terms and conditions protected on transfer have been included following representations from port health authority employees themselves and the JITs.

9. Guidance

9.1. The Department does not intend to issue any formal guidance to accompany these Regulations. However, the Department will continue its close dialogue and liaison with the JITs throughout the transitional period up to and beyond the reorganisation date.

10. Impact

10.1. The impact on business, charities or voluntary bodies is nil.

10.2. 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 on the figures provided by the local authorities in their proposals.

10.3. An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. As described above, the Department continues to maintain a close dialogue and liaison with the JITs. This is centred around monthly meetings, which provide the opportunity for the Department to be kept abreast of the progress being made in each area to implement the transition to the new single tier councils. Any issues relating to these Regulations will be identified through these channels.

13. Contact

13.1. Mark Doran at Communities and Local Government, tel: 020 7944 6729 or email: mark.doran@communities.gsi.gov.uk, can answer any queries regarding the instrument.

Department for Communities and Local Government

4 March 2009