

## NORTH ESSEX PARKING PARTNERSHIP

---

### OPINION

---

1. Essex County Council is a traffic authority<sup>1</sup>, having powers and responsibilities under the Traffic Management Act 2004 and the Road Traffic Regulation Act 1984. These powers and responsibilities embrace the control of car parking, which is (always) a controversial subject.
2. Essex County Council is, of course, a local authority within the Local Government Act 1972 (and other legislation relation to local authorities). Part VI of the Local Government Act 1972, which Act created the structure of county councils and district councils, enables authorities to arrange for the discharge of any of their functions by other local authorities. Further, section 101(5) enables two or more local authorities to discharge any of their functions jointly and also arrange for the discharge of those functions by a joint committee.
3. The Local Government Act 2000 introduced the possibility of local authority executives and it became necessary to make amendments to the 1972 Act to deal that circumstance when a function subject to arrangement between authorities function that was the responsibility of an executive. It can, of course, be in mind that part of

---

<sup>1</sup> By section 121A(3) of the Road Traffic Regulation Act 1994 in England outside Greater London the Council of the County is the traffic authority or all roads in the County for which the Secretary of State is not the Traffic Authority.

the purpose of the 2000 Act was to identify those who had responsibility for the discharge of functions.

4. Subsequent to the enactment of the Local Government Act 2000, subsections (5A) and (5B) were introduced into section 101 of the Local Government Act 1972. Section 101(5A) inhibits the possibility of local authorities making arrangements under section 101(5) of the 1972 Act to the extent that a function becomes the responsibility of an executive. However, section 101(5B) provides that section 101(5A) does not affect arrangements made by virtue of section 20 of the Local Government Act 2000.
5. By section 20 of the Local Government Act 2000 the Secretary of State may, by regulations, make provision for or in connection with permitting arrangements under section 101(5) of the Local Government Act 1972 where any of the functions, which are the subject of the arrangements, are the responsibility of an executive of the local authority under executive arrangements. These regulations are the Local Authorities (Arrangements for the Discharge of Functions (England) Regulation 2000, SI 2000/2851 as amended by SI 2001/3961.
6. The Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2000, SI 2000/2851 provide by regulation 11 for the joint exercise of an executive's<sup>2</sup> function. By regulation 12 those who can be appointed to joint committees are identified and, subject to particular provisions, should (if appointed by

---

<sup>2</sup> In other words, the function of a local authority with an executive model of governance.

an executive, a member of an executive or a committee of an executive) be a member of the executive.

7. It does not matter for present purposes whether clause 5.3 of the North Essex Parking Partnership Joint Committee Agreement 2011 was intended to reflect the provision just mentioned. Nonetheless, it provides that those councils party to the agreement, and operating executive arrangements, should appoint no more than one executive member as members of the joint committee.
8. It is clear, therefore, that the agreement was taking a particular course; and that local government legislation has also taken a particular course, which has been to differentiate between executive members and those who are not executive members. Unless such an ability exists there would be no sense in the legislation (or the agreement) having taken the course I have described.
9. Given that, as seen, whether or not someone is a member of an executive carries a legislative consequence, it is only to be expected that the legislation provides definitions. By section 11(1) of the 2000 Act the executive of a local authority, must take a form specified in section 11(2) to (5) that is applicable to the authority.
10. This provision does not admit of doubt. An executive must be in that form and can be in no other. The various forms of local authority executives are set out in section 11. I need not recite them. They have, for present purposes, a common and important theme. They identify certain people as being executive members or (as it might be put) part of the executive. Thus, the first form of executive exists when there is an

elected mayor. In that case the executive consists of the elected mayor or two or more councillors appointed to the executive by the elected mayor. It can be noted that the number of members of a mayor and cabinet executive or a leader and cabinet executive cannot exceed ten.<sup>3</sup> Further, an executive may not include the chairman or vice-chairman of the authority.<sup>4</sup>

11. A form of executive arrangements introduced by way of amendment to the Local Government Act 2000 is that of leader and cabinet executive: section 11(2A) of the 2000 Act. In this case (subject to the outside numerical limit) the executive consists of the leader and two or more councillors appointed to the executive by the executive leader.
12. It is no surprise that the Local Government Act 2000, having established the possibility of executive arrangements and defined who constitute the executive, goes on to deal with executive functions and provisions with respect to executive arrangements. Thus, in the case of leader and cabinet executive, section 14, identifies how functions come to be discharged. This embraces the possibility of the leader discharging functions, the executive discharging functions, a member of the executive (other than the leader) discharging functions or an officer of the authority discharging functions.
13. It follows that my instructing solicitor was absolutely correct to point out, as she has done, that executive powers cannot be delegated to a deputy cabinet member and that it is not possible to delegate executive powers to those beyond the mentioned

---

<sup>3</sup> Section 11(8).

<sup>4</sup> Section 11(7).

categories. This is not surprising as it is apparent that the purpose (or part of the purpose) behind the legislation was to identify those responsible for particular decisions.

14. Local authorities, although they have, in recent years, been granted wider powers than hitherto, must nonetheless always keep within the scope of the legislation affecting local authorities. Thus, delegation of executive powers cannot occur other than in accordance with the legislation. If it is purported to be done then it is an action which is beyond the powers of the authority. If someone purports to exercise delegated executive powers when that person cannot have such powers delegated to him then any purported exercise would constitute an illegality.
15. The relevant agreement is explicit in setting out that (to take the case of Braintree) the Council cannot appoint more than one executive member. The only provision in the agreement for appointment is as an executive member. If a member of (say) Braintree Council attends he can speak but not vote.
16. If deputy cabinet members (not being members of the Executive appointed to the Joint Committee) attend and vote there is a risk that the decisions taken by the Joint Committee could be set aside. The regulatory regime, of which I have set out part, makes it clear that arrangements between authorities have to be done in particular ways. The approach just mentioned would sit ill with those arrangements and the agreement. Consequently, whilst one cannot predict with certainty that the court would set aside all decisions what can clearly be said is that such an approach (i.e. the deputy cabinet member approach) puts at risk decisions of the joint committee.

17. The question of amendment of the 2011 agreement has arisen. First, the agreement cannot be amended by the Joint Committee. Second, if the Joint Committee wish to put forward an amendment it must come from the Joint Committee as properly constituted. In other words those who vote must be entitled to vote. Third, the parties to an agreement are, of course, able, if they agree, to make a new agreement.
18. Fourth, any such agreement in this context must reflect the legislative provisions. In particular any such agreement must reflect the provisions which enable joint discharge by authorities of functions where those functions fall within the executive functions of one of the authorities.
19. The question, which arises, is whether a joint committee concerned with a function otherwise falling within those functions undertaken by the executive of Essex County Council can contain members from other local authorities, operating executive arrangements, who are not members of an executive. A discussion of this question occurs in an opinion given by Mr Hugh Flanagan of 20 September 2011.
20. As he points out the relevant regulations (SI 2000/2851) are awkwardly drafted. Two distinct matters are addressed in the Regulations, namely who has power to make arrangements under Section 101 of the Local Government Act 1972 and who can be a member of a joint committee.
21. My understanding of the function to be undertaken by the joint committee is that they are all the responsibility of Essex County Council. (It can be noted that other

possibilities are catered for in regulation 11 and, of course, when any new agreement comes to be made it may be that other matters would be embraced.)

22. Proceeding on the basis of that understanding means that regulation 11(3A) appears to operate so that appointment of the joint committee is under Section 102(1)(b) of the 1972 Act and the number of members to be appointed and term of office is fixed in relation to the authority (whose functions are to be discharged, i.e. by Essex) by that person having power under the regulations to make arrangements under Section 101(5).
  
23. This means that as far as the other authorities are concerned one falls back on the language of Section 102(1)(b) of the Local Government Act 1972 so the appointment is by the local authority. It may be, and this would have to be checked at the time, that the power of appointment by a local authority operating an executive model could be in the hands of the executive. If that were the case then regulation 12(1) of the Discharge of Functions Regulations 2000 provides that everyone appointed to a joint committee in accordance with regulation 11 by an executive, or member of the executive or a committee of an executive is to be (subject to certain following paragraphs of regulation 11) a member of the executive.
  
24. I should add that I have pondered about the meaning of regulation 12(1A), which refers to a joint committee discharging a function. On the whole I consider the functions here relate to Essex rather than five or more local authorities. However, if a new agreement was to be made it would need to be made precisely clear as to what functions related to what authorities. This is because regulation 12(1A) makes it plain

that appointees could, if that regulation operates, be either members of the executive or members of the local authority.

## **CONCLUSION**

25. The present position is clear: in order to vote on the Joint Committee one needs (whether substitute or not) to be an executive member or (in the relevant instances) a member of the policy committee.

Further, those who are members of the executive are an ascertainable group and it is not possible to delegate power beyond those ascertainable people. The approach of my instructing solicitor is correct.

A handwritten signature in black ink, appearing to read "Timothy Straker". The signature is written in a cursive style with a long horizontal stroke at the beginning.

**4-5 Gray's Inn Square  
Gray's Inn  
London WC1R 5AH**

**TIMOTHY STRAKER Q.C.**

**22 August 2012**



**NORTH ESSEX PARKING PARTNERSHIP**

---

**OPINION**

---

**Kim Mayo  
Solicitor  
PI & Civil Litigation Team  
Essex Legal Services  
Essex County Council**