

Minister for Local Government

TO BE RETURNED TO
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26 February 1985

ABOLITION: COUNTER-OBSTRUCTION

I have considered carefully colleagues' responses to my letter to you of 9 January which proposed that we amend the Abolition Bill to introduce additional controls over the ability of the GLC and the metropolitan county councils to secure 'life after death' by creating enforceable undertakings whereby commitments would pass to successor authorities regardless of the latter's views. We are all agreed that additional measures are necessary and that we cannot rely on the requirement in Section 11 of the Paving Act for the abolition authorities to consult constituent districts and boroughs about future expenditure proposals. In any case, consultation alone will clearly be inadequate to protect the interests of successor authorities. We will, therefore, be introducing an amendment, at Report Stage in the Commons, to require the Secretary of State's consent to have been obtained before any such financial arrangement or undertaking is entered into by the abolition authorities.

Contract Values

We know that, based on counsel's advice, the GLC are interpreting quite narrowly the present 'disaggregation' provisions in the Paving Act which were designed to prevent large contracts from being separated into small units, each below the £100,000 threshold. There have, for example, been two recent publicity contracts each for more than £90,000. I therefore propose that we should at the same time as the new controls and sanctions are announced take steps to tighten our control by reducing the minimum value above which consent is required to £15,000. This will involve a considerably greater administrative burden, but I will aim to cope with the extra work within the Department's manpower provision.

For both these extended controls we would provide for exemptions to be granted by means of general consents and, possibly, in certain important instances, on the face of the Bill.

I do not consider that it will be sufficient to rely solely on the sanction of disqualification from local authority membership of the councillors responsible for a failure to obtain consent either to the creation of enforceable undertakings or, now that the principle of abolition is accepted, to disposals of land or contracts. When we were introducing the controls under the Paving Bill, we considered, but rejected, the possibility of adding the further penalty of a surcharge, a measure falling short of the criminal sanction to which

the Home Secretary rightly objected in his letter of 23 January, but a sanction stringent enough to deter all but the most determined of militant minorities. I believe that we now have little choice but to return to this concept, which is strongly supported by Conservative councillors in the successor authorities. Details of the proposal are set out in the draft clause attached.

Third Party Rights

Some colleagues have also suggested that actions taken without your consent should automatically be invalidated on 1 April 1986. In principle I agree that such a measure is now justified in the light of continuing threats that have been made by some of the abolition authorities, for example to dispose of County Hall or to let large contracts in the period immediately before abolition. I do not think we can entirely rely on the threat of disqualification and even surcharge, nor am I sanguine about relying on the courts to set aside as unreasonable such transactions: it may not always be easy for objecting successor authorities to establish bad faith; moreover the prospect of emergency retrospective legislation to undo what had been done is extremely unpalatable. I am satisfied that the need to prevent possible irresponsible activity makes it imperative for us to protect successor authorities absolutely from the consequences of such actions. Indeed, as abolition approaches I suggest that it is only reasonable that the abolition authorities should not be able to bind successor authorities without your consent. The risk of significant actions which, though unlawful and irresponsible in themselves, would still be valid vis-a-vis third parties, being taken in anticipation of any new provision to this effect accordingly suggests that this further sanction should be brought into effect retrospective to the date of announcement: it would not be wise to give firm notice of our intentions by bringing it into effect at Royal Assent or some later specified date.

We need to look very carefully at the effect which such a universal measure could have on innocent contractors or purchasers of land, and indeed at the hardship which might be caused to third and fourth parties whose actions taken in all innocence would be prejudiced. It would certainly be necessary to seek to mitigate these effects by means of publicity and wide general consents. But, even so, I have little doubt that a considerable measure of uncertainty would be created - with all the attendant administrative difficulties - particularly about actions taken in the period between the date of announcement and Royal Assent. Against this, we could argue with some force that the effect of a consent issued after I had consulted the appropriate successor authority would be to provide a measure of security for deserving contractors against the possibility of a successor body seeking to renege on commitments which were considered to be undesirable.

We also need to consider carefully the effect of this new control on the passage of the Bill, both in terms of the debate on Report Stage, when I would suggest that the announcement should be made, and in the Lords. With regard to the Lords, it might be in their lordships' minds that none of this would have been needed if they had not insisted on amending the Paving Bill!

A possible alternative would be to seek an order-making power whereby defined categories of contracts or disposals would be automatically invalidated unless, after the date specified in the orders, consent had been obtained. This would allow me to select those cases, and those authorities, of particular potential significance, and I would, for example, act to protect the future ownership of County Hall immediately after Royal Assent. As this power could not be used until August of this year it would open the possibility of one or more horses bolting before such an order could be made. However, it would reduce the risk of irresponsible behaviour, and there may well be some merit in the selectivity that would thereby be provided. We would, nevertheless, have to rely on the courts setting aside as unreasonable actions taken before the effective date of the order, in particular where there had been an element of collusion and secrecy. The choice which faces us therefore lies in introducing a controversial new measure with immediate and universal effect, based on the threats which have been made, or waiting until one or more unlawful actions had been taken before introducing selective measures for which there would then be clear justification.

Decision Criteria

Lastly, I am concerned that now that the principle of abolition has been accepted and certainly after Royal Assent there should be no doubt that you may exercise your discretion under Sections 8 and 9 of the Paving Act in such a way as to prevent, for example, the letting of a short-term contract on the grounds that the cost incurred would not be in the interests of ratepayers. I propose accordingly to bring all the controls, existing and contemplated, into line with Section 7 of the Paving Act and Clause 86 of the Bill by providing that, before giving consent, you should be satisfied that the proposal is expedient.

Timing of Introduction

With the possible exception of the power to invalidate by order enforceable undertakings, contracts and land disposals let without your consent, should we go down that road, I consider that these new measures should take effect from midnight on the date of announcement, which would coincide with the tabling of amendments to the Abolition Bill at Report Stage.

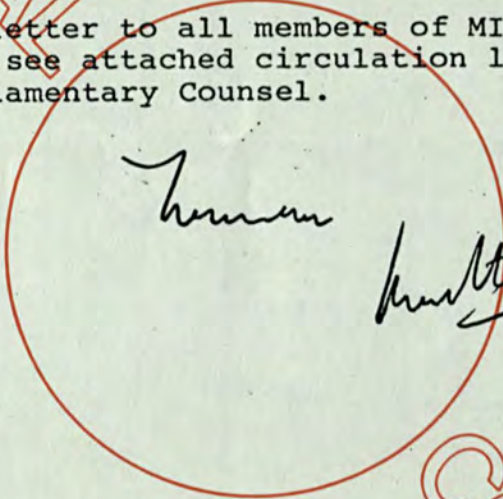
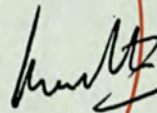
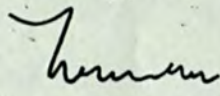
I am not convinced that we would be justified in seeking to take controls over the wide range of activities involving expenditure and the raising of income in general by the abolition authorities which have no direct consequences for successor authorities. Such steps would fall not far short of putting the authorities into commission, and I am doubtful of the consequences of, say, seeking to control all grant-giving by the GLC and MCCs in the run-up to abolition.

I am, of course, concerned that the tabling of amendments such as are proposed at Report Stage should not prejudice the timely passage of the Bill. But, given the necessity for further measures I consider that it would be better to take any further steps necessary for tightening controls at that stage, rather than to announce more limited steps, with the possibility of tabling further amendments at a later stage.

The attached draft paper describes the package of measures in more detail. This paper could be discussed at a meeting of MISC 95 if necessary; but if colleagues are content to proceed without discussion I will take the necessary steps to prepare amendments to the Bill and a simultaneous announcement.

I am copying this letter to all members of MISC 95, other colleagues with an interest - see attached circulation list, Sir Robert Armstrong and the First Parliamentary Counsel.

KENNETH BAKER



The Rt Hon Patrick Jenkin MP

CIRCULATION LIST

no comment Lord President of the Council
don't interfere Lord Chancellor
Secretary of State for Foreign and Commonwealth Affairs
no objections Secretary of State for the Home Department
coming - 11/6A? Secretary of State for Education and Science
no comment? Secretary of State for Scotland
" ? Secretary of State for Wales
" ? Lord Privy Seal
" ? Secretary of State for Social Services
no NK Secretary of State for Trade and Industry
no comment Secretary of State for Employment
leader minor comment Minister of Agriculture, Fisheries and Food
letter with way Chief Secretary, Treasury
NK Secretary of State for Transport
Chancellor of the Duchy of Lancaster
Attorney General
Parliamentary Secretary, Treasury (Chief Whip)
Captain of the Gentlemen-at-Arms, Chief Whip (House of Lords)
? Sir Robert Armstrong
The First Parliamentary Counsel

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(5) In this section -

"building or engineering works" includes any work involved in the laying out of land, the improvement of land or buildings, the construction or improvement of a highway and any work of demolition;

"maintenance works" includes work for the maintenance or repair of land, buildings or highways, the gritting of a highway and the clearing of snow from a highway.

(6) This section applies to any contract entered into after 12th July 1984 and any consent given by the Secretary of State for the purposes of this section between that date and the passing of this Act shall have effect as if given under this section.

Insert the following new Clause:-

Penalties for contravention of sections (Control of disposals of land) and (Control of contracts).

.-(1) If, on the application of a constituent council or a local government elector for the area of a constituent council, it appears to the court that the Greater London Council or a metropolitan county council has made a disposal in contravention of section (Control of disposals of land) above or entered into a contract in contravention of section (Control of contracts) above, the court may -

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- (a) order that any person responsible for authorising the disposal or contract shall make to the council a payment of a sum not exceeding the amount specified in subsection (2) below and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to make that payment; and
- (b) if the person responsible is, or was at the time of the conduct in question, a member of the council, order him to be disqualified for being a member of that council and to be disqualified for a specified period for being a member of any other local authority.

(2) The amount of the payment under subsection (1)(a) above shall be -

- (a) in the case of a disposal in contravention of section (Control of disposals of land) above, an amount equal to the amount or value of the consideration for the disposal or, if there is no consideration or it is less than the market value of what is disposed of, an amount equal to that market value;
- (b) in the case of a contract in contravention of section (Control of contracts) above, an amount equal to the amount or value of the consideration in respect of the matters by virtue of which the contract is subject to that section.

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(3) The court having jurisdiction for the purposes of this section shall be the High Court except that, if the amount of the payment under subsection (1)(a) above would not exceed the amount over which county courts have jurisdiction in actions founded on contract, the county court shall have concurrent jurisdiction with the High Court.

(4) In section 265 of the Public Health Act 1875 the reference to sections 19 and 20 of the Local Government Finance Act 1982, and in sections 80(1)(e), 86(b) and 87(1)(d) of the principal Act references to Part III of the said Act of 1982, shall include references to this section."")

CLAUSE 10

Page 8, line 18, at end insert ("and either unconditionally or subject to conditions")

Transpose clause 10 to after new clause (Penalty for contravention of sections Control of disposal of land) and Control of contracts).

CLAUSE 11

Page 9, line 12, leave out subsection (5).

CLAUSE 13

Page 9, line 17, at end insert -

("() For the purposes of this Act the constituent councils are -

DRAFT PAPER FOR MISC 95

ABOLITION: COUNTER-OBSTRUCTION

Introduction

1. The Local Government (Interim Provisions) Act requires the GLC and the metropolitan county councils to obtain my consent to (a) expenditure under section 137, LG Act 1972 after 1/4/85, (b) major contracts for specified purposes, and (c) disposals of land, and to consult constituent district and borough councils about proposals for expenditure after 1/4/86. While the operation of the consent provisions has not proved administratively burdensome, it has become clear that the Act's provisions - and those in clause 86 of the Abolition Bill - will probably not be sufficient to deter the abolition authorities from activities designed specifically to prejudice abolition, now that the Bill has achieved the Commons' agreement in principle. The Government would not, however, in present circumstances be justified in seeking to take complete control of the authorities' activities in the remaining period of their existence.

Long term liabilities

2. The Abolition Bill ensures that no rights or liabilities of the abolition authorities which exist at abolition will be extinguished. Some of the abolition authorities seem inclined to exploit this principle by creating long term liabilities, for example to ensure the continued financial support of Enterprise Boards, which successor authorities will inherit, with the aim of perpetuating their policies long after abolition. Accordingly, it is proposed to introduce a new control to constrain such activities.

Contract values

3. It is apparent that the GLC at least are interpreting the provisions in section 9 of the Paving Act narrowly so as to allow certain obstructive contracts to proceed without consent. It is therefore proposed to require consent in future to be obtained to such individual contracts above a value of £15,000, which would cover the majority of such activities as may be contemplated.

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Sanctions

4. It is also becoming clear that the existing Paving Act sanction of disqualification from local government office will not prove to be an effective deterrent to disposals of land or the letting of major contracts without my consent. To place total reliance on the courts in due course finding against such actions as unreasonable would be tiresome and risky; while the prospect of having to legislate to set aside retrospectively a court finding in favour of an abolition authority, and to undo the transaction, would be extremely unpalatable.

5. It is therefore proposed to provide not only the sanction of disqualification but also for contracts capable of binding successor authorities to be unenforceable against them if they were let without my consent, and for disposals of land without my consent to be invalidated. Colleagues will wish to consider, in the light of the likely adverse effects on innocent third parties and the Abolition Bill, whether

- (a) this sanction should apply, with universal effect (but ameliorated by means of specific exemptions, general consents and appropriate publicity) retrospectively to the date of announcement; or
- (b) it would be preferable, on balance, to seek a power in the Bill to apply the sanction selectively by order from the effective date of the order(s)

Although the latter option would leave some risk that actions would be taken, as indeed may already have happened, which could not be set aside even after judicial review, it is a possible alternative. It would reduce considerably the uncertainty created for third and other interested parties while offering protection to successor authorities and creating a measure of long term security for deserving cases, but some evasive action will be taken before it comes into operation.

6. Furthermore, if only because of the financial hardship which may in consequence be suffered by third parties, it is proposed for reasons of equity to apply the additional sanction of a liability to surcharge for the loss which is deemed to be incurred by the councillors responsible for the unlawful action.

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Decision Criteria

7. The discretionary powers in sections 8 and 9 of the Paving act may be exercised only for the purposes for which the Act was sought. Now that the principle of abolition has been accepted, and certainly after Royal Assent is obtained, I consider that the criteria governing the exercise of the discretionary Paving Act powers over contracts and property disposals, and the new control over long term liabilities, should be slightly widened to require me to be satisfied that the proposal would be expedient. This would allow me, beyond doubt, to take into account such considerations as the financial penalty on ratepayers or successor authorities of a short-term contract or disposal of land. Section 7 of the Paving Act and Clause 86 of the Bill already contain such a criterion.

Summary of proposals

8. It is proposed to introduce amendments to the Abolition Bill, having retrospective effect to midnight on the date of announcement, so that the abolition authorities will require my consent to:-

- (1) property disposals (as in section 8 of the Paving Act);
- (2) contracts (of the types specified in section 9 of the Paving Act) to a value in excess of £15,000 (as opposed to £100,000 or £250,000);
- (3) any other enforceable agreement or arrangement capable of surviving beyond abolition.

Where consent is not obtained:-

- (4) the councillors responsible will be liable to disqualification and surcharge on application to the High Court by an interested party.

And:-

- (5) before giving consent I would have to be satisfied that the proposal is expedient.

Furthermore,

either

(6A) any property disposal undertaken without my consent will be void, and any contract or other arrangement will not be binding on successor authorities;

or

(6B) provision will be included for orders to be made with the effect, from the date of the order, of invalidating specified categories of land disposals or of providing that specified contracts or

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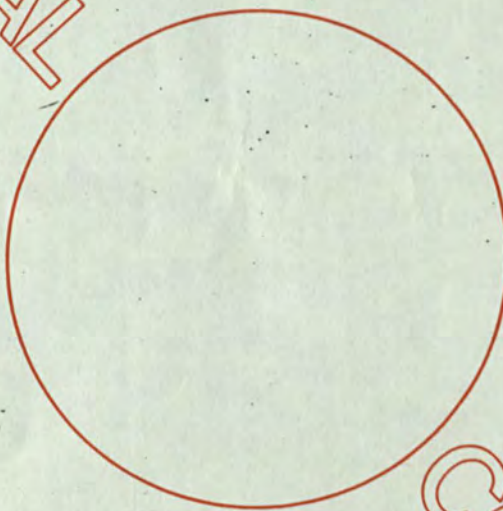
other arrangements will not be binding on successor authorities, unless my consent has been obtained.

9. The following activities would be specifically exempt from these provisions:

- actions taken before the date of announcement
- contracts of employment
- borrowing activities

The effect of the controls would also be ameliorated by means of general consents to certain activities. The existing provisions in Clause 86 of the Abolition Bill (relating to financial assistance to other authorities) and in section 7 of the Paving Act (concerning expenditure under section 137, LG Act 1972) would not be affected.

February 1985



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Sec of State

cc: Lord Avon
Mr Waldegrave
Sir George Young
Mr Heiser
Mr Ennals
Mr Owen
Mr Pickup
Mr Rowcliffe
Mr Fletcher
→ Mr Griffin
Mr Hobson
Mr Medcalf
Mrs Phillips
Mr D J Phillips
Mr Roscoe
Mr Walley
Mrs Watson - Legal
PS Mr Barker

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