

---

---

## INSTRUCTIONS TO COUNSEL TO ADVISE –

---

---

Your Instructing Solicitor in this matter is Mr Mark Heath, the Solicitor to the Council Services, Southampton City Council. He can be contacted on 023 8083 2371. His address is Southbrook Rise, 4-8 Millbrook Road East, Southampton, S015 1YG.

Counsel is requested to advise Southampton City Council in relation to the issue of substitution by Members at Committees and Sub-Committees of the Council.

### **Overview**

Southampton City Council is a unitary authority operating Executive Arrangements under the Local Government Act 2000. However, this issue does not relate to the operation of Executive Arrangements.

The issue arises by way of the operation of the Committee system and the appointment of Committees and Sub-Committees of the Council to discharge non-Executive functions. Examples could well include Overview and Scrutiny, Licensing and Development Control.

The Local Government Act 1972 gives the local authority power to discharge its functions through a Committee structure and to appoint Committees and Sub-Committees to undertake its functions. By virtue of the Local Government and Housing Act 1989 a fundamental change to the way in which appointments were made to Committees and Sub-Committees was introduced. The 1989 Act formally recognised that local authorities were subject to political control, and the system for appointing members was amended accordingly. Under the 1989 Act local authorities were obliged to secure political balance on their Committees, Sub-Committees and advisory committees and once this had been achieved, there was a duty to make appointments to the body in question in accordance with the wishes of the political group to which the seat had been allocated.

When taken together with the 1972 Act, the effective of the 1989 Act was to ensure that the composition of Committees, etc reflected political circumstances.

The difficulty appears to arise by virtue of the wording in the Local Government Act 1972. This appears to be compounded by the *Gladbaum* case and a number of opinions that authorities have sought, various beliefs on what the legislation says (as compared to what it actually says) and a view expressed by civil servants during the drafting of the model Constitution under the Local Government Act 2000 that substitution per se was unlawful. Thus, some authorities do not operate substitution schemes and some of those that do are questioning their legality.

The issue before Southampton City Council is that its current approach, which is contained within its Constitution, whilst revised in May 2002, still causes difficulty for both Officers and Members. The City Council would wish to receive advice upon whether or not substitution is lawful, and whether some of the permutations laid out in the detail of these instructions may be relied upon.

Counsel is, therefore, requested to advise whether or not the possible approaches that Southampton City Council could take in relation to the issue of substitution are lawful and, of course, to provide any other advice around the topic as appropriate.

## **Documents**

Counsel will find enclosed:

1. Southampton City Council's Constitution
2. Local Government Act 1972 (relevant extracts)
3. Local Government and Housing Act 1989 (relevant extracts)
4. Regulations
5. Various opinions
6. The *Gladbaum* case
7. Views of Members

## **The Position in Southampton**

Prior to the adoption of the new Executive Arrangements in October 2001, the City Council had a substitution scheme whereby Members officially resigned from a Committee and

officers had delegated authority to appoint replacements. Members completed a form, the resigning and replacement member had to sign it, and they were replaced for the entire meeting. This was, in essence, a version of substitution that we felt addressed the circumstances following the Local Government and Housing Act 1989. With the new Executive Arrangements coming on board, the Council adopted, in essence, the model Constitution and Counsel will find enclosed the entirety of the City Council's Constitution but the salient part is the Council Procedure Rules, specifically Council Procedure Rule 4. Counsel has the latest version of the Constitution, as amended on the 15<sup>th</sup> May 2002 and will notice that we now have two substitutes per individual member. Prior to May 2002 we followed the model Constitution to the letter and had only one substitute for each member, but your Instructing Solicitor, aware of Members' concerns as to the operation of this regime, changed the position to allow two substitute Members per allocated Member on the basis that it did not seem to make the position any legally worse (or better), and that if substitution was unlawful, it was unlawful, regardless of the numbers.

Members have indicated that they find the current system difficult to operate. They believe that the public expectation is that the elected representatives of the City will fill the seats of committees and sub-committees in accordance with the political proportionality of the Council. Having vacant seats at committee or sub-committee meetings because the political groups are either unable to provide substitutes or the substitution scheme is so narrow and restrictive that only Council can appoint substitute Members results in democracy not being well served. The Members would clearly wish to see the most flexible scheme possible, and ideally a reversion to the type of regime in place prior to October 2001. Council to determine the political proportionality, the officers being delegated with authority to implement appointments in accordance with Groups' wishes (including circumstances where, in essence, a Member resigns for the course of one meeting and one meeting only and is replaced by another Member who then resigns at the end of the meeting, with the original Member then re-taking up their seat). This clearly provided the degree of flexibility that Members are seeking, but needs to be carefully evaluated in the light of both the Local Government Act 1972, the Local Government and Housing Act 1989 and the *Gladbaum* case. Some views are contained in copy correspondence (Document 7)/

## **Local Government Act 1972**

Section 101 Local Government Act 1972 empowers local authorities to make arrangements for the discharge of their functions (this is now obviously subject to the Local Government

Act 2000 and the new regime for Executive functions) by Committee, Sub-Committee or officer of the authority (or by any other local authority).

Section 102 empowers local authorities to appoint Committees and it is to be noted that Section 102(2) provides that the number of members of a committee, their term of office and certain other factors, are to be fixed by the appointing authority. Section 102(5) states that “every member of a committee appointed under this section” which suggests that it is the member of the committee who is appointed by virtue of Section 102 of the 1972 Act.

Section 106 of the 1972 Act enables local authorities to make Standing Orders (these are now embodied within most authorities’ Constitution as part of the Council’s Procedure Rules) with respect to quorum, proceedings, place of meetings, etc. Some have construed this widely as providing a procedural basis for a flexible regime dealing with the issue of substitution.

### **Local Government and Housing Act 1989**

The cumulative effect of Sections 16, 16 and Schedule 1 is to require political proportionality across the formal, non-Executive activities of the City Council representing the overall composition of the authority. As well as meaning that there can be no one party committees or sub-committees, these provisions change the emphasis in terms of appointment from appointment. The issue is no longer one of the appointment of Members to a Committee by the authority, but determination of the seats (as compared to votes) on the ordinary committees and sub-committees of the authority to be determined in accordance with the political proportionality calculation as set out within Sections 15, 16 and Schedule 1 which the authority then has a duty to implement in accordance with the wishes of the particular political group in question.

Your Instructing Solicitor has enclosed a copy of the Local Government (Committees and Political Groups) Regulations 1990. These seem particularly salient to a consideration as to the decision-making in respect of this particular matter. Counsel’s particular attention is drawn not only to the salient paragraphs relating to the review of allocation of seats to political groups, but also to paragraphs 13, 14 and 15. Of course, these provisions relate specifically to initial allocation of politically proportioned seats to Groups, but if there is no express provision contained within the law permitting substitution – and it is Counsel’s view that it may not be inferred from any of the previously stated provisions – then it may well be that there is a need to rely upon these particular regulations to enable substitution by a

backdoor route. Your Instructing Solicitor has noticed that, in paragraph 13 of the Regulations, there is an express delineation of how the wishes of any political group are to be taken by the authority. Paragraph 14 deals with notifications and paragraph 15 deals with appointments where political groups fail to express their wishes. On the basis that where a political group expresses its wishes using the procedure laid down in the Regulations, that that is, in essence, a decision. That would, therefore, not require delegation or anything else to be applied, the Council having determined to which party the seat is to be allocated and the political group then having determined the Member to be appointed. Paragraph 15 applied where the group fails to express its wishes in accordance with the Regulations, etc.

Applying this to the potentiality for dealing with substitution, it would appear to be entirely possible to use Regulation 14(b) so as, in the event of there being a vacancy, whether it is a vacancy for one meeting or more, that that is notified to the Group Leader, the Group Leader then expresses the wishes of the Group as to how that seat is to be filled, the seat is then filled for that meeting or indeed any other meeting, and then, if necessary, changed following the same process.

In other words, taking it as a practical proposition, whether for a casual vacancies for one meeting or otherwise, if a Member advises the Proper Officer that they are unable to attend one or more meetings, the Proper Officer advises the leader of the Group of this, the leader of the Group indicates who is to replace that Member, and if there is then to be a further change, that Member effectively either resigns or vacates the seat and the process is gone through again. Clearly this could be promulgated using appropriate pre-determined paperwork, etc, so that in essence the position is reduced in terms of the number of steps, but the principle would appear to be supportable.

## **Opinions**

Enclosed with these Instructions are opinions that have been circulated around local authorities over time on this particular issue. Your Instructing Solicitor has not been able to compile a complete set. They consist of an opinion from Alun Alesbury dated 1<sup>st</sup> May 1992, an opinion from Anthony Scrivener QC dated 6<sup>th</sup> February 1992 and an opinion from Geoffrey Stevenson dated 7<sup>th</sup> September 1992. Much of the argument seems to have revolved around *R v Brent LBC ex parte Gladbaum (1989)*. Your Instructing Solicitor's reading of the case is, with the greatest of respect to Alun Alesbury, different. I agree with the opinion from Geoffrey Stevenson dated 7<sup>th</sup> September 1992 that the principle in *Gladbaum* does not apply to circumstances where a resignation has occurred and an

appointment under the 1989 Act provisions is sought. *Gladbaum* was not, of course, concerned with the 1989 Act at all, and was dealing with the appointment of members (and, indeed, their removal) under the Local Government Act 1972 and no more.

Your Instructing Solicitor's contention is that the 1989 Act means that *Gladbaum* is not good law for the proposition that only Full Council may appoint named members to a committee. Your Instructing Solicitor's contention is that the 1989 Act in fact sweeps that away and that the 1989 Act requires that the Council approves the proportionality calculation, etc but should then put in place appropriate arrangements under the Local Government and Housing Act 1989 to enable the appointment of members to particular committees to be facilitated in accordance with the wishes of that particular political group.

It is common ground that under Section 101 Local Government Act 1972, functions of the Council may be delegated to a committee, sub-committee or officer. If your Instructing Solicitor's conclusions in relation to *Gladbaum* are sound, then taking the fundamental propositions of that case in terms of their applicability to Sections 101 / 102 Local Government Act 1972:

1. it is acknowledged that the power to determine the membership of Council committees is fundamental to the proper discharge of the functions which the Council has been elected to perform;
2. the power to appoint a committee must include a power to appoint members of the committee;
3. whilst the Council may not delegate their powers to determine size and composition of committees and sub-committees, these being issues under the Local Government Act 1972 and the Local Government and Housing Act 1989 and properly a matter for the Council to determine, once that decision is made, then it is to be implemented in accordance with Section 16. Section 16 makes reference to "authority or committee" but that is to acknowledge the circumstances where either it is the relevant authority or committee of the relevant authority who is determine the allocation to different political groups of seats, etc.

Once, therefore, in the case of Southampton City Council, the authority has determined the political proportionality allocation, it is for the authority to give effect to that allocation. Your Instructing Solicitor sees no reason why the general provisions of the Local Government Act 1972 in terms of the delegation of functions should not mean that that determination cannot be delegated to officers. The benefit of that would be that where a resignation arose, the

officers would have delegated authority to make an appointment in accordance with the wishes of that particular political group.

Extending the logic of this process, it would be quite possible, rather than having a substitution scheme along the lines of that presently contained in the Southampton City Council Constitution, whereby a member resigned for a meeting, and with due process (and paperwork) that resignation could be recorded and an alternative member appointed, reflecting the party's political wishes by the Proper Officer for the authority, acting under a duly approved delegated power to implement the requirements of Section 16 of the 1989 Act. This would, in effect, provide a delegated substitution scheme.

Your Instructing Solicitor would appreciate Counsel's view on achieving this. This scheme in essence reflects the position in Southampton prior to the adoption of the model Constitution and the provisions in relation to substitution contained in that. Your Instructing Solicitor remains concerned about the opinions circulated and the views of various eminent local authority solicitors and barristers who have expressed views over time that the whole ethos of substitution is questionable, but in pragmatic terms your Instructing Solicitor believes that the opinions given in 1992 either fail to take account of the Local Government and Housing Act 1989 and the change in emphasis brought about by that in terms of local authority powers and/or construed *Gladbaum* in far too broad a manner.

Your Instructing Solicitor would, therefore, firstly appreciate Counsel's opinion upon the legality substitution generally and whether the general approach, and particularly the flexible approach as preferred by Members (in a style akin to that laid out in correspondence from Members in Document 7) can be derived from any of the legislative provisions available.

Failing that, whether a regime along the lines outlined within the Instructions relying on Regulations 13, 14 and 15 of the Local Government (Committees and Groups) Regulations 1990 be applicable and if so, are there any particular criteria or issues that Counsel feels your Instructing Solicitor should be aware of in applying this.

If it is Counsel's view that the various routes, suggestions, etc are all unlawful and that inevitably substitution is unacceptable, are there any alternative mechanisms that Counsel can advise upon so that the authority can achieve its objectives by an alternative route?

If, in the view of Counsel, substitution is unlawful per se, your Instructing Solicitor would also appreciate Counsel's view upon whether or not the Council's decision-making (and,

therefore, its decisions) would be rendered unlawful if the Council choose not to accept your Instructing Solicitor's advice and determined, say, to maintain the current regime in place.



---

---

**INSTRUCTIONS TO COUNSEL TO ADVISE**

---

---

To:

Mark R Heath  
Solicitor to the Council  
Southampton City Council  
Southbrook Rise  
4-8 Millbrook Road East  
SOUTHAMPTON S015 1YG

Tel: 023 8380 2371

Ref: MRH/