

Cumberland Shadow Executive

28th March 2023

Section 16 Local Government Public Involvement in Health Act – Property, Rights & Liabilities

Report from: Cllr Lisa Brown, Deputy Leader (Statutory)
Report Author: Monitoring Officer
Wards: All
Key Decision: Yes

1.0 Purpose/Summary of report

- 1.1 The purpose of the report is to set out the terms of the agreement which has been reached on behalf of Cumberland and Westmorland and Furness Councils in relation to the disaggregation of property, rights and liabilities of the predecessor councils and to which successor Authority such property, rights and liabilities will vest on the 1st April 2023.
- 1.2 The agreement draws together the principles and agreements reached on aggregation and disaggregation of the sovereign councils in the previous eighteen months into one succinct document, which dovetails with the Inter-Authority Agreement, Waste IAA and Property Transfer Scheme (Fire) between the new Authorities.

2.0 Recommendation

It is recommended that

- 2.1 Members note the contents of this report and the terms proposed in the Section 16 Agreement.
- 2.2 The Monitoring Officer be delegated authority to agree the final terms of the Section 16 Agreement following consultation with the Deputy Leader (Statutory), Chief Executive and s151 Officer.
- 2.3 That authority is given to the Monitoring Officer to sign the Section 16 Agreement.
- 2.4 That authority is given to the S.151 Officer, following consultation with the Deputy Leader (Statutory) to agree and settle any matter of

any value which falls to be agreed under the terms of the Section 16 Agreement as to proportionality of rights and liabilities between the councils.

2 Background and Proposals

2.1 Legal Basis

- 2.1.1 The agreement is entered into pursuant to Section 16 of the Local Government and Public Involvement Act 2007 ('Section 16') and Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008 ('the Transfer Regulations').
- 2.1.2 Section 16 gives public bodies the power to make agreements which affect any property, income, rights, liabilities and expenses of the parties to the agreement and in relation to any financial relations between the parties to the agreement. This is a discretionary power.
- 2.1.3 Regulation 7 of the Transfer Regulations provides that where there is the establishment of a single tier of local government for an area which consists of the entirety of the areas of both or all of the predecessor councils, all property, rights and liabilities of the predecessor councils shall on the reorganisation date vest in, and transfer to, the successor council.
- 2.1.4 Regulation 12 of the Transfer Regulations provides that where there is more than one successor in relation to a predecessor council, property, rights and liabilities of that predecessor council, which are identified in an agreement as for transfer on the reorganisation date to only one of the successor council shall, on that date, vest in and transfer to that council.
- 2.1.5 The Transfer Regulations also confirm the functions of the predecessor councils shall on the reorganisation date become functions of both or, as the case may be, all of the successor councils, and exercisable by each of them independently of the other or others (unless that function is only exercisable in a specific area in which case it will be exercising by the council into which that area falls).
- 2.1.6 The Local Government (Structural Changes) (Transitional arrangements) (No.2) Regulations 2008 ('the Transitional Regulations') are also relevant in that they provide for continuity of the predecessor councils into the relevant successor council on an area basis.

2.2 Property, rights and liabilities

- 2.2.1 The terms 'property', 'rights' and 'liabilities' are not specifically defined but are understood to include; land and buildings,

reserves, trust property, tangible assets such as fleet, ICT equipment, office equipment, shares in companies, investments, collections, contractual arrangements including grant agreements and borrowing commitments, claims against predecessor councils and records.

- 2.2.2 The Section 16 Agreement has set out classes of matters within each broader heading and either provided the principle for which is to be applied for disaggregation of that class or will append a physical list.

2.3 District and Borough Councils

- 2.3.1 As the District and Borough Councils of Cumbria have a single successor council for the entirety of their area, all functions, property, rights and liabilities of the district and borough councils will transfer and vest in their respective council on vesting day.
- 2.3.2 Allerdale Borough Council, Carlisle City Council and Copeland Borough Council's functions, reserves, property, rights and liabilities will therefore transfer and vest in Cumberland Council on 1st April 2023.
- 2.3.3 The exception to this is the historical property of Carlisle City Council will transfer and vest in the Charter Trustees of the City of Carlisle on the 1st April 2023. For the avoidance of doubt those assets which form that historical property have been set out in the Section 16 Agreement.

2.3 Cumbria County Council

- 2.3.4 Cumbria County Council's ('the County') successor councils are both Cumberland Council and Westmorland and Furness Council.
- 2.3.5 Since the Structural Changes Order was made work has been undertaken to understand how the functions, property, rights and liabilities including employees would be disaggregated across the two new single tier councils.
- 2.3.6 The Section 16 Agreement is intended to draw together and set out those established principles into one agreement for the purposes of certainty for residents, employees and the organisation itself as to how matters have been disaggregated with the aim of providing a clear line for the transfer and vesting of the class of property, rights and liabilities identified in the agreement.
- 2.3.7 Other than where the Section 16 Agreement specifically vests an asset, liability, right or property wholly in one council or jointly and severally in both councils, the County's assets, rights and liabilities will be disaggregated and vest in each new authority in

the proportion set out in the Financial Principles of Disaggregation (which can be found in the Agreement).

2.4 Caretaker Council

- 2.4.1 In the event any property, right or liability does not have a clear successor council, and has not been identified in the agreement as transferring and vesting to a successor council, the Transfer Regulations refer to the appointment of a caretaker council for the purposes of ownership, until such time as the parties can agree which council is to have ultimate ownership or if the ownership is to be shared.
- 2.4.2 The Secretary of State can elect the caretaker council, however it would be prudent to have a default council referred to in the agreement for this purpose. This provides certainty and consistency. As Westmorland and Furness Council will hold the County's reserves on trust for both council's until such time as the final accounts for 2022/23 have been prepared, it is recommended that, other than where there is a hosted service, any matters which have not been specifically referred to in the agreement, which do not have a clear successor authority or are not part of a Hosted Service, shall transfer and vest in the caretaker council on trust for both councils until such time as agreement has been reached as to the ultimate owner. Whilst the matter is being held in this way, any costs, liability, income etc shall be shared on a proportionate basis of 55/45 (as to Cumberland and Westmorland respectively) and Cumberland will indemnify Westmorland for their proportion of any holding costs (if any) until such time as agreement is reached.
- 2.4.3 For hosted services, where any property, right or liability is found not referred to in the Section 16 Agreement, it transfers and vests in the Hosting Authority on the terms of the Inter-Authority Agreement.
- 2.4.4 If after a period of time the successor councils still cannot agree which or if both councils should have ownership of the property, right or liability then the matter would be referred to arbitration for determination.

2.5 Liability in Contract, Tort, Statue or other legal claim by or against Cumbria County Council

- 2.5.1 A claim against a predecessor council is a liability, a claim being made a predecessor council is a right.
- 2.5.2 Any proceedings already issued by or against the County will continue by virtue of the Transitional Regulations into the new successor councils, to the successor council of the relevant area of

which the proceedings relate. In most cases this is simple to identify using the geography of where the incidence took place, the address of residents or the location of a school for example.

- 2.5.3 However, in some instances, it is not possible to disaggregate the a claim or proceedings which have already been commenced on a geographic basis.
- 2.5.4 The County's insurance department have disaggregated current claims (a number of which involve court proceedings but not all) on the basis of geography for those to be taken by Cumberland and Westmorland and for those to be taken by the Fire Authority. There are a number of matters which cannot be split on a geographic or service basis and therefore agreement needs to be reached as to how the liability of those matters will be shared between the successor councils. The proposal detailed in the Section 16 Agreement is that those cases transfer and vest in the successor councils on a joint and several basis and the right, liability and costs will be split on a proportionate basis being 50/50 unless agreed otherwise. Any dispute as to the proportion of liability will be referred to arbitration for resolution.
- 2.5.5 Insurance officers have completed an analysis of the insurance policies which will need to be kept in place and which insurance policy will be used to cover any future claims which relate to conduct of the County.
- 2.5.6 There will be claims that are not subject to insurance cover and there will be claims made against the successor councils in the future (as the successors to Cumbria County Council). The successor councils will therefore need to agree a principle on how their liability is proportionally split. The Section 16 Agreement proposes that in those cases that cannot be split on a geographic basis/employer basis, they will vest in the successor councils on a joint and several basis and the right, liability and costs will be split on a proportionate basis to be agreed between the parties acting reasonably and failing agreement to be referred to arbitration. Until such time as agreement has been reached the parties will indemnify each other as required on a 50/50 basis (where Cumberland has the larger proportion) until such time as the matter is settled. Any dispute as to the proportion of liability will be referred to arbitration for resolution.
- 2.5.7 **Contract Liability**
 - 2.5.7.1 There are a number of County Council contracts and frameworks which are being terminated with agreement with the supplier so that they can operate independently for each council from vesting day. There is a small risk of contingent liability under the terminated contract and the termination of the contract does not prevent a claim being brought by either the successor council or

the supplier if the event which leads to the claim arose under the terms of the terminated contract (subject to limitation).

- 2.5.7.2 The liability will be joint and several, which means if it is claim against the successor council the supplier could bring it against one or both successor councils.
- 2.5.7.3 Agreement has been detailed in the Section 16 Agreement that the cases are joint and several and the right, liability and costs will be split on a proportionate basis to be agreed between the parties acting reasonably and failing agreement to be referred to arbitration. Until such time as agreement has been reached the parties should indemnify each other as required on a 50/50 basis.

2.6 Inter-Authority Agreement (IAA), Waste IAA, and Property Transfer Scheme

- 2.6.1 The IAA, and Waste IAA are being agreed between the successor councils in order to manage how a number of services will operate from vesting day. The Section 16 Agreement operates to transfer contracts into the correct authority so that the IAA, and Waste IAA can operate with the service specific contracts that are required. Where a contract has to be hosted by one authority for the continuation of that supply of services, goods or works, the Section 16 Agreement vests that contract in the host authority.
- 2.6.2 In respect of those County's property, assets, rights and liabilities that vest in each new authority (as detailed in paragraph 2.3.7 of this report) the IAA and Waste IAA will operate to bring back together such property, assets, rights and liabilities needed for that host authority to operate the relevant service. The IAA and Waste IAA then detail how any future disaggregation occurs.
- 2.6.3 The Cumbria Commissioner Fire and Rescue Authority ('CCFRA') created under Article 3 of the Police, Fire and Crime Commissioner for Cumbria (Fire and Rescue Authority) Order 2022, are not party to the Section 16 Agreement. However, as the fire authority is currently part of the County until 31st March 2023, there is requirement to disaggregate their property, rights and liabilities and transfer and vest such matters into the CCFRA authority on 1st April 2023. This occurs via the Property Transfer Scheme and Staff Transfer Scheme. These schemes are made by the Secretary of State and are not agreements which either the County Council or the unitary authorities are party to. Work has been undertaken to identify the contracts, fleet and land and property to be wholly vested in the CCFRA. The Staff Transfer Scheme is the equivalent of the Transfer of Undertakings (Protection of Employment)

Regulations 2006, which would not have otherwise applied to this type of reorganisation.

- 2.6.4 Work is underway to establish what other property (including budget disaggregation in accordance with the Financial Disaggregation Principles) and liabilities need to be captured in the Schemes ahead of Vesting Day.

3.0 Consultation

- 3.1** The contents of the report have been presented to the SRO Board and the Senior Leadership Team for Cumberland and the Senior Leadership Team for Westmorland and Furness and their comments incorporated in the updated drafting of the agreement.
- 3.2** The contents of the agreement and the schedules has been worked up by the LGR technical officer workstreams and have been presented to relevant Directors (designate) whose comments are incorporated.

4.0 Alternative Options

- 4.1 If an agreement is not reached on the Authority into which the property, rights and liabilities of the predecessor councils vests the Secretary of State has the ability to appoint a caretaker council to allow the Authorities to agree where the property, rights and liabilities should vest. This would create uncertainty until such time an agreement was reached.

5.0 Implications

Financial, Resources and Procurement

- 5.1 The financial implications are explicit in the agreement and are clearly identified where relevant in the individual schedules There is a separate legal agreement (Fire property transfer agreement) that disaggregates the fire service assets, liabilities and contracts from the County Council. The District Council assets, liabilities and contracts have been aggregated to both Unitary Councils.
- 5.2 By exception Westmorland and Furness Council is holding the LGR Implementation reserve, Modernisation Reserve and CCC General Fund Balance. These will be disaggregated once the Cumbria County Council 2022/23 year-end financial position is finalised and the closing balance on these reserves identified.
- 5.3 The financial disaggregation principles (schedule 12) for separating the assets and liabilities are consistent with the principles discussed and agreed through the Member Implementation Board in November/ December 2022. These principles will determine the final opening balance position for both authorities once the 22/23 final accounts for all sovereign councils have been audited.

5.4 The 2023/24 revenue budget agreed by full Council on 7th March 2023 is based on the same agreed financial disaggregation principles.

Human Resources

5.5 A comprehensive programme of activity around TUPE applies to affected staff. Alice Madden 15/3/23

Legal

5.6 Contained within the body of the report.

Health and Sustainability Impact Assessment

5.5 Have you completed a Health and Sustainability Impact Assessment? No

5.6 If you have not completed an Impact Assessment, please explain your reasons: Not applicable

Equality and Diversity

5.7 Have you completed an Equality Impact Analysis? No

5.8 If you have not completed an Impact Analysis, please explain your reasons: Not applicable

Contact Officers

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Appendices Attached to this Report

Section 16 Agreement (DRAFT)

Background Documents Available

None