Website: www.francisbennion.com
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Introductory Note by Francis Bennion As published, the following article had material intended for footnotes printed as part of the text. This was in accordance with the new house style. In what follows I have retained the material as footnotes. For ease of reference I have also numbered the paragraphs. Also relevant to the subject-matter of the article are documents nos. 2009.003 (www.francisbennion.com/2009/003.htm) and 2009.005 (www.francisbennion.com/2009/005.htm).

Since the publication of the article, the date of 13 February 2009 referred to in paragraph 33 of the article has been postponed by the Secretary of State for Communities and Local Government to 15 July 2009. (This is the date by which the definitive proposal for Devon by the Boundary Committee has to be submitted by them to the Secretary of State.)

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"Never On The Cards": Fighting For Two-Tier Local Government

Francis Bennion discusses a forthcoming appeal against a threat to the existence of district councils

Introductory

1. The 1969 Redcliffe-Maud Report[1] recommended replacing the existing two-tier local government structure in England and Wales by unitary authorities. The dissenting report by Derek Senior preferred retention of the two-tier structure, with alterations. The Local Government Act 1971 followed Senior's path with the addition of further metropolitan counties. Since then the two-tier system has been eaten into. In 1996 unitary authorities were created in four counties and in 1997, before the change to a New Labour government, they were created in a further ten counties.

2. Under New Labour the trend towards a single-tier system has continued, so it has the support of the two main political parties. In October 2006 the local government White Paper *Strong and Prosperous Communities*[2] outlined the present government's intention to invite local authorities in shire areas to make proposals to replace two-tier structures of district and county councils with single-tier authorities. The White Paper expressed concern that two-tier local government creates risks of confusion, duplication and inefficiency, and argued that moving to a single tier was the best way of overcoming these.

3. Critics of this approach are found across the political spectrum. G Mulgan and F Bury, who call the change "centralisation", say:

> "One of the main rationales for centralisation was the claim that there are economies of scale in service delivery. Surprisingly, however, there is no evidence for economies of scale in the main services that have been centralised, and the only detailed analyses that have been done show very few, if any, economies of scale above the very smallest district councils."[3]

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[1] Report of the Royal Commission on Local Government in England (Cmnd. 4040).
[2] Cm. 6939.
[3] "Local Government and the case for double devolution" in *Double Devolution* (The Smith Institute, 2006).

4. At the same time as publishing the White Paper, the responsible Minister, the Secretary of State for Communities and Local Government, issued an invitation to local authorities to submit proposals for unitary government. This set out a three-stage process for the assessment of proposals. It required a proposal to be reasonably likely to deliver outcomes conforming to five criteria:

(1) The change to single-tier structures should be affordable.

(2) The change must be supported by "partners and stakeholders".

(3) The single-tier structures must be capable of providing strategic leadership.

(4) They must deliver "opportunities for neighbourhood empowerment".

(5) They must deliver value for money.

5. Local authorities were required to submit their proposals to the Secretary of State by 25 January 2007. 26 did so. This article is mainly concerned with two cases in which litigation, still continuing, has ensued. This is by way of judicial review, instituted respectively by the East Devon District Council ("East Devon") and various councils in Norfolk including Breckland District Council ("Breckland"). I shall concentrate on the East Devon case because it offers more interesting points of law and also because I know the area, being a resident and council tax payer there.

6. East Devon and Breckland are appealing against similar High Court boundary decisions on judicial review. Both cases are expected to be fast-tracked for hearing by the Court of Appeal in February.[4] As a resident and council tax payer I oppose the bringing of the East Devon appeal on grounds which can be gathered from this article and are also set out in a different form on my website[5].

The 2007 Act

7. The legislation passed to implement the New Labour government's policy of moving to more one-tier local government is Part 1, Chapter 1, of the Local Government and Public Involvement in Health Act 2007 ("the 2007 Act"). Chapter 1 is headed:

STRUCTURAL AND BOUNDARY CHANGE

Change from two tiers to single tier of local government

8. Part 1 of the 2007 Act came into force on 1 November 2007[6].

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The official explanatory notes say:

> "Part 1 of the Act provides for . . . a means by which an area where there are two tiers of local government can be reorganised so that there is a single tier . . . A two-tier area is an area where some local authority functions are undertaken by a county council and some by a district council. A single-tier area is an area in which all local authority functions are undertaken by a single (unitary) authority[7]."

9. Section 2 of the 2007 Act, headed "Invitations and directions for proposals for single tier of local government", authorises the Secretary of State to invite or direct a county council or district council to submit such a proposal. A direction may not be given after 25 January 2008; and may be given on or before that date only where the Secretary of State believes that giving the direction would be in the interests of effective and convenient local government.[8]

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[4] Statement dated 15 January 2009 on East Devon website.
[5] They can be accessed at *www.francisbennion.com/2009/003.htm*
[6] SI 2007/3136.
[7] This summarizes s. 1(2) of the 2007 Act.
[8] 2007 Act, s. 3(1).

10. The invitations sent out earlier by the Secretary of State are deemed to have been issued under s. 2 of the 2007 Act[9]. In response to an invitation to Exeter City Council, that council made a proposal in early 2007 for a new unitary authority based on its existing boundaries. What happened next is told in the judgment of Cranston J, in *East Devon District Council v Electoral Commission (The Boundary Committee for England)*[10]. I shall refer to this as "the Devon Boundaries Case". I shall refer to the judgment of Cranston J as "the Devon judgment".

> "In a Parliamentary statement in July [2007] the Minister for Local Government said that there was a concern about the affordability of the Exeter proposal and he was asking the council to undertake further work and to submit additional information on the financial viability of its proposal. In December 2007 the Secretary of State stated that she was at present minded not to implement the Exeter proposal, because she was not satisfied that it met the affordability criterion. However, she had decided to ask the Boundary Committee for advice on it. As would be expected preparatory discussions took place between civil servants and officers of the Boundary Committee. In the middle of December 2007 the Boundary Committee wrote to the Minister for Local Government expressing gratitude for the assurance that if the Committee were to undertake the task 'there would be no question of us being drawn into expressing views on the merits of two-tier versus unitary structures. That in our view is a policy matter for government, not the Committee'."[11]

11. The statement that the Secretary of State had decided to ask the Boundary Committee ("the Committee") for advice relates to s. 4 of the 2007 Act. This applies where the Secretary of State receives a proposal in response to an invitation or direction under s. 2[12]. The Secretary of State may then request the Committee to advise on any matter that relates to the proposal[13]. Among other alternatives, the Committee may then under s. 5(5) make an alternative proposal being:

> "(a) a proposal that there should be a single tier of local government for an area that—
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> (i) is, or includes, the whole or part of the county concerned; and
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> (ii) is specified in the alternative proposal; or
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> (b) a proposal consisting of two or more proposals that are within paragraph (a) (and are not alternatives to one another)".

12. Section 6 of the 2007 Act goes on to lay down the procedure to be followed by the Committee in formulating its advice, including consultation requirements. It requires the Committee to publish a draft of any alternative proposal it intends to make to the Secretary of State.

Boundary Committee's Draft Proposals

13. In the Devon Boundaries Case the Secretary of State applied the above provisions of the 2007 Act to the Exeter proposal. On 6 February 2008 she asked the Committee

> (a) whether there could be an alternative proposal for a single tier of local government, and if so on what basis, for Exeter and the whole or part of the surrounding Devon country area … which would in aggregate … have the capacity if

[9] See below, under the heading Mind The Gap.
[10] [2009] EWHC 4 (Admin).
[11] Devon judgment, paras 3, 4.
[12] 2007 Act, s. 4(1).
[13] 2007 Act, s. 4(2).

it were to be implemented, to deliver the outcome specified by the five criteria …; and

(b) if there could be such an alternative proposal for a single tier of local government as referred to in sub-paragraph (a) above, would the Boundary Committee make that alternative proposal to the Secretary of State (for the avoidance of doubt the reference to the making of any such proposal is a reference to the making of a proposal in accordance with the procedures set out in section 6(4) and (5) of the 2007 Act).[14]

14. After deliberation and consultation, the Committee published a draft of its alternative proposal on 7 July 2008[15]. This proposed a single unitary council for Devon, excluding Plymouth and Torbay (which are existing unitary local authorities). It paralleled a concept already promoted by Devon County Council in its document, *Flying the Flag for Devon*. The Committee said in the draft:

> "We have not finalised our proposal for a unitary pattern of local government in Devon. In the light of representations received, we will review our draft proposal and consider whether it should be altered."

15. The Committee indicated that it might have liked also to publish another possible alternative, but had been advised that it could not legally do so. In the words of the Devon judgment

> "Although the Committee made clear that the 2007 Act in its view required it to set out a single draft proposal, and that it had no power to seek views on a range of potential options, nonetheless
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> > 'we have identified a further pattern that, in our judgment, might also meet the Secretary of State's criteria against which our draft proposal can be assessed. Interested parties may wish to have this further pattern in mind when commenting on our draft proposal' (paragraph 2.22)[16].
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> That 'further pattern', which the Boundary Committee thought had merit, involved two unitary authorities – an Exeter and Exmouth authority comprising those two urban areas and their surrounding parishes, and a Devon authority comprising the remainder of the county. (The boundaries of Plymouth and Torbay would not be changed)."[17]

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16. Cranston J said this view "is grounded in the statute", setting out the provisions of s. 5 of the 2007 Act described above[18]. He then said:

> "The use of the singular 'alternative proposal', is repeated in other consequential provisions, for example, ss. 5(7) and 6(4). Although s. 6(c) of the Interpretation Act 1978 provides that words in the singular include words in the plural, that only applies absent a contrary intention: see Bennion, *Statutory Interpretation*, 5th ed, 579-580."

17. Cranston J went on to point out[19] that here the Committee discerned a contrary intention in s. 5(5)(b) of the 2007 Act (set out above), which contemplates plural proposals. An express definition of an alternative proposal to mean two or more proposals in a particular situation was said to argue against it meaning the same generally. The Committee, Cranston J went on, also drew attention to the contrast with its power to make a recommendation under the

[14] See the Devon judgment, para. 5.
[15] See *http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/56657/Report-on-Devon-review-web.pdf*
[16] Devon judgment, para. 10.
[17] Ibid.
[18] Devon judgment, para. 35.
[19] Devon judgment, para. 36.

Regional Assemblies (Preparations) Act 2003, where a recommendation must include at least two options for structural change in relation to each county area in the region: s. 16(2).

18. Moreover, the Committee pointed to its power in s. 4(2)(b) of the 2007 Act, that it can give only advice specified in the Request. In this instance, the advice sought referred to "whether there can be an alternative proposal for a single tier of local government": paragraph 11(a) and (b). In paragraph 11(c) the word used was "better" rather than "best" which, in the Committee's submission, is also instructive.

19. The Committee's function of making recommendations is conditioned by guidance to which it must have regard: s. 6(2). The guidance in this case contemplated a single proposal: see paragraphs 3, 6 and 7. It is not easy to fit the identification of more than one proposal into the wording of the Request and Guidance. In terms of the statutory purpose, the Committee pointed to the advantage of clarity in being able to consult on one alternative proposal, indicating a contrary intention against the singular including the plural in relation to the words "alternative proposal".

20. Cranston J then tells us that while during the hearing he was attracted to the legal analysis of the Committee described above, he was not convinced, on reflection, that it was correct.

> "The presumption under the Interpretation Act, and indeed the common law, is that unless the contrary intention appears words in the singular include the plural, and vice versa. In my view that presumption is not to be easily displaced given that its advantage in overcoming cumbersome verbiage is considerable. In any event, any contrary intention must be garnered not simply from one statutory provision but from a consideration of the legislation as a whole and the purposes behind it."[20]

21. The learned Judge continued to demolish at length the Committee's argument about singular and plural. He then said that the context of the 2007 Act pointed towards the singular including the plural. If the Committee's interpretation were correct it would confine it to advancing one alternative proposal when, in its expert judgment, more than one alternative proposal might have the merit of matching the five criteria, albeit in different ways.

> "Potentially it would also mean serial consultation as each alternative proposal was advanced and, after the expense and disruption of consideration and consultation, rejected. A final factor is that in particular circumstances the Boundary Committee might decide that the calculation of the overall benefit of various alternative proposals would only be clear once possible associated arrangements have been more fully developed. Since that occurs at a later stage in the process, the sensible course in some circumstances might be to place more than one proposal before the Secretary of State . . ."[21]

22. Finally on this point, Cranston J said that the guidance from the Secretary of State could not alter the position concerning singular and plural as it was "subordinate to the statute".[22]

23. The Committee "has therefore misdirected itself as to what it could publish, consult on and propose to the Secretary of State".[23] East Devon argued that this meant the Committee must restart the operation from scratch, but Cranston J disagreed:

> "Even if I did not regard the matter as premature in judicial review terms, this is a situation where as a matter of discretion it would not be appropriate for me to quash the Boundary Committee's implementation of the Secretary of State's request. The Devon exercise has incurred considerable time, effort and expense on the part of the Committee, local authorities in Devon and those who have responded to the

[20] Devon judgment, para. 37.
[21] Devon judgment, para. 38.
[22] Devon judgment, para. 39.
[23] Devon judgment, para. 40.

> consultation exercise. Were the matter to begin afresh, the public may be at a point of satiation, so that any new consultation would be relatively unproductive."[24]

24. The learned Judge said that what must happen is that the Committee should consider whether it would be right to make further alternative proposals for Devon. If it were to decide that that course were appropriate, it would need to comply with the statutory requirements. However, the Committee could decide, in its discretion, that responses already received were such that a more limited, further consultation was all that was necessary.

Mind The Gap

25. Observant readers will have noticed that there was a gap between the time when the Secretary of State issued an invitation to local authorities to submit proposals for unitary government (October 2006) and that when the legislation authorising this came into force (November 2007). This seems odd, and needs to be explained.

26. There was no mention of it in the Devon judgment so I turn for enlightenment to the 2008 Court of Appeal decision in *Shrewsbury and Atcham Borough Council and Anor v Secretary of State for Communities and Local Government and Anor*[25] ("the Shropshire and Cheshire Boundaries Case"). This was a similar fight to prevent smaller authorities being swept away in the move to unitary local government. By

an interesting coincidence, leading counsel for threatened East Devon, Andrew Arden QC, also appeared for the endangered local authorities in the Shropshire and Cheshire Boundaries Case.

27. There was a similar time gap in that case, and one of the grounds of appeal advanced by Mr Arden concerned an allegation that the actions of the Secretary of State in issuing invitations to local authorities to submit proposals for unitary government were for that reason *ultra vires*. The Court of Appeal rejected this allegation in the ground that they were merely administrative acts preparatory to anticipated legislation (the 2007 Act), and that they did not require specific authority. Carnwath LJ said in his judgment in the appeal ("the Carnwath judgment"):

> "Judicial review, generally, is concerned with . . . events which have, or will have, substantive legal consequences . . . Judicial review proceedings may come after the substantive event, with a view to having it set aside or "quashed"; or in advance, when it is threatened or in preparation, with a view to having it stayed or "prohibited". In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event . . . In the present case, the substantive event, if it occurs, will be the taking effect of the necessary orders under the 2007 Act, bringing about the creation of the new authorities and the abolition of the old."[26]

28. This is relevant to the East Devon judicial review case, which Cranston J thought had been brought prematurely, and which as noted above East Devon has decided to take to appeal. In the parallel Breckland case, which was also tried by Cranston J, the learned Judge thought fit to include in his judgment ("the Breckland judgment") the statement that, as he made clear at the hearing, he regarded the Breckland action as "a proper one to be brought"[27]. He made no such statement in the Devon judgment.

29. Carnwath LJ and Richards LJ disagreed on what general power authorised the anticipatory acts of the Secretary of State. The third Judge, Waller LJ, declined to decide

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[24] Devon judgment, para. 41.
[25] [2008] EWCA Civ 148. See also 2007 Act s. 21 (Pre-commencement invitations etc.).
[26] Carnwath judgment, paras. 32-34.
[27] Breckland judgment, para. 3.

between them. I can give a flavour of the dispute by quoting the following from the judgment of Richards LJ in the case:

> "The complex process of government includes a vast amount of work in relation to the formulation of policy, drafting new legislation and preparing for its implementation. Carnwath LJ states that it is not necessary to invoke a "third source" of power for such work, which is simply "a necessary and incidental part of the ordinary business of government" (para 49). To my mind, however, it is still necessary to explain the basis on which that ordinary business of government is conducted, and the simple and satisfactory explanation is that it depends heavily on the "third source" of powers, i.e. powers that have not been conferred by statute and are not prerogative powers in the narrow sense but are the normal powers (or capacities and freedoms) of a corporation with legal personality."[28]

30. This refers to a controversy I have not space to go into here, namely whether there is a "third source" of legislative power[29]. In my textbook *Bennion on Statutory Interpretation* I treat prerogative powers in the wide or full sense[30]

"Never On The Cards"

31. I conclude by summarizing the reasons why, both as a lawyer and a council tax payer who will have to help foot the bill, I consider that East Devon are wrong to appeal against Cranston J.'s decision in the Devon Boundaries Case.

32. I believe that Cranston J. was right to say that East Devon were premature in launching a judicial review even before the Committee had submitted its Devon proposal to the Secretary of State. They exacerbate the consequences of this error in complicating matters further by a pointless appeal now. What the Committee should be able to do, in the light of the Devon judgment, is proceed along the course indicated in that judgment in order to achieve finality about what they are to recommend to the Secretary of State. Whatever its outcome, the appeal will delay and complicate this process without any fruitful result for the residents.

33. There is a further objection to the appeal. Carnwath LJ indicated that the best time for bringing judicial review proceedings would be the occurrence of the substantive event, that is the making of an order under the 2007 Act "bringing about the creation of the new authorities and the abolition of the old". There would be a possible earlier opportunity when the definitive proposal is submitted by the Committee to the Secretary of State, the date for which has been postponed to 13 February. In a dictum set out above Cranston J. refers to the public being brought to "a point of satiation". This appeal could lead to such a point being reached, thereby endangering the ability of East Devon to bring judicial review proceedings at a future more appropriate time.

34. An additional key argument, not mentioned in the Devon judgment, is that this matter is to be determined by reference to legislation (Part 1, Chapter 1, of the 2007 Act) whose sole purpose is to achieve single-tier local government. In reality East Devon's sole purpose is to maintain the two-tier system by reason of which it exists. The leading principle in modern statutory interpretation is what is called purposive construction, which is fully explained in my textbook. Put shortly, it means that an Act must be so interpreted as to further its purpose. Chapter 1's purpose is to achieve unitary local development in England and Wales, not maintain the status quo. That sounds the death knell of district councils such as East Devon.

35. It follows that, acting under Chapter 1, the Committee is not empowered to propose to the Secretary of State anything but a single-tier solution in place of the status quo that sustains East Devon. The Devon judgment includes the statement by Cranston J. "In *Breckland* I held that the issue of status quo was irrelevant to the Boundary Committee's consideration under

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[28] Report of the Shropshire and Cheshire Boundaries Case, para. 73.
[29] See Report of the Shropshire and Cheshire Boundaries Case, paras. 22-27, 43-71, 72-77, 78-81.
[30] See pp. 237-241 of the fifth edition (2008).

the 2007 Act: paragraphs [60]-[64]"[31]. Paragraph 64 of the *Breckland* judgment says: ". . . a comparison with the existing two-tier structure was never on the cards".

[31] Devon judgment, para. 29.