

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru a'r Gwasanaethau Ymchwil er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwyywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

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Regulated Mobile Home Sites (Wales) Bill

Background

- 1) The Communities, Equality, and Local Government Committee (the Committee) is considering the Regulated Mobile Home Sites (Wales) Bill (the Bill) at Stage 1 of the Assembly's Legislative Process.
- 2) The Bill is the subject of on-going consideration and discussions between Peter Black AM and his Team, and Huw Lewis the Minister for Housing, Regeneration, and Heritage and Welsh Government Officials.
- 3) The Committee's scrutiny of the Bill and all the oral and written evidence provided to the Committee thus far, has been carefully followed and noted by the Member in Charge and his Team.
- 4) In taking forward the Bill, all the recommendations the Committee will make in its forthcoming published Report will also be carefully considered.

Context

- 5) At the evidence session on 9th January 2013, the Committee raised a specific issue about whether or not section 7(3)(b) of the Bill as currently drafted breaches Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). In particular it requested a note from the Member in Charge's legal advisers in relation to this issue. This note is provided in response to that request.
- 6) Section 7(3)(b) of the Bill as currently drafted sets out the matters that a site licensing authority must take into account when deciding whether or not to grant or refuse a site licence.

The relevant matters include:-

- 7) *“(b) that the licence holder is a fit and proper person to be the owner of a regulated site”.*
- 8) Section 9 of the Bill sets out criteria that the licensing authority will have to apply in deciding whether the applicant is a “fit and proper person”. As the Bill is currently drafted, both the owner and the manager of the site will have to meet the fit and proper person test.
- 9) This test is based on the test applicable to licence holders and managers of Houses in Multiple Occupation (HMOs) as set out in section 66 of the *Housing Act 2004*. However, it is broader, in that it will also take into account discrimination on the grounds of any of the protected characteristics under section 4 of the *Equality Act 2010* (rather than the narrower list in the 2004 Act), i.e. discrimination on the grounds of: age; gender reassignment; marriage and civil partnership; pregnancy and maternity; religion or belief; and sexual orientation.

The European Convention on Human Rights (ECHR)

- 10) As stated above, the relevant right is Article 1 of Protocol 1 to the Convention, which states:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

- 11) So Article 1 of Protocol 1 protects citizens against:
- a) being deprived of their possessions – except lawfully, and in the public interest and subject to internationally accepted principles (such as the principle that there should normally be compensation where the State seizes property of individuals);
 - b) controls on the use of property that are not in the general interest (and, again, lawful) – i.e. that are oppressive or arbitrary.

- 12) Companies, as well as individuals, may rely on Article 1 of Protocol 1.
- 13) It must be stressed that the case-law of the European Court of Human Rights (ECtHR) allows the State has a wide “margin of appreciation” – i.e. a wide discretion – to implement social and economic policies that have the effect of controlling the use of property.
- 14) The concept of “property” or “possessions” in Article 1 has been very broadly interpreted by the ECtHR and the definition is not fixed. It has been held by the ECtHR to include intangible property that could be said to be similar to the right to run a mobile home site. In particular, the Article has been held to include a landlord’s entitlement to rent, the economic interests connected with the running of a business and the right to exercise a profession.
- 15) As the scope of Article 1 Protocol 1 is not fixed, it is impossible to advise categorically that the right to own and run a mobile home site is outside its scope, in the absence of clear case-law to that effect. Therefore, the Member in Charge is proceeding on the basis that the Article applies to this aspect of the Bill. That does not, however, mean that the Article is breached by section 7(3)(b) or section 9 of the Bill. This will be considered in the next section.

Do sections 7(3)b) and /or 9 of the Bill as drafted breach Article 1 of Protocol 1?

- 16) A control of the use of property will not breach Article 1 of Protocol 1 if it is:
 - (a) lawful (this means lawful in Welsh law, and also lawful in the sense of complying with the rule of law – so the legislation in question must be clear, must be publicly available, and normally, it must not have retrospective effect);
 - (b) pursuing a legitimate aim that is in the general interest;
 - (c) proportionate to this aim (i.e. strikes a fair balance between the protection of the individual’s right to property and the requirement of the general interest. A fair balance will not be struck where the individual property owner is made to bear “an individual and excessive burden”).

17) These criteria come partly from the wording of the Article itself, set out above, and partly from a long line of case-law in the ECtHR.

18) In one leading case ECtHR concluded that there is no deprivation of property if the owner remains able to use, let or sell it. If the owner has been deprived of part of his/her income from their property, that was a control on the use of the property, not a deprivation. Therefore, the control of use would be compatible with the Convention if it was done lawfully, was in the general interest, and was proportionate to the general interest pursued.

19) The ECtHR's judgment in this case is very relevant to the subject-matter of the Regulated Mobile Home Sites (Wales) Bill. The Court stated that, in order to implement social and economic policies, and especially in the field of housing, the legislature must have a wide discretion - both to determine that there is a problem of public concern warranting measures of control, and to choose the detailed rules for the implementing such measures of control.

20) The Court went on to consider whether the interference was justified under the criteria set out above – were they lawful, were they in the general interest and were they proportionate. Importantly for the Committee's consideration of the present Bill, the Court decided that the legislation in that case was compatible with Article 1 Protocol 1. It found that, although the control on property in question (rent reductions) was striking, it did not follow that it constituted a disproportionate burden, or that the legislature could not reasonably decide to impose them. This is of particular interest because the control imposed in this case changed contractual rents – i.e. it affected an existing legal regime.

21) Applying the ECtHR's criteria to section 7(3) (b) and 9 of the Bill, the Member in charge considers that they do not breach the Convention. The reason for introducing the fit and proper person test is to protect residents of mobile home sites in Wales from unacceptable treatment. The Explanatory Memorandum accompanying the Bill sets out more detail of the problems that the Bill, and the test in particular, seeks to achieve. In the Member's view, this is clearly a legitimate aim in the general interest, as interpreted in the relevant case-law. The fit and proper person test will be imposed by a clear and publicly available law – the Bill itself. And the fit and proper person test is a proportionate way of protecting mobile home residents: i.e. it is not excessively restrictive, and it does not impose an "individual or excessive burden" on site owners as opposed to other categories of person. This is evidenced by the fact that an equivalent test is imposed on licence-holders for houses in multiple occupation.

Conclusion

22) In the Member in Charge's view, the Bill as currently drafted is compatible with Article 1 of Protocol 1 of the Convention.

23) However, the Bill is subject to on-going discussions and consideration of relevant issues between the Member in Charge and the Minister for Housing, Regeneration, and Heritage. Amendments to the Bill are of course possible at Stage 2 or Stage 3 of the Assembly's legislative process. A copy of this note is being made available to the Minister's legal advisers, but the time available has precluded a discussion of its contents before its submission to the Committee.

24) The Member in Charge has already indicated that he is minded to lay an amendment which would mean that the fit and proper person test does not apply to the owner of the site, only to the manager. Although the Member in Charge considers that the Bill as drafted is compatible with the Convention, he recognises that such an amendment would be a further guarantee of the proportionality of the new fit and proper person test.

25) In considering any future amendments to the Bill, including any changes made to section 7(3)(b), Article 1 of Protocol 1 issues will be carefully considered.

Legal Services

National Assembly for Wales

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