

# Legal Note for All Councillors on the Setting of the Council Tax

## Legal, Financial and Practical Consequences of a failure or delay in setting the Council Tax

### 1 Summary

- 1.1 The local authority has a legal duty to set a lawful budget in time.
- 1.2 Members jointly and severally (collectively and individually) have a fiduciary duty to Council Tax payers.
- 1.3 This means they have a duty to facilitate, rather than obstruct, the setting of a lawful budget, a process that requires flexibility and compromise.
- 1.4 Failure to set a lawful budget in time can lead to a loss of revenue, significant additional administrative costs and reputational damage.
- 1.5 Failure to set a lawful budget may lead to intervention from the Secretary of State under section 15 of the Local Government Act 1999 (as previously seen in authorities in relation to a failure of governance.)
- 1.6 It may give rise to personal liability for individual Members for misfeasance in public office, negligence or breach of statutory duty.
- 1.7 This legal note explains the position in more detail and makes practical suggestions for all Members' consideration and guidance.

### 2 The Legal Duty

- 2.1 Section 30(6) of the Local Government Finance Act 1992 provides that the Council has to set its budget before 11 March in the financial year preceding the one in respect of which the budget is set. This means the Council has a duty to set the 2023/24 budget before 11 March 2023.
- 2.2 If the budget is set after that date, the Act says the failure to set a budget within the deadline does not, in itself, invalidate the budget. However, such delay may have significant financial, administrative and legal implications, including potential individual liability of any Member who contributed to the failure to set a budget.
- 2.3 Section 66 of the 1992 Act provides that failure to set a Council tax (or delay in setting a Council tax) shall not be challenged except by an application for judicial review. The Secretary of State and any other person with an interest or "standing" may apply for a judicial review.

### 3 Financial Implications of Delay

- 3.1 A delay in setting the Council Tax means a delay in collecting the tax due not only to the council, but also the precepting authorities such as the Police, Fire Service and others such as the parish council on whose behalf the council acts as a collection authority.

- 3.2 The council has a legal duty to provide a range of statutory services (such as children's social care services, adult social care, etc.) and is not absolved from its duty because of the late setting of the tax. It also has to pay the monies due to the precepting authorities (such as Fire Service and the Police) whether or not it collects any Council Tax.
- 3.3 One significant point that Members need to be aware of is that a delay in setting the budget may affect the council's ability to enter into new agreements with significant financial commitments until and unless the budget is agreed. Otherwise these would be unfunded commitments and therefore potentially unlawful.
- 3.4 Even if the Council sets the budget by 10 March but later than the planned February Budget Council meeting, there is still likely to be some disruption to the administrative arrangements (such as printing, posting, delivery of bills) that will have cost implications.

#### **4 Duty to take the advice of the Section 151 Chief Financial Officer**

- 4.1 Sections 25 to 29 of the Local Government Act 2003 impose duties on the council in relation to how it sets and monitors its budget. These provisions require the council to make prudent allowance for the risk and uncertainties in its budget and regularly monitor its finances during the year. The legislation leaves discretion to the council about the allowances to be made and action to be taken.
- 4.2 Section 25 also requires the Council's Section 151 Chief Financial Officer to make a report to full Council when it is considering its budget and council tax. The report must deal with the robustness of the estimates and the adequacy of the reserves allowed for in the budget proposals, so that members will have authoritative advice available to them when they make their decisions.
- 4.3 The section requires Members to have regard to the report in making their decisions. Any decision that ignores this advice, including the implications of delay, is potentially challengeable.

#### **5 Section 114 Report and the Prohibition Period**

- 5.1 Section 114 of the Local Government Finance Act 1988 puts an obligation on the Section 151 Officer (the Chief Finance Officer) to issue a report "if it appears to him or her that the expenditure (including proposed expenditure) is likely to exceed the resources (including borrowing) available to the council." He would also be under a similar obligation if he became aware of a course of action which, if pursued, would be unlawful and likely to cause loss or deficiency on the part of the authority. The S151 Officer has to consult the Chief Executive and the Monitoring Officer before considering issuing a S114 report. If it is determined that a report should be issued, the Department of Levelling-Up, Housing & Communities must also be consulted before issuing the report.
- 5.2 If such a report were issued, a copy of it must be sent to the council's external auditor and every Member of the Council. Full Council must consider the report within 21 days at a meeting where it must decide whether it agrees or disagrees with the views contained in the report and what action (if any) it

proposes to take. Between the issuing of the report and the day after the meeting (“the probation period”) the council is precluded from entering into new agreements involving the incurring of expenditure except in certain limited circumstances where expenditure can be authorised by the Chief Finance Officer. The legislation also provides that during the prohibition period “the course of conduct which led to the report being made shall not be pursued.” Failure to take appropriate action in response to such a report may lead to the intervention of the council’s auditor.

- 5.3 It is not possible to say in advance for certain whether such a report would be issued, but the longer the setting of the budget is delayed, the greater the likelihood that a Section 114 report may be issued.

## **6 Monitoring Officer Report**

- 6.1 Section 5 of the Local Government & Housing Act 1989 imposes on the Monitoring Officer an obligation similar to that of the S151 Officer with the same consequences if it appears to him/her that what the Council has done or is proposing to do is likely to contravene a rule of law or any code of practice made or approved by or under any enactment or maladministration. The Monitoring Officer is also under a duty to warn Members of the consequences under the Code of Conduct for Members.
- 6.2 The Section 114 and Section 5 reports may be joint or separate and, if separate, they may be issued concurrently or at different times.

## **7 Code of Conduct Consequences**

- 7.1 The Localism Act 2011 imposes a duty on Members to abide by the Code of Conduct for Members. In interpreting the Code, regard must be had to the General Principles of Public Life, including the requirement that they should make decisions in accordance with the law.
- 7.2 Members have an active duty to ensure that the Council sets a lawful budget. Voting against proposals repeatedly, knowing that the result means no lawful budget will be set, is incompatible with Members’ obligations under the Code as it is bound to bring the council into disrepute.

## **8 Personal Liability of Members**

- 8.1 Notwithstanding the abolition of surcharges, if a Member’s wilful misconduct is found to have caused loss to the council, the Member may be liable to make good such loss under the principle approved by the House of Lords in *Porter v Magill.1 (2002)*.
- 8.2 Depending on the exact role played by a Member, and the seriousness of the loss incurred, a Member could, in principle, be guilty of the tort and crime of misfeasance in public office. The indemnity cover that Members are provided with by the Council does not include actions that constitute an offence or are reckless.
- 8.3 It is also possible (in theory) for a Member to be liable in negligence and or breach of statutory duty.
- 8.4 It must be pointed out that one would probably need to prove that what the Member/s were doing was deliberate or reckless and involved persistent

failure to facilitate the setting of a lawful budget before it attracts liability of the sort referred to in the preceding paragraphs. The longer the setting of a budget is delayed, and the more repeatedly the Member/s “blocks” the setting of a lawful budget, the more likely for the liability to arise.

## **9 Intervention by the Secretary of State**

- 9.1 The Local Government Act 1999 imposes a duty on the council “...to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.”
- 9.2 Section 15 of the Act gives the Secretary of State the power to intervene and take a range of measures. The powers of the Secretary of State are very extensive and include: (a) Directing the council to take any action which he/she considers necessary or expedient to secure its compliance with the requirements of this Part (for example, setting a budget by a specified date); (b) The Secretary of State, or a person nominated by him/her, exercising the council’s functions (such as setting the Council tax) for a period specified in the direction or for so long as the Secretary of State considers appropriate, and (c) Requiring the council to comply with any instructions of the Secretary of State or their nominee in relation to the exercise of that function and to provide such assistance as the Secretary of State or their nominee may require for the purpose of exercising the function.
- 9.3 If the Secretary of State decides to intervene on the issue of setting the Council Tax, he/she need not set the full budget and could, for example, direct the Council to set a budget at a specified Council Tax level by a set date, leaving the council to work out the detailed savings for each service.
- 9.4 The Secretary of State is expected to exercise the powers after consulting the local authority and it usually follows a report from external auditors, by an inspector appointed by the Secretary of State, by Ofsted or similar body, although this is not a requirement in cases of urgency. The measure is stated to be one of last resort and is, itself, challengeable by way of judicial review. The National Audit Office and External Auditors use certain guidance in deciding whether to refer a local authority to the Secretary of State to use his powers under section 15. These include cases where there are:
- Serious service failures in an authority that could result in danger or harm to the public;
  - Persistent failures by an authority to address recommendations made by inspectors or auditors;
  - Serious failures in a number of services in an authority, which reveal fundamental weaknesses in an authority’s corporate capacity to manage services and make improvements;
  - Serious failures in corporate governance arrangements or capacity whether or not there is serious service failure; and
  - Other circumstances that demonstrate a serious or persistent failure to comply with the requirements of Part 1 of the Local Government Act 1999, which includes the requirement that authorities make arrangements to secure continuous improvement in the exercise of their functions.

- 9.5 The Secretary of State has exercised the powers under section 15 by intervening in a number of authorities including Hackney LBC, Doncaster Council, Tower Hamlets LBC, Northamptonshire CC, Thurrock LBC and Liverpool City Council for failure to comply with the best value duty. These same powers would be available to the Secretary of State if he is of the view that there is failure on the part of the Council to set a budget expeditiously resulting in or risking financial loss or failure in services.
- 9.6 It is unlikely that the Secretary of State would intervene and set a budget for the council immediately after the 11 March deadline passes. There is also no certainty that he/she would necessarily do so until matters reach a much more serious point. This is because:
- (a) Section 30 (6) of the Local Government Finance Act 1992 provides that that failure to set a Council tax by the deadline shall not invalidate the Council Tax;
  - (b) Section 66 of the Act provides that any failure to set the Council Tax shall not be questioned otherwise than by way of an application for judicial review;
  - (c) The exercise of the Section 15 powers require a much more serious, systematic and persistent failure of governance. The current financial and other governance and service delivery position of the council is far from approaching the failings identified in those authorities where Section 15 powers have been exercised. The council has not been issued with any Public Interest reports and the latest Annual Report by the External Auditor (2021/22) has not identified any weaknesses in governance.
- 9.7 Given the complexity of setting a budget (the Secretary of State will have to do the same calculations and assessments the council has) it is not a straightforward process and it is questionable if the Secretary of State or a person nominated by them could do it quicker. He/she is more likely to give directions for the council to set its budget by a particular date and take particular steps and within specified parameters rather than setting it themselves.

## **10 Reputational damage**

- 10.1 Whatever its political make up or whatever the local challenges, the council has had a strong financial and corporate governance reputation. Failure to set a Council Tax and any intervention by the Secretary of State whether formal, informal or even references to failure to set the tax will have significant adverse impact on the council's reputation locally and nationally. This is not simply a theoretical concept, it has real practical impact in terms of investor confidence, peoples' preparedness to work with the council and even on Council Tax collection rates as residents may see the council as wasteful, procrastinating and/or inefficient. Reputation and credibility is hard to earn but, once lost, difficult to regain.

## **11 Practical Advice to Members**

- 11.1 The council as a corporate body, and Members (both individually and collectively), have a fiduciary duty to Council Tax payers to avoid doing

anything that would result in loss of revenue or failure to deliver services. In addition to Members' legal obligations, they also have the moral and democratic obligation to set the budget on behalf of the people who elected them.

- 11.2 There is always a tension between Members' desire to vote for what they believe to be the right decision on the one hand and the legal obligation to set a lawful budget on time and avoid any loss to the council on the other. Each budget setting round has its own dynamics and permutations, and it is difficult to generalise as to what a Member should do. At the risk of oversimplification, a suggested practical approach would be:
- (a) Members should always strive to facilitate, rather than frustrate, the setting of a lawful budget;
  - (b) As no Group currently has an overall majority in the Council, all Groups and each Member should, where possible, try to reach compromise and agreement beforehand so as to deliver a lawful budget with majority support on time;
  - (c) If there is failure to reach agreement, then, until it becomes clear that the Council may not be able to agree a budget, Members are free to vote as they see fit;
  - (d) If it becomes clear (for example as a result of an initial vote) that there is no majority support for any budget but there is a realistic prospect of such an agreement if Members are given additional time for negotiation, then Members should consider a short adjournment, or adjournment to another day, whichever is more appropriate. This would be informed by the advice from the Chief Executive after checking with each of the Group Leaders and the advice from the S151 Chief Finance Officer and the Monitoring Officer.
  - (e) If Members do not consider that an adjournment would resolve the impasse or there has been an adjournment and no agreement reached that could deliver a majority, then officers' advice would be:
    - (i) To identify composite amendments (amendments that have cross party-support) and for all Members to vote for these amendments;
    - (ii) When it comes to the substantive vote, for Members who support the Policy & Resources Committee proposals (with any composite amendment/s) to vote for the proposal;
    - (iii) For Members who do not support the proposal, but are unable to secure a majority for an alternative/amendment budget, to support the substantive budget as amended, or, at least, abstain;
    - (iv) In the event of Policy & Resources Committee failing to agree on a recommendation to Budget Council, the reference in the preceding sub-paragraphs to "Policy & Resources Committee proposals" shall read as referring to the recommendations of the Chief Finance Officer as presented in the report to the Policy & Resources Committee and Budget Council.

This would ensure that the Council sets a lawful budget and avoids the damaging legal and practical consequences discussed above as well as

keeping the setting of taxes locally and preserve the council's governing reputation.

- 11.3 The above advice is based on the fact that, unlike other times when a proposal that fails to gain the support of a majority of Members simply falls and the status quo prevails, the status quo is not a legal option when it comes to the budget. The nearest legal option the Council has to a status quo is the Policy & Resources Committee proposals.

## **12 Conclusion**

- 12.1 The Council has a duty to set a lawful budget by 10 March.
- 12.2 Each Member has an obligation to facilitate, rather than frustrate, the setting of a lawful budget in time.
- 12.3 Failure to discharge that duty may leave Members at risk of breaking the Code of Conduct for Members and possibly expose them to legal liability.
- 12.4 It is also possible that, if there is a prolonged delay, the Secretary of State may exercise his/her powers under Section 15 of the Local Government Act 1999 to step in and make the decision or ask another person to do so, which would damage the council's governing reputation.
- 12.5 If, after all reasonable attempts are made, it is not possible to find a majority support for any budget (i.e. unable to 'get the budget through') then the most appropriate thing to do, in officers' view, would be for Members who support the Policy & Resources Committee recommendations to vote for the recommendations and those who do not support the Policy & Resources Committee proposals (with composite amendments) to vote for the budget, or at the very least abstain, unless they are in a position to put forward alternative proposals that have majority support.

