

## **Appendix J**

### **ADVICE FROM THE DIRECTOR OF LEGAL AND HR SERVICES**

#### **1. INTRODUCTION**

This appendix sets out in some detail Members' individual responsibilities to set a legal budget and how Members should approach the task. It also reminds Members about the rules concerning pecuniary and other interests.

#### **2. WHEN THE BUDGET MUST BE SET**

Under Section 31A of the Local Government Finance Act 1992, budget calculations have to be made before 11<sup>th</sup> March, but they are not invalid merely because they are made on or after 11<sup>th</sup> March. However, delay in setting the Council Tax will have very serious financial consequences. It will render the Council vulnerable to legal proceedings requiring it to set the tax. In any event, it is important that the tax is set well in advance of 1<sup>st</sup> April as no sum is payable for Council Tax until 14 days after the date of posting bills. Serious financial losses will accrue very soon from a late setting of Council Tax as income is delayed and interest is foregone.

An important feature of Council Tax is that the statutory budget calculation must be followed exactly. If not the Council Tax resolution will be invalid and void.

#### **3. NOTICE**

There is a requirement to publish notice of the amount set for Council Tax in at least one local paper within 21 days of the Council's decision under section 38(2) of the Local Government and Finance Act 1992. There is also a duty to consult with representatives of Non-Domestic Ratepayers about the proposed revenue and capital expenditure before the budget requirement is calculated under section 65 of the Local Government and Finance Act 1992.

#### **4. MEMBERS' FIDUCIARY DUTIES**

The obligation to make a lawful budget each year is shared equally by each individual Member. In discharging that obligation, Members owe a fiduciary duty to the Council Taxpayer.

The budget must not include expenditure on items which would fall outside the Council's powers. Expenditure on lawful items must be prudent, and any forecasts or assumptions such as rates of interest or inflation must themselves be rational. Power to spend money must be exercised bona fide for the purpose for which they were conferred and any ulterior motives risk a finding of illegality. In determining the Council's overall budget requirement, Members are bound to have regard to the level of Council Tax necessary to sustain it. Essentially the interests of the Council Taxpayer must be balanced against those of the various service recipients.

Within this overall framework, there is of course considerable scope for discretion within the 2018/19 financial year, especially on the part of the Cabinet. Setting a budget is not the same as deciding what expenditure will in fact be incurred. To budget for expenditure is to estimate likely expenditure and/or make financial provision for such expenditure.

However, Members will bear in mind that in making the budget commitments are being entered which will have an impact on future years. Some such commitments are susceptible to change in future years, such as staff numbers which are capable of upward or downward adjustment at any time. Other commitments however impose upon the Council future obligations which are binding and cannot be adjusted, such as loan charges to pay for capital schemes. For some specific proposals within the overall Budgetary framework, Cabinet decisions have already been made. For some other proposals, subject to relevant consultation where necessary, decisions by the Cabinet will need to be made, especially where the making of such a decision would result or would be likely to result in the permanent closure of a facility used by the public or a permanent and significant reduction in the level of services or facilities provided to the public other than where such closure or reduction in service is considered necessary by the relevant strategic director for reasons of health and safety.

In making those subsequent decisions the Cabinet will be required to consider all relevant matters including the results of any consultation and the Council's equality duties. This will include that should the Cabinet (or other decision maker) consider it appropriate, for example when being asked to make service changes to achieve a budget reduction and having taken into account all relevant facts (including but not limited to the results of any consultation and after due consideration of the Council's equalities duties) they have the option of not making the budget reductions detailed within the overall budget. They will still be required to balance the budget overall using the appropriate constitutional procedures, for example, finding the savings from elsewhere or using reserves and otherwise complying with the Council's rules on budget setting and management.

Only relevant and lawful factors may be taken into account and irrelevant factors must be ignored. A Member who votes in accordance with the decision of his or her political group but who does so after taking into account the relevant factors and professional advice will be acting within the law. Party loyalty and party policy are capable of being relevant considerations for the individual Member provided the member does not dogmatically toe the party line without considering the relevant factors and professional advice and without properly exercising any real discretion.

Under the Brent Member Code of Conduct members are required when reaching decisions to have regard to relevant advice from the Chief Finance Officer and the Monitoring Officer (the Director of Legal and HR Services). If the Council should fail to set a budget at all or fail to set a lawful budget, contrary to the advice of these two officers there may be a breach of the Code by individual members if it can be demonstrated that they have not had proper regard to the advice given.

## **5. ARREARS OF COUNCIL TAX AND VOTING**

In accordance with section 106 of the Local Government Finance Act 1992 ("the 1992 Act"), where a payment of Council Tax that a member is liable to make has been outstanding for two months or more at the time of a meeting, the Member must disclose the fact of their arrears (though they are not required to declare the amount) and cannot vote on any of the following matters if they are the subject of consideration at a meeting:

(a) Any decision relating to the administration or enforcement of Council Tax.

(b) Any budget calculation required by the Local Government Finance Act 1992 underlying the setting of the Council Tax.

(c) Any recommendation, resolution or other decision which might affect the making of the Annual Budget calculation.

Members should note the following points:

(i) These rules are extremely wide in scope. Virtually any Council decision which has financial implications is one which might affect the making of the budget underlying the Council Tax for next year and thus is caught. The former DoE (now MHCLG) shared this interpretation as it made clear in its letter to the AMA dated 28<sup>th</sup> May 1992.

(ii) The rules do not apply just to full Council meetings but extend to committees and sub-committees of the Council and to the Cabinet and its Highways Committee.

(iii) Members who make a declaration are not entitled to vote on the matter in question but are not prevented by the section from taking part in the discussion.

(iv) Members will have a defence under section 106 of the 1992 Act if they did not know that the section applied to them (i.e., that they were in arrears to the relevant extent) at the time of the meeting. Thus unwitting Members who for example can prove that they did not know and had no reason to suppose at the time of the meeting that their bank has failed to honour a standing order will be protected should any prosecution arise.

(v) It is not enough to state that a benefit application has been submitted which has not yet been determined, as Members remain liable to pay pending determination.

(vi) Breach of the rules is a criminal offence under section 106 of the 1992 Act which attracts a maximum fine of £1,000.

Members' attention is also be drawn to the effect of the Local Authorities (Standing Orders)(England)(Amendment) Regulations 2014 which came into effect on 25 February 2014 which is that where any vote is taken at a Council meeting on setting the budget for the authority, the Minutes of the meeting will record the names of all Councillors present at the vote and how each Councillor voted (for or against) or the fact that they abstained from voting.

## **6. DISCLOSABLE PECUNIARY INTERESTS**

Members are reminded to consider whether they have a disclosable pecuniary interest or a personal interest in the setting of the council's budget. If a member has a relevant interest they must disclose the interest at the meeting, subject to the provisions in the Code in respect of sensitive interests. If the interest is:

- a disclosable pecuniary interest; or
- a personal interest which a member of the public knowing the facts would reasonably regard it as so significant that it is likely to prejudice their judgement of the public interest (and it affects their financial position or the financial position of a connected person (as defined in the Code) or relates to a regulatory matter affecting or likely to affect them or a connected person.

The member may not participate in the discussions or vote on the matter, although if the interest is prejudicial only, the member may remain for the purposes of making representations or asking questions.

Members should seek early advice to avoid any confusion on the night of the meeting if they consider they have a relevant interest.

## **Dispensations**

The Council's Monitoring Officer may, on written request from a Member, grant a dispensation to relieve the applicant from the restrictions on participation and voting. Dispensation may be granted if:-

- Without the dispensation the number of persons prohibited from participating would be so great a proportion to impede the effectiveness of the meeting;
- The representation of different political groups would be affected and likely to alter the likely outcome of any voting at the meeting;
- Granting the dispensation is in the interests of persons living in the Borough;
- Every Member of the Council's Cabinet would be precluded from participating in the meeting;
- It is appropriate to grant a dispensation.

Dispensation may be granted for up to 4 years. A dispensation will mean that the Member to whom it is granted can speak and vote on a matter in which they have a relevant interest. Where the Monitoring Officer is undecided on the best response, and time is not of the essence, the decision could be passed to Standards Committee for decision and there is no Standards Committee meeting currently fixed before the budget setting meeting.

## **7. RESPONSIBILITIES OF CHIEF FINANCIAL OFFICER AND AUDITORS' POWERS**

### **Chief Financial Officer and Monitoring Officer**

Section 114 of the Local Government Finance Act 1988 places the Chief Financial Officer under an obligation to prepare a report (to full Council) if it appears to him that the expenditure the Authority proposes to incur in a financial year is likely to exceed its resources available to meet that expenditure. A failure to take note and act on such a report could lead to a complaint to the Standards Board. Similarly, the Council's Monitoring Officer is required to report to Full Council if it appears to her that a decision has been or is about to be taken which is or would be unlawful or would be likely to lead to maladministration.

Under section 25 of the Local Government Act 2003 the Chief Financial Officer is required to report to the authority on the robustness of the estimates made for the purposes of the calculations required to be made by the Council and the adequacy of the proposed financial reserves. These are the estimates which the Cabinet is required to determine and submit to Full Council and are contained within this report. However, if the Council were minded to agree a budget based on different estimates e.g. if Council did not agree with the estimates provided by the Cabinet then those estimates which the Council would adopt would effectively become 'the estimates' for the purpose of Section 25 and as such should be subject to a report by the Chief Financial Officer.

## **External Auditors' Powers**

Section 91 of the Local Government Act 2000 and section 19A of the Audit Commission Act 1998 provide that an External Auditor may issue an "Advisory Notice" if he has reason to believe that an Authority is about to take a course of action which, if pursued to its conclusion, would be unlawful and likely to cause a loss or deficiency. This power is to be used where the matter is significant either in amount or in principle or both.

While the advisory notice has effect it is not lawful for the authority to implement or take the course of action in question unless it has considered the issues raised in the notice and given the auditor notice that it intends to proceed with that course of action in a specified period and that period has expired.

In addition, it is also open to the Auditor to apply for judicial review on any decision of an Authority or failure to act which it is reasonable to believe would have an effect on the accounts of an Authority.

## **8. SPECIFIC BUDGET ADVICE**

### **Balances and Other Budget Calculations**

A local authority must budget so as to give a reasonable degree of certainty as to the maintenance of its services. In particular local authorities are required by section 31A(2)(b) and (c) of the Local Government Finance Act 1992 to calculate as part of their overall budget what amounts are appropriate for contingencies and reserves. The Council faces various contingent liabilities set out in the main budget report. Furthermore the Council must ensure sufficient flexibility to avoid going into deficit at any point during the financial year. Members will need to pay careful attention to the advice of officers here. As set out previously, under section 25 of the Local Government Act 2003 the Chief Finance Officer is required to report to the authority on the adequacy of the proposed financial reserves.

In addition to advising on the robustness of the estimates as set out above, the Chief Finance Officer is also required to report on the robustness of the proposed financial reserves. The same advice applies to these as to the other calculations required to be made by the Council.

Having considered the officer's report the Council is then required to "*have regard to the report*" but it is not required to adopt the recommendations in it. However, Members must demonstrate they have acted reasonably if they do not adopt the recommendations.

### **Localism Act 2011**

Sections 72 to 79 and Schedules 5 to 7 of the Localism Act 2011 amended the legislation regarding the calculation of council tax. Schedule 5 of the Localism Act provides for a council tax referendum to be held if an authority increases its relevant basic amount of council tax in excess of principles determined by the Secretary of State. Authorities will not be able to exceed the Secretary of State's principles without having held such a referendum. The principles applicable for 2019/20 are discussed at paragraphs 6.4 to 6.6 of the main report. 6

## **Alternative Proposals**

If alternative proposals to those contained in this report are moved at the budget setting meeting, the Chief Finance Officer will need to consider if the estimates or proposed financial reserves contained in this report are affected and whether a further report (which may be oral) is required under section 25 of the Local Government Act 2003. If the Chief Finance Officer is unable to report on the estimates or the reserves because of the lateness of the alternative proposals then he will not be able to comply with this statutory requirement. The Act does not say what happens if this duty is not fulfilled and nor does it say whether the Council can set the budget without that advice. It follows from this then that there is no express statutory prohibition. However, the authority is at risk of a Judicial Review by an interested person, e.g. a resident, if the Council has failed to have regard to a report of the Chief Finance Officer on the estimates and reserves used for its budget calculations.

## **Capital Programme**

The requirements of the “*Prudential Code*” established in the Local Government Act 2003 are set out in the report.

## **Expenditure Charged to the Housing Revenue Account**

Members will be aware that the Housing Revenue Account (HRA) is by law to be maintained separately from the General Fund and there are strict rules which determine to which account any expenditure must be charged. There are only very limited areas of discretion here. Members should bear in mind that if they wished to review any current determination which affects the apportionment of charges between the General Fund and HRA, they would need to do so on the basis of an officers' report and specific legal advice. The Housing Revenue Account must be maintained in balance throughout the year and the Council is under a duty to prevent a debit balance in the Housing Revenue Account pursuant to Section 76 Local Government and Housing Act 1989.

## **Equalities Legislation**

Section 149 of the Equality Act 2010 sets out the public sector equality duty which requires the Council, when exercising its functions to have ‘due regard’ to the need to eliminate discrimination (both direct and indirect discrimination), harassment and victimization and other conduct prohibited under the Equality Act, and to advance equality of opportunity and foster good relations between those who share a ‘protected characteristic’ and those who do not share that protected characteristic.

A ‘protected characteristic’ is defined in the Equality Act as:

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race; (including ethnic or national origins, colour or nationality)
- religion or belief;
- sex;
- sexual orientation.

Marriage and civil partnership are also a protected characteristic for the purposes of the duty to eliminate discrimination.

Having due regard to the need to 'advance equality of opportunity' between those who share a protected characteristic and those who do not, includes having due regard to the need to remove or minimize disadvantages suffered by them. Due regard must also be had to the need to take steps to meet the needs of such persons where those needs are different from persons who do not have that characteristic, and encourage those who have a protected characteristic to participate in public life.

Complying with the duty may involve treating some people better than others, as far as that is allowed by the discrimination law. Due regard to the need to eliminate discrimination, advance equality, and foster good relations must form an integral part of the decision making process. The Council must consider the effect that implementing a particular policy will have in relation to equality before making a decision.

There is no prescribed manner in which the equality duty must be exercised. However, the council must have an adequate evidence base for its decision making. This can be achieved by gathering details and statistics on who use the facilities. A careful consideration of this assessment is one of the key ways in which the Council can show "due regard" to the relevant matters. Where it is apparent from the analysis of the information that the proposals would have an adverse effect on equality then adjustments should be made to avoid that effect (mitigation).

The duty is not to achieve the objectives or take the steps set out in s.149. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its functions. "Due regard" means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions.

There must be a proper regard for the goals set out in s.149. At the same time, the council must also pay regard to any countervailing factors, which it is proper and reasonable for them to consider. Budgetary pressures, economics and practical factors will often be important. The weight of these countervailing factors in the decision making process is a matter for the Council.

The equality and diversity implications of budget proposals are considered at all stages of the budget process, from the development of the initial budget strategy, through consideration of individual growth and savings proposals, to the production of service development plans. The processes in place are therefore aimed at ensuring that the budget proposals in this report do not discriminate against communities or individuals because of age, ethnicity, gender, disability, religion, or sexual orientation, and support the council in meeting its other duties to promote equal opportunities and good race relations.