

ADVICE FROM THE BOROUGH SOLICITOR

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 personal and prejudicial interests.

The paper concludes with specific legal advice over aspects of the budget which potentially give rise to difficulties.

2. WHEN THE BUDGET MUST BE SET

Under Section 32 of the Local Government Finance Act 1992, budget calculations have to be made before 11th March, but they are not invalid merely because they are made on or after 11th 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 1st 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. Detailed advice will therefore be available at the Council meeting.

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. 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.

4. CAPPING

The Local Government Finance Act 1992 and Local Government Act 1999 contain powers on the part of the Secretary of State to cap the Council's budget requirement. The cap is applied to the budget requirement and not to the final level of Council Tax requirement, and so it is a means by which the Secretary of State can directly control the Council's expenditure. An authority can be designated for capping if the amount it calculates as its budget requirement is considered to be excessive either intrinsically or in relation to the previous year's calculation. It is considered that the Secretary of State could cap the budget requirement even if it does not exceed the amount of its Relative Needs Formula. In practice no Secretary of State has done this. The Secretary of State can insist that the authority revises its budget for the

year within such lower amount as he determines, or he can set a notional amount for the year which is taken into account in determining capping decisions for the following year. If the decision is for the authority to revise its budget for the year, the capped authority must then in effect re-set its budget and Council Tax at an appropriate level. Any reduction in budget must be passed on in full by way of a reduced Council Tax.

The same legislation applies to the Greater London Authority whose budget could be capped which would require Brent, as the billing authority, to issue new bills.

5. 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. 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.

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 blindly 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 (the Director of Finance and Corporate Resources) and the Monitoring Officer (the Borough Solicitor). 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.

6. ARREARS OF COUNCIL TAX AND VOTING

In accordance with section 106 of the Local Government Finance Act 1992, 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 DCLG) shared this interpretation as it made clear in its letter to the AMA dated 28th 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 Executive 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. However, where questions of enforcement are under consideration, Members with any arrears of Council Tax are likely to have a prejudicial interest under the Brent Members Code of Conduct. In these circumstances Members are disentitled from taking part in discussions as well as from voting, and must declare an interest whether or not their arrears have been outstanding for two months and must leave the room.
- (iv) Members will have a defence under section 106 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 which attracts a maximum fine of £1,000.

7. PERSONAL AND PREJUDICIAL INTERESTS

Under the Brent Members Code a Member will have a personal interest where a decision on a matter might reasonably be regarded as affecting, to a greater extent than other tax payers and inhabitants of the area, the well being or financial position of him or herself or a relative or friend; or the employment or employer of any of these; a corporate body in which they hold shares of nominal value over £5k or a body in respect of which they hold a position of general management or control. The existence and nature of such an interest has to be declared at any meeting where the matter is discussed. The interest will also be prejudicial if it is one that members of the public knowing the facts would reasonably regard as so significant as to be likely to prejudice the Member's judgement of the public interest. In the case of a prejudicial interest the Member concerned must withdraw from the meeting and leave the room. A failure to comply with the Code puts the member at risk of suspension or disqualification.

Personal Interests and Grants to Outside Bodies

If a Member is on the Management Committee of, or is otherwise in a position of general control or management of, a voluntary organisation whose grant from the Council is under consideration at a meeting, or if a member's relative or friend holds such a position, then the Member concerned has a personal interest as defined by the Brent Members Code of Conduct. If a member of the public with knowledge of the relevant facts would reasonably regard this interest as likely to prejudice the Member's judgement of the public interest then the interest will be a prejudicial one. Under the Code a Member may regard the interest as not being a prejudicial interest if he or she were appointed or nominated to the body by the Council.

You must declare a personal interest and if it is a prejudicial interest you should neither speak nor vote on the matter under consideration. Furthermore you should withdraw from the meeting.

This does not necessarily mean that a member will have a prejudicial interest in relation to the budget report nor that he or she will necessarily be precluded from voting on it – this will very much depend on the circumstances at the time and the content of the budget report. An important factor will be whether the report refers to the relevant organisations specifically and what members of the public would think if they looked at the issue reasonably.

Dispensations

Dispensations are available in respect of prejudicial interest under the Brent Code of Conduct but only in very limited circumstance and only from the Standards Committee. In order to be given a dispensation to allow you to

participate in a meeting despite having a prejudicial interest, it would be necessary to establish that the transaction of business of the authority at the meeting would otherwise be impeded because 50% of members otherwise entitled to participate would be prohibited due to prejudicial interests. This is the only circumstance in which a dispensation can now be granted. As the dispensation now has to be given by the Standards Committee and not the Secretary of State there are also time limits to be considered which are new. The Standards Committee can only meet on 5 clear days notice and, unless certified as urgent, business can only be transacted if 5 clear days notice of it has been given. There is no Standards Committee meeting currently fixed before the budget setting meeting on 5th March 2006.

Procedure

At any early stage in the meeting the Mayor will invite Members with personal or prejudicial interests in any of the business on the agenda to declare them. If you miss this opportunity then it would clearly be helpful if you give the Mayor (via a Democratic Services Officer) a written note of any personal or prejudicial interest you intend to declare. You still have to declare your interest which you can do at an appropriate point by rising to a point of order. The sooner in the meeting that you do this the better.

8. 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 him or 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 now 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. These are the estimates which the Executive 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 Executive 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 provides 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.

9. SPECIFIC BUDGET ADVICE

Bad Debts

The Code of Practice on Local Authority Accounting in Great Britain sets out in detail the standard for proper accounting practices to be followed by local authorities. The Code makes it quite clear that debts which are judged by the Director of Finance and Corporate Resources to be uncollectable must be written off immediately and in full. This is therefore a minimum legal requirement. The rationale for the rule is straightforward; it is not permissible to continue to treat a sum as income in the accounts once it has been judged not to be collectable.

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 32 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.

In addition to advising on the robustness of the estimates as set out above, the Chief Financial 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. The Director of Finance's view of the level of reserves is contained within the report.

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.

Alternative Proposals

If alternative proposals to those contained in this report are moved at the budget setting meeting, the Chief Financial 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 Financial 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 or the Audit Commission if the Council has failed to have regard to a report of the Chief Financial 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 by Section 76 Local Government and Housing Act 1989.

TERRY OSBORNE
Borough Solicitor