

APPENDIX 4

STATUTORY POWER TO UNDERTAKE PROPOSALS IN THE REPORT

1. INTRODUCTION

It is important that Members are fully aware of the full legal implications of the entire budget and Council Tax making process, when they consider any aspect of setting the Council's Budget. Formal and full advice to all Members of the Council protects Members, both in their official and personal capacity, as well as the Council. If Members have received the appropriate professional legal and financial advice and act reasonably, generally the courts will not interfere in their decisions.

2. GENERAL POSITION

- a. The first and overriding legal duty on Members is their fiduciary duty to weigh the needs of service users against the interests of local taxpayers. In planning the budget, Members are under a fiduciary duty to act prudently, responsibly, in a businesslike manner and in their view of what constitutes the best interests of the general body of local taxpayers. In deciding upon expenditure, the Council must fairly hold a balance between recipients of the benefits of services provided by the Council and its local taxpayers. Members should note that their fiduciary duty includes consideration of future local taxpayers as well as present local taxpayers.
- b. There is a general requirement in administrative law that a local authority decision must be rational, authorised by law and must take account of all relevant considerations, whilst ignoring any irrelevant ones. It should also be noted that the concept of proportionality, given great emphasis in the Human Rights Act 1998, is also becoming a relevant factor for determining the reasonableness of any decision and should be borne in mind by Members.
- c. An authority commits an illegal act if it acts beyond or in abuse of its statutory powers or in breach of its fiduciary duty. It will also act illegally if it fails to take relevant considerations into account or acts in outrageous defiance of reason.

3. OBLIGATION TO MAKE A COUNCIL TAX

- a. The legal significance of the Annual Budget and setting a Council Tax derives from the Council's duty under the Local Government Finance Act 1992 (the 1992 Act) and Part 5 Chapter 1 of the Localism Act 2011 to set a balanced budget and Part 5 Chapter 1 of the Localism Act 2011. This is achieved by calculating the aggregate of:
 - i. the expenditure it estimates it will incur in the year in performing its functions in the year (including an allowance for contingencies),

- ii. the payments it estimates it will make in the year in defraying expenditure already incurred and
 - iii. expenditure it will incur in funding costs before a transfer of funds is made from the Collection Fund and then deducting such sums as will be paid into the General Fund, i.e. income. Calculations made under this section must be made before 11 March in the preceding financial year.
- b. In order to fulfil this duty, the Council must prepare detailed estimates of its expenditure for the coming year and of the resources that will be available to meet this expenditure. Account must be taken of any deficit brought forward from a previous year and the amount needed to cover contingencies. The resources include income from rents, fees and charges and any available balances. All of these issues must be addressed in the budget report. The estimation of the detailed resource and expenditure items is the main reason for the budget process. The budget must balance, i.e. proposed expenditure must be met from proposed income from all sources, with any shortfall being the precept on the Collection Fund.
 - c. Failure to make a lawful Council Tax on or before 11 March could have serious financial results for the Council and make the Council vulnerable to an Order from the Courts requiring it to make a Council Tax.
 - d. Section 151 of the Local Government Act 1972 places a general duty on local authorities to make arrangements for 'the proper administration of their financial affairs'.
 - e. Information must be published and included in the Council Tax demand notice. The Secretary of State has made regulations, which require charging authorities to issue demand notices in a form and with contents prescribed by these regulations.
 - f. There is also a duty under Section 65 of the 1992 Act to consult persons or bodies appearing to be representative of persons subject to non-domestic rates in each area about proposals for expenditure (including capital expenditure) for each financial year.

4. DEFICIT BUDGETING

- a. A deficit budget, one which does not cover all anticipated expenditure with resources reasonably expected to be available, is unlawful. Any Council Tax which rests on such a budget will be invalid. Councils are constrained to make a Council Tax before all the separate elements, which will constitute available resources or anticipated expenditure, have been identified and quantified fully. Best estimates have to be employed.
- b. Where these best estimates include sums for unallocated savings or unidentified expectations of income, extreme care must be taken to ensure

that the estimates are reasonable and realistic and do not reflect an unlawful intention to incur a deficit. It might be appropriate at budget setting time to require regular monitoring throughout the financial year of such estimated savings or income. Prompt action to reduce spending must be taken, if at any stage it seems likely that a balance between income and expenditure will not be achieved.

5. BORROWING

The rules and regulations governing a local authority's ability to borrow money were altered significantly by the introduction of the Local Government and Housing Act 1989 and subsequent regulations. This has now been abolished and replaced by the self-regulating Prudential Code.

6. OTHER RELEVANT LEGISLATION

- a. The Local Government Finance Act 1988 (the 1988 Act) created the (now repealed) Community Charge and the current National Non- Domestic Rating regime and deals with grants, funds, capital expenditure and the financial administration of a local authority.
- b. Under Section 114 (2) and 114 (3) of the 1988 Act, the Chief Financial Officer is required to make a report, if it appears to him/her that a decision or course of action the Council or an officer has agreed or is about to make is unlawful, or that expenditure is likely to exceed resources available.
- c. Members have a duty to determine whether they agree with the Chief Financial Officer's statutory report issued under Section 26 Local Government Act 2003. If Members were to disagree, they would need to set out cogent reasons for so doing. Unless such reasons could be set forward, Members' action in disagreeing with the Chief Financial Officer's views on the basis of his/her professional judgement would be likely to be held unreasonable and constitute wilful misconduct. It should be noted that under the Members' Code of Conduct, Members are required to take account of any advice issued by Chief Financial Officer (and the Monitoring Officer) acting in their statutory capacities.

7. BEST VALUE: LOCAL GOVERNMENT ACT 1999

The Local Government Act 1999 (the 1999 Act) introduced a duty of Best Value, which came into force on 1st April 2000. Members need to be aware of and take account of the impact on the Council of this duty.

8. THE CONSTITUTIONAL POSITION: LOCAL GOVERNMENT ACT 2000 (THE 2000 ACT)

- a. The 2000 Act has had a fundamental effect on the governance of the Council and in particular has resulted in a change to the working arrangements of Council, with the requirement for a Constitution setting out executive (Cabinet) and scrutiny and overview arrangements. The 2000 Act also provides a power for Councils to promote the economic, social and environmental well being of their areas and develop community strategies. In addition, the 2000 Act establishes an ethical framework.
- b. Of particular importance to the Council Tax setting process and Budget Meeting of the Full Council is the Council's Budget and Policy Framework Procedure Rules set out in Part 4 of the City Council's Constitution. These provide a legal framework for the decision making process whereby the Budget of the City Council is determined, and the Council Tax is set. In addition, Members need to be aware that these Rules provide a route whereby the Leader may require the Full Council to reconsider their position if they do not accept the Executive's recommended budget without amendment.
- c. In addition, the Constitution contains a range of further material relevant to the setting of the Council Tax and the Budget Setting meeting:
 - i. Article 12 contains guidance on decision making and the law.
 - ii. The Council Procedure Rules in Part 4 regulate the conduct of the Full Council meeting (although traditionally, some of the rules relating to the conduct of the debate are suspended to allow different arrangements during the budget debate).
 - iii. The Members' Code of Conduct must be followed by Members.
 - iv. The Officer/Member Protocol contains guidance both on pre-budget discussions, but also on how officers and Members should interact with specific guidance about budget preparation issues.

9. PERSONAL LIABILITY AND SURCHARGE

The 2000 Act abolished the local government surcharge provisions and replaced them with a new statutory offence of 'misuse of public office'. This new statutory offence covers two situations, namely unlawfully incurring expenditure or incurring expenditure as a result of wilful misconduct. It also covers the exercise of a public function in a manner that involves dishonesty or oppression or malice. The Courts (rather than the District Auditor) would impose penalties. The Council could sue for losses/deficiencies sustained.

10. LEGAL STATUS OF POLITICAL PROMISES AND DOCUMENTS

- a. It is appropriate for Members to consider their own position as some Members may have expressed support publicly for policies that are not policies of the Council.

- b. Political documents do not represent a legal commitment on behalf of the Council. To treat any political document as a legal commitment by the Council would be illegal. Where there is a valid choice before Members, then, at that stage and only at that stage, Members may take political documents into account.
- c. All decisions must be taken within the framework of the formal decision making process of the Authority. Members must take into account all relevant matters and disregard all irrelevant ones. Decisions taken at a political meeting, such as a political group meeting, have no status within this process. A Member, who votes in accordance with a group decision which has been reached, having regard to relevant factors and who has addressed their mind independently to those factors and to the decision itself, will be acting within the law.
- d. The Courts have also advised on the balancing exercise to be undertaken by a Council when deciding whether to pursue a particular policy:

A local authority must exercise its statutory powers in the public interest and for the purpose of which those powers have been conferred. Political views, as to the weight to be attached to the various relevant considerations and as to what is appropriate in the public interest in the light of those considerations may properly influence the exercise of a statutory discretion. A decision will not be unlawful merely because some political advantage, such as electoral popularity, is expected to flow from it, so long as the decision is made for a legitimate purpose or purposes. Because at some stage in the evolution of a policy an improper political purpose has been espoused, does not mean that the policy ultimately adopted is necessarily unlawful. However, a political purpose extraneous to the statutory purpose can taint a decision with impropriety. Where there is more than one purpose:

- a) *The decision will generally be lawful provided that the permitted purpose is the true and dominant purpose behind the act. This is so even though some secondary or incidental advantage may be gained for some purpose, which is outside the authority's powers.*
- b) *The decision will be invalid if there are two purposes one ultra vires and one intra vires and the ultra vires purpose is a (even if not the) major purpose of the decision. Accordingly a decision substantially influenced by a wish to alter the composition of the electorate would be unlawful.*
- c) *Where there is some evidence justifying enquiry, the Court will consider whether an apparently lawful purpose e.g. home ownership is merely a colourable device to conceal an illegitimate purpose e.g. electoral advantage.*
- d) *Even if those voting for a particular policy at a Council meeting have perfectly proper reasons in mind, the policy can be tainted by the improper motives of others who have taken part in the formulation of that policy although not actually present to vote. As a matter of law it is possible for a corrupt principal to cause a result through an innocent agent.*

11. OTHER LEGAL IMPLICATIONS

The financial forecasts contained in this report have been prepared and are submitted as part of the budget process set out in the Council's Constitution.