

## **APPENDIX 5**

### **ADVICE FROM THE ASSISTANT DIRECTOR OF LEGAL & DEMOCRATIC SERVICES AND JOINT CHIEF FINANCIAL OFFICER**

#### **1. INTRODUCTION**

This note 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 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). The Localism Act 2011 includes amendments to the 1992 Act and requires the Council to calculate a Council Tax Requirement for the year, due to the referendum provisions if the Council Tax is increased above a prescribed level. 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.

#### **3. NOTICE**

There is a requirement to publish notice of the amount set for Council Tax in at least one local newspaper within 21 days.

#### **4. COUNCIL TAX REFERENDUM**

Under the provisions of the Local Audit & Accountability Act, The Secretary of State has the power to require any billing or precepting Authority which sets an excessive Council Tax increase to hold a public referendum. Any authority planning an excessive council tax increase will be required to prepare a 'shadow budget' based on the maximum non-excessive council tax increase allowed and they will also be required to inform the Secretary of State by notice.

The legislation requires the authority proposing any excessive increase ('the relevant authority') to prepare supporting factual material setting out the proposed council tax increase and budget, the comparative non-excessive Council Tax rise and shadow budget, and the estimated cost of holding the referendum. If a proposed rise in council tax were rejected, the relevant authority would immediately adopt the shadow budget and transfers from the Collection Fund would be reduced accordingly. It would also be required to inform the Secretary of State by notice. The billing authority would be able to issue new bills immediately, offer refunds at the end of the year or allow credits against liability in the following year. However, consistent with existing legislation, billing authorities will be required to refund (and re-bill) any local resident who requests this.

## **5. MEMBERS' FIDUCIARY DUTIES**

The obligation to set a balanced budget at the start of every 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 it is 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. 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, some 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 simply follow the party line without considering the relevant factors and professional advice and without properly exercising any real discretion.

Under the Code of Conduct, members are required, when reaching decisions, to have regard to relevant advice from the Section 151 Officer and the Monitoring Officer. 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 advice.

## **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.

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

(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 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.