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## **Appendix 3 – Legal Responsibilities – Budget Setting : Monitoring Officer Advice Note**

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### **1 Summary**

- 1.1 Under section 31A of the Local Government Finance Act 1992, the Council has a duty to set a budget before 11 March. In setting the budget, Members jointly and severally (collectively and individually) have a fiduciary duty to Council taxpayers. This means that they have a duty to facilitate, rather than obstruct, the setting of a lawful budget.
- 1.2 Failure to set a lawful budget in time can lead to a loss of revenue, significant additional administrative costs and reputational damage. It may leave the Council at risk of a legal challenge from council taxpayers and/or intervention from the Secretary of State under section 15 of the Local Government Act 1999.
- 1.3 Failure to set a lawful budget in time may also lead to personal liability for individual Members for misfeasance in public office, negligence, or breach of statutory duty.
- 1.4 This advice note sets out the position in more detail and is intended to assist Members in considering their approach to the Council meeting on 19 February 2025.

### **2 The Local Government Finance Act 1992 – Duty to set a budget**

- 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 precenting the one in respect of which the budget is set. This means that the Council has a duty to set the 2025/26 budget before 11 March 2025.
- 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 a delay is likely to have significant financial, administrative and legal implications, including potential liability of any Member who contributed to the failure to set a budget.
- 2.3 Section 66 of the Local Government Finance Act 1992 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” (e.g. a council tax payer within County Durham) may apply for 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 other precepting authorities such as Police and Fire as well as Town and Parish Councils on whose behalf the Council acts as collection authority.
- 3.2 The Council has a legal duty to provide a range of statutory services (such as children’s and adults social care), which continues notwithstanding the delay in setting Council tax. It must also pay the monies due to the precepting authorities whether or not it collects any Council Tax.
- 3.3 A delay in setting the budget may also impact on the Council’s ability to enter into new agreements with significant financial commitments until and unless the budget is agreed. Otherwise, they would be potentially unlawful unfunded commitments.
- 3.4 If the Council sets the budget by 10 March but later than the planned February budget Council meeting, there is still likely to be disruption to the administrative arrangements for Council tax (printing, posting, delivery of bills) which will have cost implications.

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

- 4.1 Sections 25 to 28 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 Council has a discretion as to how such allowances are made and the action to be taken.
- 4.2 Section 25 also requires the Council’s section 151 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. Members must have regard to this report in making their decisions. Any decision that ignores this advice, including the implications of delay, is potentially challengeable.

## **5 Section 114 and Section 5 Reports**

- 5.1 Section 114 of the Local Government Finance Act 1988 puts an obligation on the Section 151 Officer to issue a report “if it appears to him that the expenditure (including proposed expenditure) is likely to exceed the resources (including borrowing) available to the Council.” A similar duty arises if he becomes 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.
- 5.2 Section 5 of the Local Government & Housing Act 1989 imposes similar obligations on the Monitoring Officer, if it appears to 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 Member Code of Conduct.
- 5.3 In the event Council failed, or looked likely to fail to set a budget before 11 March, the s.151 Officer and Monitoring Officer would be required to issue a report in accordance with the duties above.

## **6 Member Code of Conduct**

- 6.1 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 seven Principles of Public life, including the requirement that Members should make decisions in accordance with the law.
- 6.2 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 failure to set a lawful budget is likely to bring the Council into disrepute.

## **7 Personal Liability of Members**

- 7.1 If a Member’s wilful misconduct is found to have cause loss to the council, the Member may be liable to make good such loss.
- 7.2 Depending on the role played by a Member and the seriousness of the loss incurred, a Member could in principle, be guilty of misfeasance in public office. The indemnity cover provided to Members by the Council does not include actions that constitute an offence or are reckless.

- 7.3 There is also a possibility that a Member might be liable in negligence and/or breach of statutory duty.
- 7.4 In order for an action against a Member to succeed, it would be necessary to prove that their actions were deliberate or reckless and involved persistent failure to facilitate the setting of a lawful budget. The longer the budget is delayed and the more repeatedly the Member(s) “blocks” the setting of a lawful budget, the more likely it is that personal liability will arise.

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

- 8.1 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”.
- 8.2 Section 15 of the Local Government Act 1999 gives the Secretary of State the power to intervene and take a range of measures. The powers of the Secretary of State are 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 (setting a budget by a specified date).
  - b) the Secretary of State/or a person nominated by them, exercising the Council’s functions (such as setting the Council Tax) for a specific period or such time as the Secretary of State considers appropriate.
  - 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.
- 8.3 If the Secretary of State were to intervene on the issue of setting 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.
- 8.4 Intervention by the Secretary of State is a measure of last resort and is usually preceded by a report from external auditors, an inspector appointed by the Secretary of State or a regulatory body. However, the

Secretary of State can intervene directly in cases of urgency. It is unlikely that the Secretary of State would intervene and set a budget for the Council immediately after 11 March deadline. Given the complexities involved and the calculations and assumptions required in setting a budget, it is more likely that the Secretary of State would give directions to the Council to set its budget by a particular date and take particular steps rather than set it themselves.

## **9 Reputational Damage**

- 9.1 Failure to set a budget, even in the absence of legal challenge and/or formal/informal intervention by the Secretary of State will have a significant impact on the Council's reputation locally and nationally. It will have an impact in terms of investor confidence, people's preparedness to work with the Council and on Council Tax collection rates as residents may see the council 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.

## **10 Failure to set a budget at the February Council meeting**

- 10.1 If Council fails to agree the budget proposed by the Cabinet at its meeting on 19 February 2025, the Council's Constitution requires the Cabinet to meet and consider the reasons why the budget was rejected. At that meeting, it would need to decide whether to re-submit the budget unamended or to make changes. Council would then need to meet again to consider the Cabinet's proposals.
- 10.2 The Council must set the budget at this second meeting. There is no provision for further objections being referred to the Cabinet to consider. If it looked as if the Council were unlikely to agree the budget at this meeting, it is likely that the section 151 Officer and Monitoring Officer would suggest adjourning the meeting to allow Groups to negotiate a way to agreement. If after an adjournment, agreement still looks unlikely (as a measure of last resort) those Members unable to vote in favour of the budget may be advised to abstain.

## **11 Section 106 of the Local Government Finance Act 1992**

- 11.1 Under section 106 of the Local Government Finance Act 1992, a member who has not paid an amount due in respect of their Council tax for at least two months after it became payable is unable to vote on any matters affecting the level of Council Tax or arrangements for administering the Council Tax (they are entitled to speak).

11.2 Any members unable to vote by virtue of section 106, must make a declaration to that effect at the start of the meeting. Failure to make such a declaration and/or voting when the provisions are engaged may constitute a criminal offence (maximum fine £1000).

Helen Bradley

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