

BUDGET SETTING ADVICE NOTE

1. This advice note is written in advance of the publication of the budget report to Full Council and further to the legal implications advice contained in the report to Executive Board on 13 February 2024. That initial advice referenced the two new instructions issued by the Improvement and Assurance Board which were set out for noting in recommendation 1 k) of the report as follows: -
2. “To note the following additional statutory instructions from the Improvement and Assurance Board flowing directly from the existing instructions, ‘2.1, Approval of wholly realistic plans and budgets’ and ‘2.2, Establish and Maintain a sound and prudent reserves policy and practice’:
3.
 - The Section 151 Officer, after consultation with the Chief Executive and fellow Corporate Directors, shall present his best professional view on a draft budget for 2024/25 in line with normally expected professional standards but which in particular maximises the level of savings options that Corporate Directors believe can be delivered and thus quantifies the minimum budget imbalance relying on the bid to Government for ‘Exceptional Financial Support’
4.
 - Subject only to any professionally required changes determined by the Section 151 Officer, the draft budget for 2024/25 as defined in 1 above, shall be presented and recommended to the Full budget setting Council meeting for its approval”.

Section 114 and Medium-Term Financial Plan Context

5. At the Extraordinary Meeting of the City Council held on 18 December 2023, which considered the Council’s response to the Section 114 (3) report, it was resolved to accept the continuation of the Spend Control Policy introduced by the Section 151 Officer until 31 March 2025, subject to review after the 2023/24 budget outturn. It was also noted that the setting of a balanced budget for 2024/25 and Medium-Term Financial Plan for 2024/25 to 2027/28 in the context that very significant savings will be required, forms a key part of the Financial Improvement Plan.

External Assurance

6. The Government appointed Improvement and Assurance Board continues to support, advise, and challenge the Council on the delivery of the instructions it has issued. That now includes the new instructions referred to in paragraphs 2, 3 and 4 above, which became effective from 25 January 2024, progress against which they will, along with those issued previously, report against to the Secretary of State for Levelling Up, Housing and Communities. This remains the case pending any further decision from the Secretary of State following on from his “minded to” letter regarding the appointment of Commissioners.

Members obligations

7. Irrespective of the abstentions on the recommended budget proposals at Executive Board on 13 February 2024 those proposals will still be submitted to Full Council in accordance with the instructions issue by the Improvement and Assurance Board. Full Council is required to decide on the Council’s budget for the next financial year 2024/25. This is one of the most important decisions that Full Council is called upon to make during the year. This is more so this year in view of the information set out in the preceding paragraphs.
8. In the signed acceptance of office declaration, all elected Members agree to fulfil their duties as councillors to the best of their ability and judgement. Councillors also agree to abide by the Councillor Code of Conduct which provides that “In accordance with the public trust placed in them, on all occasions, Councillors will act lawfully and not bring their role or local authority into disrepute”. These declarations and obligations apply to the duty on Councillors to set a lawful budget.

Full Council’s legal duty

9. Full Council must agree to set the budget by 11 March 2024. This legal duty arises from the Local Government Act 2000, Local Authorities (Functions & Responsibilities) Regulations 2000 and the Local Government Finance Act 1992. This duty is both individually owned and collectively shared between all

elected Members that make up Full Council.

10. In deciding how to exercise its duty to set a lawful budget, Full Council must have regard to the advice of the Chief Finance Officer (S151 Officer) and the Monitoring Officer. Full Council must act in accordance with the Council's statutory duties, common law duties and administrative law principles.
11. Failure to meet the 11 March 2024 deadline to set a budget will have significant financial, legal, and reputational impact on the Council and its residents. To be clear on this point if Full Council does not set a budget it will be acting unlawfully.
12. With no agreement on the budget, no budgetary allocations exist and there can be no provision for services, staff, or contractual commitments of the Council. The Council's ability to perform its statutory responsibilities, will be in jeopardy and will in effect 'grind to a halt'. This will have a significant impact on most residents, in particular vulnerable adults, and children. At its basic level, bills and staff wages will not be able to be paid, new contracts cannot be entered into and there will be breach of existing contracts.
13. The Council will not be able to process and send out council tax bills to residents, direct debits will not be set up and payment demands cannot be sent out. The whole council tax payment process will be delayed, and not just for the Council but also for the Police and Crime Commissioner and for the Fire Authority. Delays in billing and chasing council tax collection reduces the probability of collecting what is due. This would also include what is due to the Police and Crime Commissioner and the Fire Authority and they would expect the City Council to compensate them for losses of income given that the delay would be entirely of the City Council's making.
14. This would also mean that the initial council tax payments the Council receives would be delayed and the Council's cash reserves will be undermined by millions of pounds in April 2024 and thereafter every month that the delay continues. This missing cash would need to be borrowed from the market, typically from other local authorities. The fact that the Council require these loans due to its inability to set a budget would reduce the number of sources prepared

to lend to the Council and would significantly impact the rate of interest demanded. This would obviously significantly worsen the Council's financial position and at a time when revenue is most needed. All this and the uncertainty that follows will damage the Council's reputation locally and nationally and with central government, other local authorities, staff, partners, businesses, contractors, residents, and potential investors in the City. The Council and Members will be at risk of litigation in these circumstances.

15. Member's fiduciary duty (i.e. legal duty as trustee of the public purse)¹ is a material consideration to reflect upon. This includes the duty to council taxpayers to avoid unlawful action (i.e. not to set a budget by 11 March) that would result in the loss of significant revenue to the Council or a failure to deliver services with consequential litigation and adverse financial implications to the Council. Personal liability may arise in the form of misfeasance in public office² depending on the nature and extent of conduct at the Full Council meeting and its impact.
16. To discharge Members individual and collective legal duty and avoid the financial, legal, and reputational consequences alluded to in this advice note, Full Council should vote by a simple majority to approve the budget proposals. The key requirement is to ensure that the legal duty to set a budget is discharged.
17. The Chief Finance Officer (S151 Officer) has advised that the minimum decision required to meet the statutory requirements under the Local Government Finance Act 1992 are those in the budget proposal which was submitted to the Executive Board and will be put before Full Council as these are all integral to setting the budget and the council tax level.
18. In the event of an impasse Members will be reminded of their legal obligations and duties which collectively requires them through Full Council to set a lawful budget based on the proposals before them. Mindful of the legal duties, the adverse consequences of not setting a budget and potential personal liability arising from any willful misconduct, Members must work collaboratively (across party divides) to facilitate rather than frustrate the setting of a lawful budget.

19. If any Member's willful misconduct in (persistently) refusing to set the budget is found to have caused a financial loss to the Council, they may be liable to make good such loss (i.e. misfeasance in public office). There could be a potential breach of the Members' Code of Conduct by bringing the Council into disrepute and failing to act lawfully. Further, under Section 66 of the Local Government Finance Act 1992, the failure to set or delays in setting the budget, could give rise to a judicial review challenge by any person with sufficient interest (which could include a council taxpayer).

Chief Finance Officer and Monitoring Officers reports

20. The Chief Finance Officer (s151 Officer) is responsible for the financial administration of the Council. The Monitoring Officer (MO) is responsible for ensuring the Council conducts its business in a lawful manner. In the event of a failure by Full Council to set a budget and by 11 March 2024 and which invariably will lead to the worsening of the Council's financial position, the Chief Finance Officer will have to issue a Section 114 (3) report. The MO will also have to consider issuing a report under Section 5 of the Local Government and Housing Act 1989 as Full Council will be acting unlawfully. Therefore, it is imperative that Full Council discharges its legal duty to set a lawful budget.

Secretary of State's intervention

21. As indicated above, the Council is the subject of statutory intervention by the Secretary of State through the appointment of an Improvement and Assurance Board which now has powers of instruction. The failure to act as required by law to set a budget and consequently provide statutory functions and secure value for money would highly likely lead to further intervention³ by the Secretary of State on the basis that the council is failing in its best value duty. This could take the form of issuing directions or in the current prevailing circumstances the appointment of commissioners.

Conclusion

22. Failure to set a balanced budget at the meeting on 4 March 2024 would have wide and far reaching consequences for both the Council and, potentially, individual Councillors depending on their stance. My very clear advice to you all is that it is imperative that Full Council acts lawfully and approves a lawful and balanced budget at its meeting on 4 March 2024.

Malcolm R. Townroe
Director of Legal and Governance and Monitoring Officer

19 February 2024

¹ *Bromley London Borough Council v Greater London Council*² "It is well established ... that a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage ... (Lord Diplock)" *Roberts v Hopwood*³ "... [a] body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly business-like manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others. (Lord Atkinson)"

² Misfeasance in public office is an action against a holder of public office. It provides a remedy for persons who are injured by the actions of a public officer who has exercised his powers in bad faith. It is an unusual tort in that the prime focus is on the motivation of the defendant. There are similarities between the tort of misfeasance in public office and the criminal offence of misconduct in public office. However, the two are not the same and care should be taken before transferring principles between them. The ingredients of the tort a) The defendant must be a public officer; b) The defendant must have exercised power as a public officer; c) The defendant must have acted with malice or in bad faith, either with the intention of injuring the claimant or, being aware of the risk of such injury, without an honest belief that his conduct was lawful; d) That conduct must have caused the claimant material injury or damage of a sort foreseen by the defendant.

³ Section 15 of the Local Government Act 1999 provides powers, where the Secretary of State is "satisfied" that an authority is failing to comply with its best value duty, for he or she "to take any action which he considers necessary or expedient to secure its [the authority's] compliance with the requirements" of the best value duty. In particular, the legislation provides powers for the Secretary of State (or his or her nominee) to take over all or some of the functions of the authority. In recent interventions, the practice has been to use the latter powers to nominate Commissioners to take over some or all of the functions of an authority. However, it should be noted that the wording quoted above allows a wider range of actions to be taken by the Secretary of State, such as the issuing of Directions to an authority requiring it to carry out a review of its exercise of specified functions and either carry specific instructions or develop and deliver an improvement plan. In all cases, the Secretary of State can require the authority to "comply with any instructions...in relation to the exercise of that function" and to provide assistance as required for the exercise of a function. (Paragraph 3.2 Statutory intervention and inspection. A guide for local authorities