

28 February 2019

Brighton & Hove City Council

**Legal, Financial and Practical Consequences of
Failure or Delay in Setting Council Tax**

1 Summary

- 1.1 The Council has a legal duty to set a lawful budget in time.
- 1.2 Members jointly and severally (individually and collectively) have a fiduciary duty to Council Tax payers.
- 1.3 This means they have a duty to facilitate, rather than obstruct, the setting of a lawful budget, a process that requires flexibility and compromise.
- 1.4 Failure to set a lawful budget in time will lead to loss of revenue, significant additional administrative costs as well as reputational damage.
- 1.5 Failure to set a budget may lead to intervention from the Secretary of State under section 15 of the Local Government Act 1999 (as previously seen in Doncaster, Hackney and Tower Hamlets in relation to failure of governance.)
- 1.6 It may give rise to personal liability for individual Members for misfeasance in public office, negligence or breach of statutory duty.
- 1.7 This note explains the position in more detail and makes practical suggestions for Members' consideration.

2 The Legal Duty

- 2.1 Section 30(6) of the Local Government Finance Act 1992 provides that the Council has to set its budget before 10 March in the financial year preceding the one in respect of which the budget is set. This means the Council has a duty to set the 2019/20 budget before 10 March 2019.
- 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 delay may have significant financial, administrative and legal implications, including potential individual liability of any Member who contributed to the failure to set a budget.
- 2.3 Section 66 of the 1992 Act 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" may apply for judicial review.

3 Financial Implications of Delay

- 3.1 Delay in setting the Council tax means a delay in collecting the tax due not only to the council, but also the precepting authorities such as the police, fire service and others such as the parish council on whose behalf the council acts as a collection authority.

- 3.2 The council has a legal duty to provide a range of statutory services (such as refuse collection, children's services, homelessness, etc.) and is not absolved from its duty because of the late setting of the tax. It also has to pay the monies due to the precepting authorities (such as Fire Service and the Police) whether or not it collects any Council tax.
- 3.3 One significant point that Members need to be aware of is that a delay in setting the budget may affect the council's ability to enter into new agreements with significant financial commitments until and unless the budget is agreed. Otherwise these would be unfunded commitments and therefore potentially unlawful.
- 3.4 Even if the Council sets the budget before 10th March but much later than the planned 28th February Budget Council meeting, there is still likely to be some disruption to the administrative arrangements (such as printing, posting, delivery) that have cost implications.

4 Duty to take the advice of the Chief Financial Officer

- 4.1 Sections 25 to 29 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 legislation leaves discretion to the council about the allowances to be made and action to be taken.
- 4.2 Section 25 also requires the Council's Section 151 Chief Financial 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 members will have authoritative advice available to them when they make their decisions.
- 4.3 The section requires members to have regard to the report in making their decisions. Any decision that ignores this advice, including the implications of delay, is potentially challengeable.

5 Section 114 Report and the Prohibition Period

- 5.1 Section 114 of the Local Government Finance Act 1988 puts an obligation on the Section 151 Officer (The Executive Director of Finance & Resources) 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." He would also be under a similar obligation if he became 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. The S151 Officer has to consult the Chief Executive and the Monitoring Officer before issuing the report.
- 5.2 If such a report were issued, a copy of it must be sent to the council's auditors and every Member of the Council. Full Council must consider the report within 21 days at a meeting where it must decide whether it agrees or disagrees with the views contained in the report and what action (if any) it proposes to take. Between the issuing of the report and the day after the meeting ("the probation

period”) the council is precluded from entering into new agreements involving the incurring of expenditure except in certain limited circumstances where expenditure can be authorised by the Chief Financial Officer. The legislation also provides that during the prohibition period “the course of conduct which led to the report being made shall not be pursued.” Failure to take appropriate action in response to such a report may lead to the intervention of the council’s auditor.

- 5.3 It is not possible to say in advance for certain whether such a report would be issued, but, the longer the setting of the budget is delayed, the greater the likelihood that a section 114 report may be issued.

6 Monitoring Officer Report

- 6.1 Section 5 of the Local Government & Housing Act 1989 imposes on the Monitoring Officer an obligation similar to that of the S151 Officer with the same consequences if it appears to him/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 Code of Conduct for Members.
- 6.2 The Section 114 and Section 5 reports may be joint or separate and, if separate, they may be issued concurrently or at different times.

7 Code of Conduct Consequences

- 7.1 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 General Principles of Public Life, including the requirement that they should make decisions in accordance with the law.
- 7.2 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 it is bound to bring the council into disrepute.

8 Personal Liability of Members

- 8.1 Notwithstanding the abolition of surcharges, if a Member’s wilful misconduct is found to have caused loss to the council, the Member may be liable to make good such loss under the principle approved by the House of Lords in *Porter v Magill*. 1 (2002).
- 8.2 Depending on the exact role played by a Member, and the seriousness of the loss incurred, a Member could, in principle, be guilty of the tort and crime of misfeasance in public office. The indemnity cover that Members are provided with by the Council does not include actions that constitute an offence or are reckless.
- 8.3 It is also possible (in theory) for a Member to be liable in negligence and or breach of statutory duty.

- 8.4 It must be pointed out that one would probably need to prove that what the Members were doing was deliberate or reckless and involved persistent failure to facilitate the setting of a lawful budget before it attracts liability of the sort referred to in the preceding paragraphs. The longer the setting of a budget is delayed, and the more repeatedly the Member/s “blocks” the setting of a lawful budget, the more likely for the liability to arise.

9 Intervention by the Secretary of State

- 9.1 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.”
- 9.2 Section 15 of the Act gives the Secretary of State the power to intervene and take a range of measures. The powers of the Secretary of State are very 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 (for example, setting a budget by a specified date);
 - (b) The Secretary of State, or a person nominated by him/her, exercising the council's functions (such as setting the Council tax) for a period specified in the direction or for so long as the Secretary of State considers appropriate, and
 - (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.
- 9.3 If the Secretary of State decides to intervene on the issue of setting the Council Tax, he/she need not set the full budget and could, for example, direct the Council to set a budget at a Council Tax freeze level by a set date leaving the council to work out the detailed savings for each service.
- 9.4 The Secretary of State is expected to exercise the powers after consulting the local authority and it usually follows a report from external auditors, by an inspector appointed by the Secretary of State, by Ofsted or similar body, although this is not a requirement in cases of urgency. The measure is stated to be one of last resort and is itself, challengeable by way of judicial review. The Audit Commission (and its successor body the National Audit Office) used certain guidance in deciding whether to refer a local authority to the Secretary of State to use his powers under section 15. These include cases where there are:
- Serious service failures in an authority that could result in danger or harm to the public;
 - Persistent failures by an authority to address recommendations made by inspectors or auditors;

- Serious failures in a number of services in an authority, which reveal fundamental weaknesses in an authority's corporate capacity to manage services and make improvements;
 - Serious failures in corporate governance arrangements or capacity whether or not there is serious service failure; and
 - Other circumstances that demonstrate a serious or persistent failure to comply with the requirements of Part 1 of the Local Government Act 1999, which includes the requirement that authorities make arrangements to secure continuous improvement in the exercise of their functions.
- 9.5 The Secretary of State has exercised the powers under section 15 by intervening in the case of Hackney London Borough Council in 2001 and Doncaster in 2013. More recently, the Secretary of State has used these powers to put in place a set of intervention measures against Tower Hamlets London Borough Council, for failure to comply with the best value duty. These same powers would be available to the Secretary of State if he is of the view that there is failure on the part of the Council to set a budget expeditiously resulting or risking financial loss or failure in services.
- 9.6 The direction of the Secretaries of State for Communities and for Education given in the Doncaster case is attached as an annex to this report for information. None of the cases where the Secretary of State exercised section 15 powers seem to relate to failure or delay in the setting of Council Tax.
- 9.7 It is unlikely that the Secretary of State would intervene and set a budget for the council immediately after the 10th March deadline passes. There is also no certainty that he/she would necessarily do so until matters reach a much more serious point. This is because:
- (a) Section 30 (6) of the Local Government Finance Act 1992 provides that that failure to set a Council tax by the deadline shall not invalidate the council tax;
 - (b) Section 66 of the Act provides that any failure to set the Council tax shall not be questioned otherwise than by way of an application for judicial review;
 - (c) The exercise of the section 15 powers require a much more serious, systematic and persistent failure (failure similar to the one in Hackney, Doncaster or Tower Hamlets). The current financial and other governance and service delivery position of the council is nowhere near anything approaching the failings identified in those authorities.
- 9.8 Given the complexity of setting a budget (the Secretary of State will have to do the same calculations and assessments the council has) it is not a straightforward process and it is questionable if the Secretary of State or a person nominated by them could do it quicker. He/she is more likely to give directions for the council to set its budget by a particular date and take particular steps and within specified parameters rather than setting it themselves.

- 9.9 By way of example, when there was a dispute with local authorities defying the government in the 1980s, Liverpool City Council did not set their budget until 9th June and the government did not invoke any special powers. Lord Hailsham, in giving judgement on whether the expectation to set local taxes for a financial year was mandatory or directory, referred to delays of “months rather than days or weeks.” Therefore, missing the 10th March deadline by a few days may not, in itself, be a sufficient ground for intervention. But the cumulative effect of delay, uncertainty and effect on third parties and service users may tip the balance in favour of intervention.

10 Reputational damage

- 10.1 Whatever its political make up or whatever the local challenges, the council has had a strong financial and corporate governance reputation. Failure to set a Council Tax and any intervention by the Secretary of State whether formal, informal or even references to failure to set the tax will have significant adverse impact on the council's reputation locally and nationally. This is not simply a theoretical concept; it has real practical impact in terms of investor confidence, peoples' preparedness to work with the council and even on Council Tax collection rates 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.

11 Practical Advice to Members

- 11.1 The council as a corporate body, and Members (both individually and collectively), have a fiduciary duty to Council Tax payers to avoid doing anything that would result in loss of revenue or failure to deliver services. In addition to Members' legal obligations, they also have the moral and democratic obligation to set the budget on behalf of the people who elected them.
- 11.2 There is always a tension between Members' desire to vote for what they believe to be the right decision on the one hand and the legal obligation to set a lawful budget on time and avoid any loss to the council. Each budget setting round has its own dynamics and permutations and it is difficult to generalise as to what a Member should do. At the risk of over simplification, a suggested practical approach would be:
- (a) Members should always strive to facilitate, rather than frustrate, the setting of a lawful budget;
 - (b) As no Group currently has an overall majority in the Council, all Groups and each Member should, where possible, try to reach compromise and agreement beforehand so as to deliver a lawful budget with majority support on time;
 - (c) If there is failure to reach agreement, then, until it becomes clear that the Council may not be able to agree a budget, Members are free to vote as they see fit;

- (d) If it becomes clear (for example as a result of an initial vote) that there is no majority support for any budget but there is a realistic prospect of such an agreement if Members are given additional time for negotiation, then Members should consider a short adjournment, or adjournment to another day, whichever is more appropriate. This would be informed by the advice from the Chief Executive after checking with each of the Group Leaders and the advice from the S151 Officer and the Monitoring Officer.
- (e) If Members do not consider that an adjournment would resolve the impasse or there has been an adjournment and no agreement reached that could deliver a majority, then officers' advice would be:
 - (i) To identify composite amendments (amendments that have cross party-support) and for all Members to vote for these amendments;
 - (ii) When it comes to the substantive vote, for Members who support the PR&G Committee proposals (with the composite amendments) to vote for the proposal;
 - (iii) For members who do not support the proposal, but are unable to secure a majority for an alternative/amendment budget, to support the substantive budget as amended, or, at least, abstain;
 - (iv) In the event of PR&G Committee failing to agree on a recommendation to Budget Council, the reference in the preceding sub-paragraphs to "PR&G Committee proposals" shall read as referring to the recommendations of the Executive Director of Finance & Resources as presented in the report to the Policy, Resources & Growth Committee and Council.

This would ensure that the Council sets a lawful budget and avoids the damaging legal and practical consequences discussed above as well as keeping the setting of local taxes locally and preserve the council's governing reputation.

- 11.3 The above advice is based on the fact that, unlike other times when a proposal that fails to gain the support of a majority of Members simply falls and the status quo prevails, the status quo is not a legal option when it comes to the budget. The nearest legal option the Council has to a status quo is the PR&G Committee proposals.

12 Conclusion

- 12.1 The Council has a duty to set a lawful budget before 10th March.
- 12.2 Each Member has an obligation to facilitate, rather than frustrate, the setting of a lawful budget in time.
- 12.3 Failure to discharge that duty may leave Members at risk of breaking the Code of Conduct for Members and possibly expose them to legal liability.
- 12.4 It is also possible that, if there is a prolonged delay, the Secretary of State may exercise his/her powers under section 15 of the Local Government Act 1999 to

step in and make the decision or ask another person to do so, which would damage the council's governing reputation.

- 12.5 If, after all reasonable attempts are made, it is not possible to find a majority support for any budget (i.e. unable to get the budget through) then the most appropriate thing to do, in officers' view, would be for Members who support the PR&G Committee recommendations to vote for the recommendations and those who do not support the PR&G Committee proposals (with composite amendments) to vote for the budget, or at the very least abstain, unless they are in a position to put forward proposals that have majority support..

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DIRECTION UNDER SECTION 15(5) OF THE LOCAL GOVERNMENT ACT 1999 AND SECTION 497A(4B) OF THE EDUCATION ACT 1996 TO DONCASTER METROPOLITAN BOROUGH COUNCIL**WHEREAS**

1. The Secretary of State for Communities and Local Government and the Secretary of State for Education (“the Secretaries of State”), have carefully considered the following reports in respect of the Metropolitan Borough Council of Doncaster (“the authority”):
 - a. the Audit Commission’s Corporate Governance Report of 19 April 2010;
 - b. The Edlington Case - A Review by Lord Carlile of Berriew CBE QC at the request of the Secretary of State for Education of 16 November 2012;
 - c. Ofsted’s inspection of local authority arrangements for the protection of children in Doncaster Metropolitan Borough Council dated 16 November 2012; and
 - d. Doncaster Recovery Board’s Recovery Plan Annual Stocktake Report: Assessment of the State of Intervention 2012 of 8 January 2013.
2. The Secretaries of State were satisfied that the authority is failing to comply with the requirements of Part 1 of the Local Government Act 1999 (“the 1999 Act”), and is failing to perform to an adequate standard, or at all, some or all of the functions to which section 497A of the Education Act 1996 (“the 1996 Act”) is applied by section 50 of the Children Act 2004 (“children’s social care functions”), namely:
 - a. social services functions, as defined in the Local Authority Social Services Act 1970, so far as those functions relate to children;
 - b. the functions conferred on the local authority under sections 23C to 24D of the Children Act 1989 (so far as not falling within paragraph (a) above); and
 - c. the functions conferred on the authority under sections 10, 12, 12C, 12D and 17A of the Children Act 2004.
3. The Secretaries of State issued a direction on 17 April 2013, in exercise of their powers under section 15(5) and (6) of the 1999 Act and section 497A(4B) of the 1996 Act, in respect of the authority (“the April 2013 direction”), and that direction remains in force.
4. The Secretaries of State have carefully considered the report and recommendations of Professor Julian Le Grand, dated 24 May 2013, on the most appropriate structure and governance arrangements for delivering improvements to the authority’s children’s social care services.
5. The Secretaries of State remain satisfied that the authority is failing to comply with the requirements of Part 1 of the 1999 Act, and is failing to perform to an adequate standard, or at all, some or all of their children’s social care functions.
6. The Secretaries of State propose:

- a. to appoint a person (“the Commissioner for Children’s Social Care”) to act as a Commissioner for the purposes of:
 - i. the April 2013 direction (including, in particular, for the purposes of paragraph 4.iii. of that direction); and
 - ii. this direction;
 - b. to establish, or to secure the establishment of, a company (“the Trust”) for the purposes of, in particular, planning, managing, providing and/or delivering the authority’s children’s social care functions.
7. The Secretary of State for Communities and Local Government, having considered the representations made by the authority as required by section 15(9) of the 1999 Act, and the Secretary of State for Education, having considered the representations made by the authority, consider it necessary or expedient in accordance with their powers under section 15(5) of the 1999 Act and section 497A(4B) of the 1996 Act to direct the authority, as set out below, in order to ensure:
- a. the authority’s compliance with the requirements of Part 1 of the 1999 Act; and
 - b. that the authority’s children’s social care functions are performed to an adequate standard.

NOW THEREFORE

8. Pursuant to their powers under section 15(5) of the 1999 Act and section 497A(4B) of the 1996 Act, the Secretaries of State direct that the authority shall:
- a. comply with any instructions of the Secretary of State for Education or the Commissioner for Children’s Social Care in relation to ensuring that the authority’s children’s social care functions are performed to an adequate standard;
 - b. in relation to the establishment, setting up or carrying on of the Trust:
 - i. comply with any instructions of the Secretary of State for Education or the Commissioner for Children’s Social Care;
 - ii. provide such assistance to the Secretary of State for Education or the Commissioner for Children’s Social Care as they may require; and
 - iii. cooperate fully with the Secretary of State for Education and the Commissioner for Children’s Social Care.

Signed on behalf of the Secretary of State for Communities and Local Government and the Secretary of State for Education

Graham Archer
A Senior Civil Servant in the Department for Education

Paul Rowsell
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Note: The text below is as per the original direction. The Audit Commission has since been abolished and these responsibilities now fall to the Secretary of State and the National Audit Office.

Referrals

- 36 Where the Commission has serious concerns regarding a council's performance it may exercise its power, under section 13 of the Local Government Act 1999, to refer the council to the Secretary of State. A referral is a recommendation that the Secretary of State use his or her powers under section 15 of the Act to issue a direction where an authority is 'failing'. The Commission uses its referral powers extremely rarely and only where other options to support improvement are not considered feasible or desirable.
- 37 From May 2006 the Commission has determined that the circumstances that may lead it to make a referral to the Secretary of State are:
- serious service failures in an authority that could result in danger or harm to the public;
 - persistent failure by an authority to address recommendations made by inspectors (or auditors);
 - serious failures in a number of services in an authority, which reveal fundamental weaknesses in an authority's corporate capacity to manage services and make improvements;
 - serious failure in corporate governance arrangements or capacity whether or not there is serious service failure; and
 - other circumstances that demonstrate a serious or persistent failure to comply with the requirements of Part 1 of the Local Government Act 1999, which includes the requirement that authorities make arrangements to secure continuous improvement in the exercise of their functions.
- 38 The decision to refer a council to the Secretary of State will be made by a Referrals Committee formed with approval from the Audit Commission Board. The decision to put a case to a Referrals Committee rests with the Chairman and Chief Executive. The Referrals Committee will base its decision on inspection findings and other relevant information. The authority subject to potential referral will have an opportunity to make representations to the Referrals Committee prior to a decision being reached.
- 39 Further details on the way in which referral decisions are made can be found in Best Value Audit and Inspection Referrals: Policy and Procedure available at <http://www.audit-commission.gov.uk>

