

Report of:	Mayor Director of Finance and Director of Legal services
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Submitted to:	Council
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Date:	27 February 2023
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Title:	Legal, Financial and Practical Consequences of Failure or Delay in Setting Council Tax
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Report for:	Information
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Status:	Public
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Strategic priority:	All
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Key decision:	Not applicable
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Why:	
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Urgent:	No
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Why:	
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Executive summary

- The Council has a legal duty to set a lawful budget before 11 March 2023
- Members jointly and severally (individually and collectively) have a fiduciary duty to Council Tax payers
- This means members have a duty to facilitate, rather than obstruct, the setting of a lawful budget, a process that requires flexibility and compromise
- Failure to set a lawful budget in time will lead to loss of revenue, significant additional administrative costs as well as reputational damage for the council
- Failure to set a budget may lead to intervention from the Secretary of State under section 15 of the Local Government Act 1999 (and this has happened in number of councils)
- Failure to set a budget may give rise to personal liability for individual Members for misfeasance in public office, negligence or breach of statutory duty.

Purpose

1. This note explains the legal, financial and practical consequences of failure or delay in setting the Council Tax requirement in more detail and makes practical suggestions for Members' consideration.

Background and relevant information

The Legal Duty

2. 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 preceding the one in respect of which the budget is set. This means the Council has a duty to set the 2023/24 budget before 11 March 2023.
 - 2.1 If the budget is set after that date, the Local Government Finance Act 1992 says the failure to set a budget within the deadline does not 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 delay in setting a budget.
 - 2.2 Section 66 of the Local Government Finance Act 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.

Financial Implications of delay

3. 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 councils on whose behalf the Council acts as a collection authority.
 - 3.1 The Council has a legal duty to provide a range of statutory services (such as refuse collection, children's services, support for the homeless .) and is not absolved from its statutory duties 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.
 - 3.2 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.
 - 3.3 Even if the Council sets the budget before 11th March but much later than the planned 27th 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.

Duty to take advice of the Chief Finance Officer

4. 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.

- 4.1 Section 25 also requires the Council's Chief Finance 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. This 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.
- 4.2 Section 26 requires authorities to ensure that their budget made allowance for reserves at least equal to the minimum.

Section 114 Report and the Prohibition Period

5. Section 114 of the Local Government Finance Act 1988 puts an obligation on the Section 151 Officer (The Director of Finance) to issue a report "if it appears to her that the expenditure (including proposed expenditure) is likely to exceed the resources (including borrowing) available to the Council." She would also be under a similar obligation if she 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 S.151 Officer has to consult the Chief Executive and the Monitoring Officer before issuing the report.
 - 5.1 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 prohibition 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 Finance 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.
 - 5.2 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 more likely there may be a section 114 report.

Monitoring Officer Report

6. Section 5 of the Local Government & Housing Act 1989 imposes on the Monitoring Officer an obligation similar to that of the S.151 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.
 - 6.1 The Section 114 and Section 5 reports may be joint or separate and, if separate, they may be issued concurrently or at different times.

Code of Conduct Consequences

7. 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.

- 7.1 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, is incompatible with Members' obligations under the Code as it is bound to bring the Council in to disrepute.

Personal Liability of Members

8. Notwithstanding the abolition of surcharge, 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).
- 8.1 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.
- 8.2 It is also possible (at least in theory) for a Member to be liable in negligence and or breach of statutory duty.
- 8.3 It must be pointed out that one would probably need to prove that what the Members were doing was deliberate or reckless and involves 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 "blocks" the setting of a lawful budget, the more likely for the liability to arise.

Intervention by the Secretary of State

9. 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."
- 9.1 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 very extensive and include:
- Directing the council to take any action which he considers necessary or expedient to secure its compliance with the requirements of this Part (for example setting a budget by a specified date);
 - The Secretary of State, or a person nominated by him, 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
 - Requiring the Council to comply with any instructions of the Secretary of State or his nominee in relation to the exercise of that function and to provide such assistance as the Secretary of State or his nominee may require for the purpose of exercising the function.
- 9.3 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.

Practical Advice to Members

10. The Council as a corporate body, and Members (both individually and collectively,) have a fiduciary duty to Council Tax payers to avoid things that would result in loss of revenue or failure to deliver services. In addition to Members' legal obligation, they also have the moral and democratic obligation to set the budget on behalf of the people who elected them.
- 10.1 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 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 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 get the budget through, 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 section 151 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:
 - To identify composite amendments (amendments that have cross party-support) and for all Members to vote for these amendments;
 - When it comes to the substantive vote, for Members who support the proposals (with the composite amendments) to vote for the proposal;
 - 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;
 - In the event of the Executive failing to agree on a recommendation to Budget Council, the reference in the preceding sub-paragraphs to Executive proposals" shall read as referring to the recommendations of the Director of Finance as presented in the report to Executive 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.
 - (f) 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 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 Mayor's proposals.

Conclusion

11. The Council has a duty to set a lawful budget before 11 March 2023.

11.1 Each Member has an obligation to facilitate, rather than frustrate, the setting of a lawful budget in time.

11.2 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.

11.3 It is also possible that, if there is a prolonged delay, the Secretary of State may exercise his powers under section 15 of the Local Government Act 1999 to step in and make the decision himself or ask another person to do so, which would damage the Council's governing reputation.

11.4 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 Executive recommendations to vote for the recommendations and those who do not support the Executive 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.

What decision(s) are being recommended?

The report requests that Council:

- Notes the legal, financial and practical consequences of failure or delay in setting the Council Tax position.

Rationale for the recommended decision(s)

- The Council has a legal duty to set a lawful budget in time.
- Members jointly and severally (individually and collectively) have a fiduciary duty to Council Tax payers. This means they have a duty to facilitate, rather than obstruct, the setting of a lawful budget, a process that requires flexibility and compromise
- Failure to set a lawful budget in time will lead to loss of revenue, significant additional administrative costs as well as reputational damage.
- Failure to set a budget may lead to intervention from the Secretary of State under section 15 of the Local Government Act 1999.
- It may give rise to personal liability for individual Members for misfeasance in public office, negligence or breach of statutory duty.

Other potential decision(s) and why these have not been recommended

Not applicable.

Impact(s) of the recommended decision(s)

Legal

The Council is required under legislation to set a balanced budget for each year. The Medium Term Financial Plan and revenue and capital budgets form part of the Council's

policy framework, as set out in its constitution. The approach outlined within the document will enable the Council to operate within the resources available and continue to meet its many statutory duties.

Elected members (individually and collectively) have a fiduciary duty to local taxpayers and so duty to facilitate, rather than frustrate, the setting of a lawful budget, and not to do so would bring damaging legal, financial, operational, and reputational consequences for the Council, and precepting authorities such as the police, fire service and local parish councils. It may also give rise to personal liability for individual members for misfeasance in public office, negligence, or breach of statutory duty, should they be found to be purposely failing to set a lawful budget.

Strategic priorities and risks

The proposed approach will ensure a positive impact on the strategic risk that the Council fails to achieve a balanced budget. The proposed approach also aligns with legal requirements around consultation and assessing the impact of proposals. It therefore impacts positively on the risks that the Council could fail to achieve good governance or comply with the law.

Human Rights, Equality and Data Protection

The Council must ensure that, in line with the Public Sector Equality Duty, that any budget saving proposals, other budget proposals, or proposed Council Tax increases thought to impact on those with protected characteristics are assessed, mitigated where possible and/or justified. As such impact assessments for specific proposals and the proposed Council Tax increase will be completed prior to consideration by the appropriate decision-making body, where required.

Financial

The financial implications are contained in the body of the report.

Actions to be taken to implement the recommended decision(s)

Action	Responsible Officer	Deadline

Background papers

Body	Report title	Date

Contact: Helen Seechurn, Director of Finance (S151 Officer)
Email: helen_seechurn@middlesbrough.gov.uk

Contact: Charlotte Benjamin, Director of Legal (Monitoring Officer)
Email: charlotte_benjamin@middlesbrough.gov.uk