

<b>REPORT TO:</b>	<b>EXTRAORDINARY COUNCIL</b> <b>16 December 2020</b>
<b>SUBJECT:</b>	<b>Response to the 2<sup>nd</sup> Section 114 Report issued on the</b> <b>2 December 2020</b>
<b>LEAD OFFICER:</b>	<b>Lisa Taylor, Director of Finance, Investment and Risk and</b> <b>Section 151 Officer</b>
<b>CABINET MEMBER:</b>	<b>Councillor Hamida Ali, Leader of the Council</b> <b>Councillor Stuart King, Cabinet Member for Croydon</b> <b>Renewal</b>
<b>WARDS:</b>	<b>All</b>
<b>FINANCIAL IMPACT:</b>	
This report confirms that the Council continues to be unable to deliver a balanced budget for the 2020/21 financial year and will continue to be unable to until such time as it receives external financial support in the form of a capitalisation direction with the Ministry of Housing, Communities and Local Government.	

## **1. RECOMMENDATIONS**

Council is recommended to:

- 1.1 Accept the views contained in the second Section 114 report issued by the Director of Finance, Investment and Risk, Section 151 Officer (Chief Financial Officer - CFO) on 2 December 2020 under Section 114 (3) of the Local Government Finance Act 1988 included at appendix 2 to the report;
- 1.2 Note the latest forecast overspend for 2020/21 of £66m;
- 1.3 Note that the Council cannot balance its budget in 2020/21 without external support and therefore continues to seek a capitalisation direction with the Ministry of Housing, Communities and Local Government;
- 1.4 Note that if the Council cannot balance the budget at the end of this 21 day period detailed in Section 114 (3) of the Local Government Finance Act 1988, or after the date of the Extraordinary Council meeting whichever is earlier then it will be necessary for the Director of Finance, Investment and Risk to issue a third Section 114 report which will need to be responded to within a further statutory 21-day period, as detailed in the Act; and
- 1.5 Agree that irrespective of whether the Council's Chief Finance Officer issues a third "Section 114" report, the spending control panel in operation under the current Section 114 report shall continue in the manner detailed in this report until such time as the Council may later determine.

## **2. EXECUTIVE SUMMARY**

- 2.1 This report asks Members to consider and accept the views contained in the second Section 114 report issued by the Director of Investment, Finance and Risk and Section 151 Officer on 2 December 2020, contained at appendix 2 of this report and agree what action (if any) it proposes to take in consequence of it.
- 2.2 The report reiterates that the Council will not be able to balance its budget in the 2020/21 or over the Medium Term Financial Strategy Period (2021/24) until such time as it receives external support in the form of a capitalisation direction request from the Ministry of Housing, Communities and Local Government (MHCLG).

## **3. BACKGROUND**

- 3.1 On 11 November 2020, the Council's Director of Finance, Investment and Risk and Section 151 officer, also known as the Chief Finance Officer, issued a "Section 114" report, a copy of which is attached at appendix 1.
- 3.2 Such reports are issued by Chief Finance Officers of Local Authorities in accordance with their responsibilities under the Local Government Finance Act 1988. Section 114(3) of that Act states that:
- 'The chief finance officer of a relevant authority shall make a report under this section if it appears to him that the expenditure of the authority incurred (including expenditure it proposes to incur) in a financial year is likely to exceed resources (including sums borrowed) available to it to meet that expenditure.'*
- 3.3 The views contained in that report were considered at an Extraordinary Meeting of the Council on 1 December 2020. At that meeting, Members resolved to agree with the Chief Finance Officer's views and agreed a further £0.5million in-year savings. However, Members also noted that as expenditure remained forecast to significantly exceed resources available, it would not be possible for the Council to deliver a balanced budget in the 2020/21 financial year until such time as it receives external support.
- 3.4 The Extraordinary Council Meeting on 1 December marked the end of the 21-day period available to the Council to seek to remedy its forecast overspend following the publication of the first Section 114 report. Following the Extraordinary Council meeting, the Chief Finance Officer remains of the professional opinion that the Council's forecast expenditure will significantly exceed the resources available to it and as such, the Council remains unable to deliver a balanced budget for the 2020/21 financial year. On that basis, the Chief Finance Officer issued a second Section 114 Report on 2 December 2020.

#### 4. THE SECOND SECTION 114 REPORT

- 4.1 In issuing a second Section 114 Report, the Chief Finance Officer took into consideration the additional savings that were agreed by Council in response to the first report and the application to the Ministry of Housing, Communities and Local Government (MHCLG) for a capitalisation direction, which is planned to be submitted to on 15 December 2020.
- 4.2 However, the Chief Finance Officer also took into account that the additional savings that had been agreed were not sufficient to achieve a balanced budget forecast in the current year and that, while discussions with MHCLG have been positive, there was no certainty that any application for a capitalisation directive would be agreed.
- 4.3 The table below details the Council's latest budget forecast, including all identified in-year savings. It also shows that since the issuing of the second Section 114 report, the budget remains unbalanced and that without the approval of a capitalisation direction the budget will remain unbalanced and further Section 114 reports will need to continue to be issued.

Table 1 Budget movements 2020/21

	£'m	£'m	£'m	£'m
	1.4.20	in year	total	Movement from original budget
2020/21 net cost of services	313.00			
Forecast Overspend q1		49.00		
Total Forecast spend			362.00	49.00
In year savings identified – Sept 2020		-27.90		
Total Forecast Spend			334.10	21.10
Correction of in year Savings		17.70		
Total Forecast Overspend			351.80	38.80
Forecast overspend q2		66.70		
Total Forecast Spend			379.70	66.70
Savings identified since issue of S114		-0.50		
Total Forecast Overspend			379.20	66.20
Capitalisation Direction required		-66.20		
2020/21 net cost of services			313.00	

- 4.4 On 2 December 2020, the Chief Finance Officer concluded, in consultation with the Head of Paid Service and the Council's Monitoring Officer, that the Council's forecast expenditure continued to have a significant unfunded financial deficit this year and that it was her duty to issue a second Section 114

report to all Members of the Council and to the Council's external auditors, Grant Thornton.

4.5 Having issued the second Section 114 report, Members are required to:

- i) Consider the report at a meeting of Full Council within 21 days of the report being issued;
- ii) At that meeting, Council must decide whether it agrees or disagrees with the views contained within the report; and
- iii) Agree what action (if any) it proposes to take in consequence of it.

4.6 Having received the second Section 114 report on the 2 December 2020 the Council has been prohibited from incurring any new expenditure during the period between the issuing of the report and the date on which this report is considered at an extraordinary meeting of Council, this is a maximum period of 21 days.

4.7 This prohibition on new expenditure continues to be managed through a daily Spending Control Panel, which considers if requests for new expenditure meet the strict criteria for essential spend that have been set by the Chief Finance Officer in compliance with the exceptions set by the Local Government Finance Act 1988.

4.8 The only expenditure allowed during the Section 114 period must meet the following criteria:

- i) existing staff payroll and pension costs;
- ii) expenditure on goods and services which have already been received;
- iii) expenditure required to deliver the council's provision of statutory services at a minimum possible level;
- iv) urgent expenditure required to safeguard vulnerable citizens;
- v) expenditure required through existing legal agreements and contracts;
- vi) expenditure funded through ring-fenced grants; and
- vii) expenditure necessary to achieve value for money and / or mitigate additional in year costs.

4.9 And, the only grounds for approval of **new** expenditure are:

- i) To prevent the situation that led to the report being issued from getting worse;
- ii) To Improve the situation; or
- iii) To prevent the situation from recurring

4.10 Members should note that the issuing of a second Section 114 report is a reflection of the seriousness of the financial issues that the Council faces. The report still has a general fund overspend forecast in excess of £66m, which is significantly greater than the £7m that the Council currently has available in reserves.

## **5. NEXT STEPS**

- 5.1 Section 115 of the Local Government Finance Act requires Members to consider what actions, if any, it proposes to take in consequence of the Section 114 Report that was issued on the 2 December 2020
- 5.2 The Extraordinary Meeting of Council on 1 December 2020, held in response to the first Section 114 report, agreed a further £0.5m of in-year revenue budget savings and £0.5m of in-year capital budget savings. The meeting also heard that additional savings would be generated as a result of the prohibition of new expenditure, though it is currently too early to accurately forecast what level of savings this will achieve.
- 5.3 The Council has also identified a number of further measures that it will take to improve its financial position over the next three years in ‘the Croydon Renewal Plan’, which was agreed by Council at its meeting on 30 November 2020. As there is now less than one third of the financial year remaining in which to deliver a balanced budget, the savings delivered by the Croydon Renewal Plan will not be made in time to help achieve a balanced budget in this financial year.
- 5.4 To that end, it continues to not be possible to make savings recommendations to Council that will allow it to deliver a balanced budget in the 2020/21 financial year. As a consequence, the Chief Finance Officer will be required to give consideration to issuing a third Section 114 report following this Extraordinary Meeting of Council, as the Council will remain unable to balance its budget for the financial year. Any further Section 114 report would serve to re-impose the prohibition of expenditure (other than as may be authorised in accordance with the controls referred to in paragraph 4.8 and 4.9) and would start another 21-day prohibition period.
- 5.5 Irrespective of whether the Council’s Chief Finance Officer issues a third Section 114 report, Members are recommended to agree to continue operating under the spending control restrictions described in paragraphs 4.7 for the foreseeable future and until such time as the Council’s financial position has improved adequately enough to allow them to be lifted.

## **6. THE 2021/22 GENERAL FUND BUDGET**

- 6.1 ‘The Croydon Renewal Plan’ report considered by Council at its meeting on 30 November 2020 detailed the Council’s ongoing financial challenge for the period 2021-24.
- 6.2 That report detailed a number of additional savings to be made to improve the Council’s financial position and its effectiveness over the next three years, but also confirmed that the Council will not be able to deliver a balanced budget during that period without external support.
- 6.3 The Council is seeking to remedy that position through a capitalisation direction agreement with MHCLG.

- 6.4 Given that the projected maximum shortfall for the 2021/22 general fund budget is currently £64.2m, Members should be aware that if the budget cannot be balanced and should the capitalisation direction not be agreed by February 2021, the Chief Finance Officer will have to issue a further Section 114 report at that time.

## **7. CONSULTATION**

- 7.1 The second Section 114 report was issued to all Members of the Council and the Council's external auditor, Grant Thornton, on 2 December 2020. This followed consultation with MHCLG, CIPFA and the Council's Head of Paid Service and Monitoring Officer.
- 7.2 The Croydon Renewal Plan, which contains details of the proposed additional in year savings, was considered at both the Cabinet meeting on 25 November 2020 and the meeting of Council on 30 November 2020.

## **8. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS**

- 8.1 This report details that the Council cannot currently deliver a balanced budget and will need support in the form of a capitalisation direction from MHCLG to enable a balanced budget to be delivered and the S114 notice removed. Without support the budget will remain unbalanced and the S114 notice will need to remain in place.

Approved by: Lisa Taylor, Director of Finance, Investment and Risk and Section 151 Officer

## **9. LEGAL CONSIDERATIONS**

- 9.1 The Head of Litigation and Corporate Law comments on behalf of the interim Director of Law and Governance that the Local Government Finance Act 1992 section 31A places the Council under a statutory responsibility to set a balanced budget.
- 9.2 As noted in paragraph 3.4 a second Section 114(3) report was issued on the 2 December 2020 as it appears to the Chief Finance Officer *“that the expenditure of the authority incurred (including expenditure it proposes to incur) in a financial year is likely to exceed resources (including sums borrowed) available to it to meet that expenditure.”* As such, a further prohibition period has come into effect and the Council has the duty to consider the second Section 114(3) report in the manner described in paragraph 4.6.
- 9.3 There is no statutory or other legal provision to govern what actions the Council must take in response to the Section 114(3) notice. That is a matter for the Council. The requirement is to meet within a 21 day period beginning on the day upon which copies of the report were served upon Members and decide if it

agrees or disagrees with the views in the report and what action to take in consequence. It is possible for more than one notice to be issued (as was the case in Northamptonshire County Council). However, ultimate responsibility rests with the Council to deliver a lawful budget.

- 9.4 The Section 114(3) report and its consequences are in addition to powers available to the Chief Finance Officer to issue a report to the Council under section 114(2) of the LGFA 1988 or under section 114A of the LGFA 1988 if it appears that the Council has made or is about to make a decision which involves or would involve the council incurring unlawful expenditure, would be unlawful and likely to cause a deficiency on the part of the council or is about to enter an item of account which is unlawful.
- 9.5 In addition, the Council should be aware that the Monitoring Officer has a duty, under section 5 of the Local Government and Housing Act 1989, if it appears that any proposal, decision or omission by the Council would give rise to a contravention by the Council of any enactment or rule of law or any such maladministration or injustice, to prepare a report to the authority with respect to that proposal decision or omission.
- 9.6 There are also powers set out in Part I of the Local Government Act 1999 regarding Secretary of State intervention in a local authority of which the Council should likewise be mindful.
- 9.7 Equally, the Council's auditor has power available under the Local Audit and Accountability Act 2004 (section 31) to issue an advisory note and apply to the High Court for judicial review where a decision or failure to act would have an effect on the accounts of the Council.
- 9.8 In pursuing certain potential courses of action to address its financial position, the Council will be subject to (i) its duties to consult under section 3 of the Local Government Act 1999, and under general principles established by case law, and (ii) its public sector equalities duties. In the case of *WX, R (On the Application Of) v Northamptonshire County Council [2018] EWHC 2178 (Admin)* that Council failed on both these counts when seeking to find budget savings (and in the context of a Section 114 report at that time).
- 9.9 In that case the budget cuts and changes in the delivery of library services following the issue of a Section 114 report were held to be unlawful (and therefore quashed) because the Council had failed to take proper account of consultation responses or consider its public sector equalities duties, even though it was (rightly) motivated to address its budgetary position. Therefore, in making decisions about service-provision, these duties do not fall away in the teeth of the urgent need to take action as a consequence of the new Section 114 report.
- 9.10 Although the new Section 114 report therefore compels the Council to take action, it must do so in light of these duties and in accordance with general principles of public law, including the Council's fiduciary duty to act prudently with public monies entrusted to it, as well as to give due and proper consideration to all relevant factors (disregarding irrelevant factors).

Approved by Sandra Herbert Head of Litigation and Corporate Law on behalf of the interim Director of Law and Governance & Deputy Monitoring Officer.

## **10. HUMAN RESOURCES IMPACT**

- 10.1 It is recognised that issuing a Section 114 notice has consequent implications for the workforce, as the council determines how it plans to reorganise its services.
- 10.2 Any proposals that have a direct staffing impact will be consulted on with our recognised trade unions and individual staff in line with the agreed HR policies and procedures

Approved by: Sue Moorman, Director of Human Resources

## **11. EQUALITIES IMPACT**

- 11.1 In making decisions pertaining to changes in spending and budgets which could impact on service delivery, the Council has obligations under the Equality Act 2010. In particular, the requirement to have due regard to the three aims of the Public Sector Equality Duty (the Equality Duty) in designing policies and planning / delivering services; this is particularly important when taking decisions on service changes. The three aims of the Equality Duty are to:
- a) Eliminate unlawful discrimination, harassment and victimisation;
  - b) Advance equality of opportunity; and
  - c) Foster good community relations between people who share any of the defined Protected Characteristics and those who do not.
- 11.2 The Equality Act lists nine Protected Characteristics: age, disability, race, religion or belief, sex (gender), sexual orientation, gender reassignment, marriage and civil partnership and pregnancy and maternity. Depending on the nature of the decisions or changes, different protected characteristics are likely to be engaged or more impacted.
- 11.3 Whilst the Council must have due regard to the Equality Duty when taking decisions, there is a recognition that local authorities have a legal duty to set a balanced budget. The Council will undertake Equality Impact Assessments to ascertain the potential impact on groups that share protected characteristics. However, where a decision is likely to result in detrimental impact on any group with a protected characteristic it must be justified objectively. This means that the adverse impact must be explained as part of the formal decision-making process and attempts to mitigate the harm need to be explored. If the harm cannot be avoided, the decision maker must balance the detrimental impact against the strength of legitimate public need to pursue the service change to deliver savings. Finances cannot be the sole consideration.

Approved by: Yvonne Okiyo, Equalities Manager

## **12. DATA PROTECTION IMPLICATIONS**

### **12.1 WILL THE SUBJECT OF THE REPORT INVOLVE THE PROCESSING OF 'PERSONAL DATA'?**

**NO**

The Head of Democratic Services and Scrutiny comments that the recommendations of this report do not involve the processing of personal data and as such, there are no data protection implications arising from this report.

Approved by Lisa Taylor, Director of Finance, Investment & Risk and s151 Officer.

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**CONTACT OFFICER:** Lisa Taylor, Director of Finance, Investment and Risk, s151 Officer.

### **APPENDICES TO THIS REPORT**

Appendix 1 - 1<sup>st</sup> Section 114 Report dated 11 November 2020

Appendix 2 - 2<sup>nd</sup> Section 114 Report dated 2 December 2020