

BUDGET SETTING ADVICE NOTE

1. This advice note is written further to the legal implication advice contained in the Cabinet Revenue Budget and Council Tax Levels 2023/24 Report on 22nd February 2023. This is contained in Pages 278 to 284 of the Agenda pack for the Full Council meeting on 1st March 2023. The web link to the Agenda pack is available here ([Public Pack](https://www.croydon.gov.uk/Agenda/Agenda%20Document%20for%20Council%2001%2F03%2F2023%2018%3A30))[Agenda Document for Council, 01/03/2023 18:30 \(croydon.gov.uk\)](https://www.croydon.gov.uk/Agenda/Agenda%20Document%20for%20Council%2001%2F03%2F2023%2018%3A30).

Section 114 Context

2. The Council is still subject to the Section 114 (3) Local Government Finance Act 1988 strict financial control regime following the report of the Corporate Director of Resources (Chief Finance Officer) (in November 2022) that the Council's expenditure is likely to exceed the resources available in the financial year 23/24 and beyond. The Council has significant estimated unfunded financial deficits forecast from 2023/24 onwards.

External Assurance

3. The Government appointed Improvement and Assurance Panel continues to support, advise, and challenge the Council on the delivery of the Croydon Renewal Plan. They also provide assurance to the Secretary of State for Levelling Up, Housing and Communities in relation to the on-going permission for the capitalisation of expenditure to balance the council's budget.

Members obligations

4. Full Council is required to decide on the Council's budget for the next financial year. 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 Paragraphs 2 and 3 above.

5. 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. Members also agree to abide by the Members' Code of Conduct which provides that "... on all occasions: I act lawfully" and "I do not bring my authority into disrepute". These declarations apply to the duty on Members to set a lawful budget.

Executive legal duty

6. The Executive Mayor is required (by law) to prepare the Council's budget proposals which comprises the revenue budget, capital budget, council tax base, council tax levels, borrowing requirements and uncommitted reserves. The Executive has discharged this legal duty by presenting to Full Council for decision a set of proposals which result in a lawful and balanced budget.

Full Council's legal duty

7. Full Council must agree to set the budget and by 11th March 2023. 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.
8. 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 and the Monitoring Officer. Full Council must act in accordance with the Council's statutory duties, common law duties and administrative law principles (See Paragraphs 14.18 – 14.23 of the Cabinet budget report at pages 282 to 283 of the Full Council Agenda pack).
9. Failure to meet the 11th of March 2023 deadline to set a budget will have significant financial, legal, and reputational impact on the Council and its residents. Full Council will be acting unlawfully.

10. 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.
11. 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 GLA. 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 GLA and the GLA would expect Croydon to compensate it for losses of income given that the delay would be entirely of Croydon's making.
12. 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 over £20m in April 2023 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 borough. The Council and Members will be at risk of litigation in these circumstances.
12. 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

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,

taxpayers to avoid unlawful action (i.e., not to set a budget by 11th 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 Full Council meeting and its impact.

Dispute Resolution

13. The law recognises that there can be disputes in agreeing the budget and therefore has built in a dispute resolution process. This is clearly set out in the Budget and Policy Framework Procedure Rules in Part 4.C of the Constitution. A briefing note (copy attached) has already been provided to Members on the budget setting process and timetable.
14. At the 1st meeting of Full Council on 1st March 2023, by a simple majority vote, Members can agree the budget proposals or reject the budget and put forward objections for consideration by the Executive.
15. At the 2nd Meeting of Full Council on 8th March 2023, Members can vote to amend the budget proposal by two-thirds majority. The Council has received only one amendment to the budget proposal (link available here [\(Public Pack\)Addendum, Budget and Council Tax report Agenda Supplement for Council, 01/03/2023 18:30 \(croydon.gov.uk\)](#)) and which has been approved by

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.

Corporate Director of Resources as capable of delivering a balanced budget. If the amendment fails to secure the two-thirds majority vote and falls, Full Council must then proceed to vote on the Executive budget proposals (which in law is the only default position). 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. Members opposing the budget proposals can abstain from voting to ensure the legal duty to set a budget is discharged.

16. The dispute resolution process provides that in the event of an impasse (i.e., no two thirds majority to amend and no majority to approve), the Chief Finance Officer should identify the minimum decisions and resolutions required at the 2nd Full Council meeting to comply with statutory requirements. Once identified, there will be no time limit on the length of the meeting and the Council shall continue to meet until it has reached a final decision on the matter. The Chief Finance 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 is before Full Council as these are all integral to setting the budget and the council tax level.
17. In the event of an impasse (as indicated above), 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 wilful misconduct, Members must work collaboratively (across party divides) to facilitate rather than frustrate the setting of a lawful budget.
18. If any Member's wilful 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

19. The Chief Finance Officer (CFO) 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 11th March 2023 and which invariably will lead to the worsening of the Council's financial position, the CFO may have to issue another Section 114 (3) report. The MO may also have to issue a report under Section 5 Local Government and Housing Act 1989 as Full Council will be acting unlawfully. Therefore, it is imperative that Full Council discharge its legal duty to set a lawful budget.

Secretary of State's intervention

20. As indicated above, the Council is the subject of non-statutory intervention by the Secretary of State through the appointment of an Improvement and Assurance Panel. The failure to act as required by law to set budget and consequently provide statutory services and secure value for money could lead to further intervention³ by the Secretary of State that the council is failing in its best value duty, by issuing directions and possibly appointing commissioners to take over some or all functions of elected Members.

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).

Conclusion

13. It is imperative that Full Council acts lawfully and approves a lawful and balanced budget proposals at its meeting on 1st or 8th March 2023.

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27th February 2023