

## COUNCIL TAX

### a. The Basic Structure of Council Tax

Council tax is a tax on property, with certain personal discounts in specific circumstances. The amount of tax payable depends on the value of property occupied and the number of liable persons resident in the property. The actual payment required may be modified further in relation to means, through entitlement to council tax benefit.

Houses have been valued in eight broad bands, labelled A-H, and the tax rate applying to each band will be determined in accordance with ratios established in the legislation, so that the lowest valued properties (Band A) will pay two-thirds of the tax applying to Band D, and the highest valued properties (Band H) will pay twice the Band D rate.

The normal rate of council tax applies to a household containing two or more liable adults. There is no extra payment required if there are more than two liable adults, but a property with only one liable adult will qualify for a 25% discount.

### b. The Relationship of Grant Distribution to the Council Tax

The system of local government finance is underpinned by an equalisation principle, such that people should pay the same amount of local tax for the same level of services throughout England. This is achieved through the distribution of Revenue Support Grant (RSG).

Non-domestic rates are collected locally at a rate set by the Government, pooled nationally and redistributed to local authorities in proportion to resident population.

RSG entitlement is a fixed sum, which does not vary with local budget decisions about spending levels.

### c. Setting the County Council's Rate of Council Tax

County Councils, Fire Authorities and Police Authorities set their own rates of council tax. In order to achieve this, they receive their own entitlement of RSG and non-domestic rate income.

Kent County Council, Kent Fire and Rescue and the Kent Police Authority determine their spending requirements as normal, including any adjustments with reserves, and then deduct government grant and non domestic rate income to arrive at the amount to be funded from council tax. This sum is divided by the tax base for the whole county to establish their respective tax rates.

These authorities notify the tax rate to each district so that the different authorities' council taxes can appear separately on the individual tax bills. They also demand from each district the precept amount to be paid from the council tax collection fund, calculated by multiplying the district's tax base by the total tax rate for the county.

Although the various authorities set separate tax rates, taxpayers will receive a single bill. Total tax bills will depend, therefore, on district council budget decisions as well as those of the other authorities. Individual bills will vary, depending not only upon the valuation band of the property, but also on any entitlement to personal discounts or council tax benefit, as well as any local parish precept.

## SECTION 2

**ANNUAL BILL**

- 2.1 Council tax is property based, each billing authority having a council tax record for each domestic unit shown in the Property Banding List issued by the Valuation Officer. Bills take account of personal discounts in respect of those properties for which the Authority is satisfied that there is an entitlement to personal discount.
- 2.2 It is the responsibility of the billing authority to take reasonable steps to identify those properties where there is entitlement to a personal discount, e.g. unoccupied properties, those with only one adult resident, or where there are individuals in the discount disregard categories who do not add to the Council Tax bill. If the Authority is not satisfied that there is entitlement to personal discount, it should bill for 100% council tax, but the reasons for refusal must be capable of being substantiated at an appeal.
- 2.3 The differential amounts of council tax for properties in each of the eight property value bands (Bands A to H) are determined by the multipliers set out in the legislation as amounts related to the tax set for Band D as detailed below:-

**Ratios  
of Tax**

| <b><u>Band</u></b> | <b><u>Range of Values</u></b>                | <b><u>Bills</u></b> |
|--------------------|--|---------------------|
| Band A             | £40,000 or less                              | 6/9                 |
| Band B             | more than £40,000 but no more than £52,000   | 7/9                 |
| Band C             | more than £52,000 but no more than £68,000   | 8/9                 |
| Band D             | more than £68,000 but no more than £88,000   | 1                   |
| Band E             | more than £88,000 but no more than £120,000  | 11/9                |
| Band F             | more than £120,000 but no more than £160,000 | 13/9                |
| Band G             | more than £160,000 but no more than £320,000 | 15/9                |
| Band H             | more than £320,000                           | 2                   |

The Authority's tax base is calculated in terms of Band D by the number of properties in each band from Band A to Band H and converting the total in each band to a Band D equivalent. The tax base for the area and part area of Dartford was set by the Council at its meeting on 15 December 2008 and is shown on page MD3 of this report.

- 2.4 Precepting authorities are required by regulations to provide information on precepts by 1 March, in order that billing authorities can set their council tax before 11 March.
- 2.5 The amount of council tax is set as an annual amount, for each valuation band, due in respect of a financial year commencing on 1 April. The annual debits for individual council taxpayers are taken directly from the amount set for the property value band in the area where the taxpayer's dwelling is located, but may be subject to one or more of the following deductions:
- (a) Disabled Person's reduction
  - (b) Personal discount of 25% or 50%
  - (c) Second home discount of 10%
  - (d) Council tax benefit.
- 2.6 Once the council tax resolution has been passed, bills are printed on the assumption that people shown in the Council tax records as council taxpayers will be liable for the whole year's charge. If the council taxpayer's liability is subject to a reduction for disabled person's relief or a discount, it is assumed that the reduction or discount will continue throughout the year. If there is entitlement to council tax benefit, it is assumed that benefit will continue at the same level throughout the year. It is the responsibility of the taxpayer to notify the authority of any change, although the Council must act if information comes to light which the Authority believes results in a change of circumstances for the individual.
- 2.7 Initially, only one bill is issued to each household, addressed to the person or persons determined as the council taxpayer for that property. Council tax bills may be addressed to one or more named individuals or, if the name of the liable person cannot be identified, the bill may be addressed to "The Council Taxpayer".
- 2.8 People who have been disregarded for the purpose of personal discount may still be responsible for paying council tax if they satisfy the test for liability, i.e. the person who comes highest in the liability list in Section 6 of the Local Government Finance Act 1992. Therefore bills (with any appropriate discount allowed) must be issued to such people, where they are the liable person. For example, a property owned and occupied by a student with a second, non-student, resident attracts a personal discount of 25%. As resident owner, the student will be the liable person for council tax, in this case at 75% of the amount for the property value band, and should be billed accordingly.
- 2.9 Wherever possible, entitlement to council tax benefit is calculated as part of the annual billing run, so that bills can be sent net of benefit. This is particularly important for people at or below income support level, who are entitled to maximum benefit of 100% and where a bill without benefit entitlement may cause concern. Where there is entitlement to 100% benefit, a bill will still be issued. Although this will show a zero balance, the bill is necessary to notify the council taxpayer of his or her liability, including the valuation band and whether or not there are reductions for discount, disabled person's reduction, and transitional relief, etc. Unless the taxpayers concerned have this information, it will be more difficult to obtain details about changes

in liability and reductions, which need to be kept up-to-date, to ensure that council tax benefit is not overpaid.

- 2.10 An annual council tax bill issued at the beginning of the year will be payable by ten monthly instalments. Authorities may offer alternative arrangements for bills to be paid by more, or by fewer, instalments, but taxpayers may insist on the right to pay by ten instalments. In all cases, enforcement will be related to whether a person has defaulted on any payment due based on a ten-monthly payment cycle. Whilst instalment details must be shown on every bill, this does not prevent authorities from inviting payment in advance by a single lump sum, or in two halves. Regulations will not permit payment to be demanded any earlier than 14 days after the issue of the bill and a minimum of 14 days' notice must be given of the first monthly instalment.
- 2.11 Requests from one person to pay the bill on behalf of another, as often occurs where someone is handling the affairs of an elderly relative, will be accepted. There is no reason why such requests should not be met, but if a bill is sent to the person volunteering to pay, there is still an obligation to send a bill directly to the actual council taxpayer, since regulation 18 of the Administration and Enforcement Regulations (SI 1992/613) requires the billing authority to serve a demand notice on every liable person. The notice sent to the actual taxpayer, however, may carry a message to the effect that someone else has arranged to make payment. In these cases, if the council tax is not paid, it will be necessary to inform the actual taxpayer accordingly and to apply any enforcement action only against the liable person.

## LEGAL CONSIDERATIONS FOR MEMBERS

### 1. Introduction

- 1.1 It is important that Members are fully aware of the legal implications of the Council Tax making process, when they consider the Budget Report. The situation is very complex and it is necessary to provide formal and full advice to all Members of the Council.

### 2. General Position

- 2.1 The first and overriding legal duty on Members is their fiduciary duty to weigh the needs of service users against the interests of local taxpayers. In planning the annual budget, Members are under a fiduciary duty to act prudently, responsibly, in a businesslike manner and, in their view, in a way which constitutes the best interests of the general body of local taxpayers. In deciding upon expenditure, the Council must fairly hold a balance between recipients of the benefits of services provided by the Council and its local taxpayers. Members should note that their fiduciary duty includes consideration of future local taxpayers as well as present local taxpayers.
- 2.2 There is a general requirement in administrative law that a local authority decision must be rational, must be authorised by law and must take account of all relevant considerations, whilst ignoring any irrelevant ones (the Wednesbury Principles). The extent to which election promises or prior committee decisions may constitute a relevant consideration is dealt with in Section 8 below.
- 2.3 An authority commits an illegal act if it acts beyond, or in abuse of, its statutory powers or in breach of its fiduciary duty. It will also act illegally if it fails to take relevant considerations into account or acts in “outrageous defiance” of reason. The local government surcharge provisions were abolished by the Local Government Act 2000.

The Section 2 ‘well-being’ powers in the Local Government Act 2000 (the 2000 Act) contain no restriction or limitation on the amount of money a local authority can spend. Local authorities are able to fund activities (by any means considered appropriate) of different groups and bodies as well as invest in such activities, if the local authority considers that this expenditure contributes to the economic, social or environmental well-being of the local area.

The Section 2 powers can be used instead of existing, more specific, powers, but the Council is still bound by any prohibition, restriction or limitation on those powers. They may also be used, where the local authority does not yet have its community strategy in place.

### 3. Obligation to Make a Council Tax

- 3.1 The legal significance of the Annual Budget derives from the Council's duty under Section 32 of the Local Government Finance Act 1992 (the 1992 Act) to calculate the aggregate of:-
- (a) the expenditure it estimates it will incur in the year in performing its functions in the year (including an allowance for contingencies),
  - (b) the payments it estimates it will make in the year in defraying expenditure already incurred and
  - (c) expenditure it will incur in funding costs before a transfer of funds is made from the Collection Fund

and then deduct such sums as will be paid into the General Fund, i.e. income. Calculations made under this section must be made before 11 March in the preceding financial year.

- 3.2 In order to fulfil this duty, the Council must prepare detailed estimates of its expenditure for the coming year and of the resources which will be available to meet this expenditure. Account must be taken of any deficit brought forward from a previous year and the amount needed to cover contingencies. The resources include income from rents, fees and charges and any available balances. All of these issues must be addressed in the budget report. The estimation of the detailed resource and expenditure items is the main reason for the budget process. The budget must balance, i.e. proposed expenditure must be met from proposed income from all sources, with any shortfall being the precept on the Collection Fund. In addition, there are the following specific requirements.
- 3.3 Section 30(6) of the 1992 Act places a duty on all charging authorities to make a Council Tax for the financial year on or before 11 March of that year, but not before the earlier of 1 March or the date of issue of the last precept capable of being issued to it for the financial year for which the amount is set.

The 1992 Act does not invalidate a Council Tax made after this date. Failure to make a lawful Council Tax on or before 11 March could have serious financial results for the Council and make the Council vulnerable to an Order from the Courts requiring it to make a Council Tax. Another effect of the 1992 Act is to place the same burden as under Community Charge upon any Council and its Members who are unable to agree on its Council Tax. A combination of legal and practical factors create the timescale, which is as follows:

- (a) The Council can only borrow against known income. There are three main sources of income:
  - (i) Transfers from the Collection Fund
  - (ii) Government Grants; and
  - (iii) Rents, Fees and Charges

- (b) Transfers from the Collection Fund become due only following the date on which the Council approves a valid resolution to make a Council Tax. The Council cannot borrow against an anticipated Council Tax.
  - (c) The Council is under a fiduciary duty to local taxpayers to manage its financial affairs according to law in a reasonable and prudent manner.
- 3.4 Section 151 of the Local Government Act 1972 places a general duty on local authorities to make arrangements for "the proper administration of their financial affairs'.
- 3.5 Information must be published and included in the Council Tax demand notice. The Secretary of State has made regulations which require charging authorities to issue demand notices in a form, and with contents, prescribed by these regulations.
- 3.6 There is also a duty under Section 65 of the 1992 Act to consult persons or bodies appearing to be representative of persons subject to non-domestic rates in each area about proposals for expenditure (including capital expenditure) for each financial year.

The non-domestic rate poundage is set by central government and they do not consider it a matter for consultation at a local level. It is the government's view that ratepayers are a major consumer of local authority services and contribute a substantial proportion of local authority revenue through non-domestic rates. They have a wider interest through their capacity as employers, as well as other concerns.

Consultation under Section 65 of the 1992 Act is intended to provide a focus for a constructive and continuing dialogue between authorities and representatives of non-domestic ratepayers on all these matters. The emphasis of the system is on ensuring that consultation takes place from the earliest stage in the development of expenditure plans and is not concentrated on the detailed budget proposals at the point at which they are about to be finalised. An authority must consult before it makes the calculation of expenditure referred to earlier.

#### **4. Deficit Budgeting**

- 4.1 A deficit budget - one which does not cover all anticipated expenditure with resources reasonably expected to be available - is unlawful. Any Council Tax which rests on such a budget will be invalid. Councils are constrained to make a Council Tax before all the separate elements, which will constitute available resources or anticipated expenditure, have been identified and quantified fully. Best estimates have to be employed.
- 4.2 Where these best estimates include sums for unallocated savings or unidentified expectations of income, extreme care must be taken to ensure that the estimates are reasonable and realistic and do not reflect an unlawful intention to incur a deficit. It might be appropriate at budget setting time to require regular monitoring throughout the financial year of such estimated savings or income. Prompt action

to reduce spending must be taken, if at any stage it seems likely that a balance between income and expenditure will not be achieved. Court cases have shown that borough newspapers and publicity material, extracts from Members' speeches reported in local newspapers and the text of Council resolutions can all provide evidence of unlawful misconduct within the meaning of the Local Government Finance Act 1982 and might similarly provide evidence of unlawful intention to incur a deficit, if unidentified savings were to be included in the agreed budget.

## 5. **Borrowing**

The Council is permitted to borrow within limits set by the Council in its Treasury Management Strategy Statement, under the framework established by the self-regulating Prudential Code (see Appendix D (iii)).

## 6. **Other Relevant Legislation**

- 6.1 Under Sections 114 (2) and 114 (3) of the Local Government Act 1988 (the 1988 Act), the Chief Financial Officer is required to make a report, if it appears to him that a decision or course of action the Council or an officer has agreed or is about to make is unlawful, or that expenditure is likely to exceed resources available.
- 6.3 The statutory effect of issuing a report is provided for in Section 115 of the 1988 Act and may be summarised as follows:
- (a) The Council must meet within 21 days of the date of a report to consider its contents. The Council must decide whether it agrees or disagrees with the views contained therein and what action, if any, it proposes to take in consequence of it.
  - (b) Beginning with the date of a report and ending with the first business day after the day on which the Council concludes its consideration of it, the Authority must not enter into any new agreement which may involve the incurring of expenditure (at any time) by the Authority.
- 6.4 The first duty of Members is to determine whether they agree with the Chief Financial Officer's report. If Members were to disagree, they would need to set out cogent reasons for so doing. Unless such reasons could be set forward, Members' action in disagreeing with the Chief Financial Officer's views on the basis of his professional judgement would be likely to be held unreasonable and constitute a breach of the Member Code of Conduct.

### Best Value

The term 'best value' no longer features so prominently in the lexicon of local government improvement. It has faded with the emergence of the Comprehensive Performance Assessment (CPA), and the more recent Comprehensive Area Assessment (CAA). Nevertheless, much of the best value regime, introduced in the Local Government Act 1999, is still in force. It provides the statutory basis on which councils plan, review and

manage their performance by ensuring best value efforts are effectively joined up with other local and national initiatives and strategies

#### Local Government Act 2000 (the 2000 Act)

6.5 The 2000 Act has had a fundamental effect on the governance of the Council and in particular has resulted in a change to the working arrangements of Council, with the requirement for a Constitution setting out executive (Cabinet) and scrutiny and overview arrangements. The 2000 Act also provides a power for Councils to promote the economic, social and environmental well-being of their areas and develop community strategies (referred to in para 2.4 above). In addition, the 2000 Act establishes an ethical framework.

### **7. Complaints regarding breaches of the Member Code of Conduct**

7.1 Complaints regarding breaches of the Member Code of Conduct are dealt with by the Council's Standards Committee.

### **8. Legal Status of Political Promises and Documents**

8.1 It is appropriate to consider your position, as an elected body of Members, where some Members may have expressed support publicly for policies which are not policies of the Council.

8.2 Political documents do not represent a commitment on behalf of the Council. To treat any political document as a commitment would be illegal. Where there is a valid choice before Members then, at that stage and only at that stage, Members may take political documents into account.

8.3 All decisions must be taken within the framework of the formal decision making process of the Authority. Members must take into account all relevant matters and disregard all irrelevant ones. Decisions taken at a political meeting, such as a political group meeting, have no status within this process. A Member who votes in accordance with a group decision which has been reached, having regard to relevant factors, and who has addressed their mind independently to those factors and to the decision itself, will be acting within the law.

8.4 The Court, in considering the Westminster Gerrymandering case, took the opportunity to provide guidance to officers and elected Members seeking to keep on the right side of the difficult professional line of maintaining political independence. The Court stated as follows:

8.4.1 *"There is nothing improper in Council Officers attending political meetings of a group of Council Members if invited to do so. Their presence does not convey assent to party political views but gives the opportunity to hear the germination and development of ideas, which may develop into Council policy. That knowledge will both alert them to issues, which they may ultimately have to address professionally and in some cases give "a steer" as to the practicality and propriety of ideas before they become policy.*

- 8.4.2 *It is entirely appropriate for Officers to provide Councillors with information about their local authority and its inhabitants which is available to the Officers and which can be supplied at modest cost.*
- 8.4.3 *In their dealings with Members, Officers may well hear a substantial amount of "Members' speak" i.e. talk that is obviously party political in nature. This does not require the giving of advice or the taking of action by an Officer until such time as it is clear that the aspiration contained in the "Members' speak" is to become policy.*
- 8.4.4 *What Officers should not do is imperil their independence by political partiality, suppress their professional views in the face of political pressure or lend support to policies of a party political or sectional serving character which are not in the interests of the authority's council tax payers as a whole."*
- 8.5 The judgement also sheds light on the balancing exercise to be undertaken by a Council when deciding whether to pursue a particular policy. The Court held as follows:-
- 8.5.1 *"A local authority must exercise its statutory powers in the public interest and for the purpose of which those powers have been conferred.*
- 8.5.2 *Political views, as to the weight to be attached to the various relevant considerations and as to what is appropriate in the public interest in the light of those considerations, may properly influence the exercise of a statutory discretion.*
- 8.5.3 *A decision will not be unlawful merely because some political advantage, such as electoral popularity, is expected to flow from it, so long as the decision is made for a legitimate purpose or purposes. Because at some stage in the evolution of a policy an improper political purpose has been espoused, does not mean that the policy ultimately adopted is necessarily unlawful.*
- 8.5.4 *However, a political purpose extraneous to the statutory purpose can taint a decision with impropriety.*
- 8.5.5 *Where there is more than one purpose:-*
- a) *The decision will generally be lawful provided that the permitted purpose is the true and dominant purpose behind the act. This is so even though some secondary or incidental advantage may be gained for some purpose, which is outside the authority's powers.*
  - b) *The decision will be invalid if there are two purposes - one ultra vires and one intra vires - and the ultra vires purpose is a (even if not the) major purpose of the decision. Accordingly, a decision substantially influenced by a wish to alter the composition of the electorate would be unlawful.*
- 8.5.6 *Where there is some evidence justifying enquiry, the Court will consider whether an apparently lawful purpose e.g. home ownership is merely a colourable device to conceal an illegitimate purpose e.g. electoral advantage.*

8.5.7 *Even if those voting for a particular policy at a Council meeting have perfectly proper reasons in mind, the policy can be tainted by the improper motives of others who have taken part in the formulation of that policy although not actually present to vote. As a matter of law it is possible for a corrupt principal to cause a result through an innocent agent. In the Westminster case, an improper purpose of the Leaders tainted a policy voted upon by other Councillors whose motives were not in question.*

## **CIPFA STATEMENT ON THE ROLE OF THE DIRECTOR OF FINANCE**

### **1 EXECUTIVE SUMMARY**

- 1.1 Over recent years, the modernising agenda has continued to gather pace and bring a steady stream of fresh challenges for councillors and officers alike. Whilst continuous improvement of front-line services remains the ultimate goal there is also a renewed focus on local authorities' underlying structures and processes and an expectation that there will be a sound governance framework and effective approach to financial management underpinning all that an authority does.
- 1.2 The relationship between local and central government is also changing with a growing tendency to link financial freedoms and other powers with the achievement of specific outcomes and targets. In seeking to meet these targets, local authorities are increasingly looking for innovative solutions both in the way services are provided and in their funding. Partnership working with a wide variety of public, private and voluntary bodies is now commonplace and many authorities are setting up companies and getting involved in Public Private Partnerships and Private Finance Initiative projects.
- 1.3 The heightened expectations of service users are also having a considerable impact – the public now demands exemplary standards of behaviour and high quality, good value services. External audit and inspection regimes have also been expanded and given a new profile to monitor progress, assess achievement levels and provide feedback to organisations and their stakeholders.
- 1.4 As authorities strive to meet these challenges and branch out into new areas, the role of the finance director becomes ever more critical – not only in assessing risk and ensuring probity in the use of public money, but also in securing sound financial management and effective controls. In covering this ground the finance director can make an important contribution to the effectiveness of the organisation and help the authority to demonstrate openness and transparency in the way it operates and conducts its business.
- 1.5 At the same time, the finance director has an absolute and overriding responsibility to discharge his or her statutory duties as the authority's 'Responsible Finance Officer' (RFO). In practice this means that the finance director carries a responsibility for managing the totality of the authority's financial affairs in all of its dealings. In addition the RFO has a fiduciary responsibility to local citizens.
- 1.6 To be able to fulfil these statutory responsibilities effectively and to facilitate robust corporate governance, the finance director needs to be at the heart of the authority's decision - making process and play a key role in the organisation – not only to ensure that finance views carry appropriate weight in policy and decision making, but also so that he or she is able to intervene with authority if proper standards are not being met at any time.
- 1.7 In CIPFA's view there are five key roles that are critical to the achievement of a finance director's statutory responsibilities

- maintaining strong financial management underpinned by effective financial controls;
- contributing to corporate management and leadership;
- supporting and advising democratically elected representatives;
- supporting and advising officers in their operational roles;
- leading and managing an effective and responsive financial service.

1.8 It is essential that an authority's organisational and managerial structures facilitate rather than frustrate the fulfilment of the finance director's statutory responsibilities. To ensure that this is the case CIPFA has identified four key requirements that should be observed when considering the position and influence of the finance director within an authority:

- there should be a single finance director in each authority who is a qualified member of a specified accountancy body and is vested with the statutory responsibilities and with the strategic and corporate roles set out in paragraph 1.7;
- the finance director should be a member of the authority's corporate management team<sup>1</sup> to ensure that financial and funding implications are factored into discussions from the outset, and should have a parallel right of access to meetings of the authority's political executive for all discussions that have a financial dimension;
- in order to ensure that there is an appropriate and clearly defined division of responsibilities for the corporate management of an authority, such that no one individual has unfettered powers of decision, the role of the finance director should not normally be combined with the role of the chief executive. Where, in particular local circumstances, authorities decide to combine these two roles, overall governance arrangements should be reviewed to ensure that adequate checks and balances exist in relation to decision making by the chief executive/finance director;
- in order to ensure that the statutory duties are discharged effectively, the finance director should be able to control and influence both the work programme of internal audit in support of those duties and the quantity and quality of staff made available to undertake the relevant internal audit projects.

1.9 CIPFA recognises that it is for each local authority to satisfy itself that its management arrangements and organisational structures are consistent with the law and that they are in line with the principles of good corporate governance. If the guidance set out in this Statement is followed, we believe that it will provide assurance that the finance director's statutory responsibilities can be properly discharged and that – as part of the overall governance framework – there are strong and effective arrangements in place for the management of the authority's

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<sup>1</sup> The corporate management team is defined as the body of individuals at officer level who collectively are responsible for the authority's leadership and strategic direction, defining control mechanisms, supervising overall management and reporting on stewardship and performance.

financial affairs. This in turn will help the authority to ensure that its overall arrangements for supporting the delivery of services are soundly based and effective.

## 2 THE ROLES OF THE FINANCE DIRECTOR

### STATUTORY RESPONSIBILITIES

- 2.1 The overriding duty of the finance director is to fulfil the statutory responsibilities attached to the position. These statutory duties derive from six principal sources as set out in the following paragraphs.

#### Statutory Definition

- 2.2 The statutory definition of the 'Treasurer' was developed by case law in England and Wales. In *Attorney General v De Winton (1906)*, it was established that the Treasurer is not merely a servant of the authority, but holds a fiduciary responsibility to the local taxpayers. This responsibility has been incorporated into the role of the Responsible Financial Officer.

#### Responsible Financial Officer

- 2.3 Section 151 of the Local Government Act 1972 requires that every local authority in England and Wales should "... make arrangements for the proper administration of their financial affairs and shall secure that one of their officers has responsibility for the administration of those affairs".
- 2.4 CIPFA has obtained a legal opinion<sup>2</sup> that the term 'administration' in these statutes means responsibility for managing the totality of the financial affairs of a local authority, in all of its dealings.
- 2.5 The officer appointed as the RFO must, by virtue of section 113 of the Local Government Finance Act 1988 England and Wales, be a member of a specified accountancy body<sup>3</sup>.
- 2.6 The statutory role must be performed by an 'officer' of the authority. Although 'officer' is not defined the legal view is that the terms 'staff' and 'officer' in the Local Government Act 1972 and elsewhere are intended to embrace all employees of local authorities<sup>4</sup>. It is permissible for an authority to procure non-statutory financial management services from an individual on the basis of a service contract.

<sup>2</sup> Eversheds, March 1999

<sup>3</sup> Defined to mean a qualified member of one of the six bodies comprising the Consultative Committee of Accountancy Bodies (CCAB) in the UK and Ireland, that is  
 Chartered Institute of Public Finance and Accountancy  
 The Institute of Chartered Accountants in England and Wales  
 The Institute of Chartered Accountants of Scotland  
 The Institute of Chartered Accountants in Ireland  
 Chartered Institute of Management Accountants  
 The Association of Chartered Certified Accountants.

<sup>4</sup> CIPFA has obtained a legal opinion on this point

## Unlawful Expenditure and an Unbalanced Budget

- 2.7 The RFO's duties in England and Wales were significantly extended by section 114 of the 1988 Act which requires a report to all the local authority's members to be made by that officer, in consultation with the monitoring officer and head of paid service<sup>5</sup>, if there is or is likely to be unlawful expenditure or an unbalanced budget. Section 114(7) requires authorities to provide their Chief Finance Officer (CFO) with 'such staff, accommodation and other resources as are in his opinion sufficient to allow his duties under this section (i.e. s114) to be performed'.
- 2.8 Section 114 has been amended following the introduction of executive arrangements under the Local Government Act 2000 for England and Wales<sup>6</sup>. This change relates only to those authorities operating executive arrangements. The effect of this modification is that the finance director is required to submit section 114 reports to the council in respect of non-executive functions in the same way as was previously the case. However, where the decision may involve unlawful expenditure, a loss or deficiency or an unlawful item of account as a result of the exercise of executive functions then – under section 114A – the finance director must submit his or her report to the executive. He or she must also send copies of the report to every member of the authority, the external auditor and where there is a mayor and council manager/ executive, to the council manager.
- 2.9 The executive must consider the report within 21 days and all action in respect of the report must be suspended until it has been considered by the executive (the 'prohibition period'). After considering the report the executive must provide a report under section 115B to the council, the CFO and the external auditor, explaining what action if any is to be taken and the reasons for that action or for not taking action. This procedure ensures that the authority's auditor has the information to take action in appropriate cases, including service of an advisory notice under section 91 of the 2000 Act, a public interest report or seeking a declaration from the courts as to the legality of the authority's proposed course of action.
- 2.10 CIPFA have produced a guidance note for preparing a section 114 report.

## Local Government Act 2000

- 2.11 The finance director's role in England and Wales has been enhanced under the executive arrangements introduced by the Local Government Act 2000. Under this Act, all principal authorities in England and Wales are required to introduce executive arrangements in the form of a leader and cabinet, an elected mayor and cabinet or an elected mayor and council manager. Smaller shire district councils in England (with a population under 85,000) and any authority in Wales, may adopt 'alternative arrangements' – a streamlined form of committee system.

<sup>5</sup> Since July 2001 in England and Wales the Monitoring Officer cannot also be the Head of Paid Service or the Chief Financial Officer – see schedule 5, Para 24 of the Local Government Act 2000 which inserts a new subsection 1A in section 5 of the Local Government and Housing Act 1989. In Scotland section 5(1) para b of the Local Government and Housing Act 1989 makes it each Council's duty to appoint a monitoring officer (MO) – the MO may be the head of paid service but shall not be the authority's CFO.

<sup>6</sup> The Local Authorities (Executive and alternative arrangements) (Modification of enactments and other provisions) England Order 2001. S1 No 2237. The Local Authorities (Executive arrangements) (Modifications and enactment of further provisions) (Wales) order 2002 w.88.

- 2.12 Under these arrangements, the full council meeting has a statutory role to set the authority's policy framework as well as approving the budget and setting the council tax. The executive (and in the case of the alternative arrangements, the committees) must act within this policy framework and budget and to do otherwise could be ultra virus. Authorities operating executive arrangements can appoint committees to deal with those functions prescribed by regulations which cannot be dealt with by the executive. These 'non-executive functions' are largely regulatory in nature. Councils also have to appoint at least one overview and scrutiny committee to hold the executive to account and a standards committee to promote and maintain high standards of conduct by members and co-opted members.
- 2.13 In addition to their traditional role of advising all members and officers about statutory powers, maladministration, financial impropriety and probity, under executive arrangements the finance director and the monitoring officer have a role in advising whether particular decisions are likely to be contrary to the policy framework or budget. The statutory guidance<sup>7</sup> issued by the Secretary of State under the 2000 Act advises that local authorities will need to ensure that the finance director and the monitoring officer have access as necessary to meetings and papers and that members must consult with him/her regularly<sup>8</sup>. The advice continues that the finance director will have an important role in the management of the local authority in particular by
- contributing to corporate management in particular to the provision of professional financial advice
  - maintaining financial administration and stewardship
  - supporting and advising members and officers in their respective roles
  - providing financial information to the media, members of the public and the community.
- 2.14 The importance of the finance director's role as adviser to councillors is supported by the Member Code of Conduct. The Code requires members to have regard to advice provided by the finance director in any formal report he or she submits under section 114 of the Local Government Finance Act 1988. Breach of the code of conduct is enforced by the Council's Standards Committee and can lead to suspension and/or disqualification of a member.
- 2.15 In recognition of the enhanced role of the finance director (and the monitoring officer) the Secretary of State has made mandatory standing orders to provide that the statutory protection in relation to dismissal currently applied to the head of paid service will be extended to the monitoring officer and the finance director<sup>9</sup>. This means that the finance director (like the head of paid service and the monitoring officer) may not be suspended for more than two months for the purpose of

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<sup>7</sup> New Council Constitutions, Local Government Act 2000 – guidance to English local authorities, chapter 8 – officers' roles under executive arrangements, DETR, October 2000

<sup>8</sup> In Wales the statutory guidance does not include this reference but implies that this should be the case.

<sup>9</sup> The Local Authorities (Standing Orders) (England) Regulations 2001). In Wales the 1999 regulations apply.

investigating misconduct unless it is in accordance with a recommendation in a report made by an independent person.

- 2.16 Finally, where local authorities in England and Wales are operating executive arrangements under the 2000 Act the s151 role is categorised as a non executive function and the finance director as a 'statutory chief officer'. This means that the appointment of the section 151 officer is the responsibility of the council (or one of its committees) and not the executive. The appointment cannot be delegated to the head of paid service or his or her nominee.

#### Accounts and Audit Regulations

- 2.17 The Accounts and Audit Regulations 2003<sup>10</sup> (England and Wales) impose responsibilities on the finance director relating to accounting records and supporting information, control systems and the statement of accounts.
- 2.18 A key feature of the Regulations in England and Wales is the requirement for internal audit. Regulation 6 requires that a 'relevant body shall maintain an adequate and effective system of internal audit of its accounting records and of its system of internal control'.

#### Local Government Act, 2003

- 2.19 The Local Government Act 2003 emphasises the importance of sound and effective financial management and signals the introduction of two new statutory duties that will bear heavily on finance directors.
- 2.20 In relation to capital financing there is a statutory requirement for each local authority to set and arrange their affairs to remain within prudential limits for borrowing and capital investment. Advice on fulfilling this responsibility is set out in CIPFA's Code<sup>11</sup>. The Government also intends to ensure that local government officers (particularly s151 officers) and external auditors have the powers they need to ensure that the legal requirements are complied with in discharging their responsibilities for capital finance.
- 2.21 There is a statutory duty on the finance director to report to the authority, at the time the budget is considered and the council tax set, on the robustness of the budget estimates and the adequacy of financial reserves. This will be a public report. The Secretary of State in England will have powers to specify in regulations a statutory minimum level of reserves that will be used if authorities fail to remedy deficiencies, or run down reserves against the advice of the finance director.
- 2.22 CIPFA updated its occasional paper on reserves and balances in February 2003 to assist finance directors in discharging their responsibilities in this area.
- 2.23 The finance director will also have a key role to play in fulfilling the requirements of the statutory duty set out in the Local Government Act for authorities to keep their finances under review during the year and take action if there is evidence that

<sup>10</sup> Accounts and Audit Regulations 2003 (England) – SI No 533.

<sup>11</sup> *Code on a Prudential Framework for Local Authority Capital Finance*, CIPFA, 2003

financial pressures will result in a budget overspend or if there is a shortfall in income.

- 2.24 In England, the finance director of an authority will have an important role to play in improvement planning, linked to the Audit Commission's Comprehensive Performance Assessment (CPA) regime. In some circumstances, where an authority is deemed to be underperforming, the authority and the finance director will need to be prepared for Government intervention<sup>12</sup> which may involve the transfer of functions or placing the authority into administration or a franchising management. The finance director clearly has a central role to play in ensuring that the authority's financial standing and financial management arrangements are sound and that such interventions are unnecessary. However, if problems do arise that could lead to intervention, the finance director should as a matter of good professional practice report his or her concerns initially to the executive.

### WEDNESBURY PRINCIPLES

- 2.25 Although not a specific responsibility for finance directors alone they – along with the monitoring officer and chief legal officer – should be alert to the 'Wednesbury' rules<sup>13</sup> which emphasise the importance of ensuring that when developing policy all relevant matters are properly considered. The judgement in the case stated that an authority's action in exercise of a statutory discretion would only be regarded unreasonable, in excess of the powers given by Parliament and therefore invalid if:
- in making its decision it took into account matters which it ought not to take into account, or;
  - it did not take into account matters which it should have taken into account, or;
  - even if the two previous conditions were satisfied the conclusion was so unreasonable that no reasonable authority could ever come to it.
- 2.26 These principles apply regardless of whether decisions on policy are taken by individual members or collectively. In order to demonstrate that these principles have been observed it is important that policy decisions and the associated advice are – as a matter of routine – well and clearly documented<sup>14</sup>.

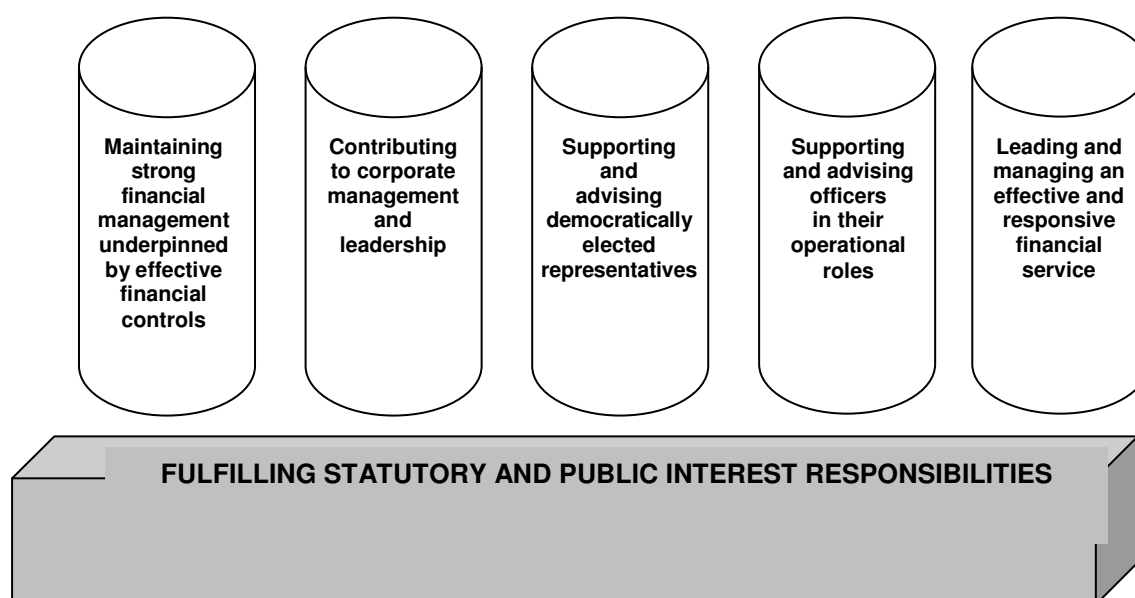
### KEY ROLES

<sup>12</sup> See the ODPM's consultation paper 'Tackling poor performance in local government', August 2002 and 'Government action following the Comprehensive Performance Assessment', ODPM, November 2002.

<sup>13</sup> Associated Provincial Picture Houses v Wednesbury Corporation (1948).

<sup>14</sup> In England and Wales model constitutions under the Local Government Act 2000 require authorities to ensure that (as with the council, its committees and sub committees) all decisions made by members of the executive (either collectively or individually) are based on sound professional advice from officers. All decisions taken by members of the executive (individually or collectively) have to be recorded and published. The decision record has to include the reasons and any relevant interests.

- 2.27 To be able to fulfil their statutory and public interest duties, and to ensure that financial arrangements remain robust and effective, finance directors must make a positive and effective contribution to an authority in five key areas. In effect these represent five discrete, though related, roles as shown in the diagram below.



- 3.28 Each of these five roles is critical to the achievement of the finance director's statutory responsibilities and this needs to be recognised in an authority's organisational structure and arrangements. The finance director should alert the authority to any areas in which arrangements adopted by the organisation may militate against the discharge of his or her statutory responsibilities.
- 3.29 Regardless of an authority's structure it should be remembered that, whilst there can be considerable delegation of authority for financial matters, there can be no delegation of the ultimate responsibility – that rests at all times with the finance director.

## PROHIBITION ORDERS AND JUDICIAL REVIEW – AUDIT POWERS

The Audit Commission Act 1998 (the ACA) confers powers on auditors to take early action to restrain an Authority from acting unlawfully, protecting council taxpayers and other sections of the public against the unlawful application of public funds or a loss or deficiency arising as a result of unlawful action or inaction. The CIPFA Code of Audit Practice gives guidance to auditors on the exercise of their powers. The Code provides that the powers should only be used where the matter is significant either in amount or principle, or both.

### Power to issue a prohibition order - Section 20

Section 20 provides that the auditor may issue a prohibition order if he/she has reason to believe that the body whose accounts are subject to audit or an officer of that body:

- "(a) is about to make or has made a decision which involves or would involve the body incurring expenditure which is unlawful; or
- (b) is about to take, or has taken, a course of action which, if pursued to its conclusion, would be unlawful and likely to cause a loss or deficiency; or
- (c) is about to enter an item of account, the entry of which is unlawful."

Thus an auditor is empowered to issue a prohibition order if he/she has reason to believe that one or more of these three specified grounds exist. It is a power to issue a prohibition order, not a duty. There is a statutory right to appeal against the issue of a prohibition order.

The actions of a committee or sub-committee, authorised to act on behalf of an Authority, are to be treated as the actions of the Authority itself.

The actions of any person (not being an officer of an Authority) authorised to act on behalf of that Authority are also to be treated as the actions of the Authority itself. An example would be a local authority acting as duly authorised agent of the Authority under audit (e.g. a District Council acting as highways agent for the County Council).

So long as the prohibition order has effect, it is unlawful for the Authority or the officer to take or continue to take the course of action or, as the case may be, enter the item of account to which the order relates. The local authority (but not an officer) is given a right of appeal to the High Court against a prohibition order. No other person may appeal against it, although of course it may have effects on those with whom the Authority might otherwise have dealt. An auditor may consider these effects in deciding whether to exercise his/her power to issue the order.

### Power to apply for judicial review - Section 24 ACA

Section 24 provides that the auditor may make an application for judicial review with respect to any decision of a body whose accounts are subject to audit or any failure by that body to act, which (in either case) it is reasonable to believe would have an effect on the accounts of that body. There is no time specified within which the effect on the accounts

may arise. This is not limited to an effect arising within the current financial year.

Thus an auditor is empowered to make an application for judicial review of any decision of, or failure to act by, an Authority which it is reasonable to believe would have an effect on the accounts of that Authority. It is a power to apply for judicial review, not a duty.

The scope of the power to seek judicial review is very wide. In practice this power is likely to be of more utility to auditors than the power to issue prohibition orders.

Relationship between the power to issue a prohibition order  
and the power to apply for judicial review

In general, any decision or course of action which could be the subject of the issue of a prohibition order is also capable of being challenged by an application for judicial review. The converse is not true.

Where a prohibition order is issued, the action is taken by the auditor, with the body under audit having a right of appeal to the High Court. It is likely that the auditor would only intervene directly by issuing a prohibition order in a clear case of an Authority acting unlawfully or proposing to do so.

Where difficult questions of law are involved, it will usually be more appropriate to make an application for judicial review. The issue of a prohibition order involves a finding of unlawfulness by the auditor. In an application for judicial review the auditor invites the High Court to give a legal ruling in the public interest.

BACKGROUND PAPERS

Audit Commission Act 1998

Local Government Finance Act 1992

Local Government Act 1999

Local Government Finance Report (England) 2009/2010 and related documents

Kent County Council Precept 2009/2010

Kent Police Authority Precept 2009/2010

Kent Fire and Rescue Precept 2009/2010

Parish Precepts 2009/2010

The Levying Bodies (General) Regulations 1993

The Local Authorities (Alternation of Requisite Calculations) (England) Regulations 2003

Internal Drainage Boards (Finance) Regulations 1990