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13 December 2012

Dear ██████████

East Herts District Council – Objection to 2011/2012 accounts: Broadband / Telephone Expenses

1. I am writing in response to your letter of 18 September 2012, in which you made an objection to the audit of the 2011/12 accounts of East Herts District Council. This letter gives you my decision and statement of reasons on the main points of your objection.

2. Essentially this concerned the efficiency, probity and legality of amounts paid by the Council in relation to members' expenses for telephones/broadband etc. In brief, my view is that some part of the payments, mentioned by you in your letter, were made by the Council unlawfully and that there were failings in the processes and procedures followed. These are matters which I have raised formally with the Council. I have decided, however, that in light of the various factors set out below in paragraphs 16 to 29 it is not appropriate for me to take further audit action, in particular seeking a court declaration under section 17 or a public interest report under section 8 of the Audit Commission Act 1998.

Background

3. It appears that up until May 2011, the Council directly paid for telephone rental lines and broadband services for members. They were responsible for the costs of their own telephone calls.

4. From May 2011 onwards, under a new IT protocol, members were paid a fixed sum of £35 per month towards the cost of telephone rental, broadband and "consumables" (ie; printers, paper etc.). The Council has claimed this was not an allowance under their Members Allowance Scheme, rather it was a payment for expenses.

5. The Council continued, despite payment of the fixed sum, to pay for the telephone rental lines and broadband costs directly to providers. In addition, the Council paid in some cases, the cost of telephone calls. The Council stated to the press that that there had been a "grace period", ending in November 2011, effectively allowing double payment but in order to avoid unwarranted disruption to members. It appears that payments continued beyond that announcement to June 2012.

6. In February 2012, the Independent Remuneration Panel carried out its annual review

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of the Council's allowances scheme. It was noted in the minutes that: "The IRP was advised of the separate IT expense payment to Members of £35 per month. The IRP noted this expense payment".

7. As far as I am aware, no sums have been recovered from Council members.

The Law

8. The first question to ask is under what power the Council considers they made the particular payments. The Council have argued that they were relying upon section 111 Local Government Act 1972 (power to do anything that is conducive or incidental to the discharge of the Council's functions). The difficulty with this argument, in my view and on advice, is that, whilst on the face of it payment of IT expenses for members will meet this test, in support of any number of the Council's wider functions, section 111 is not meant to apply in areas that are already heavily prescribed. The power in section 111 is expressly limited, it being said that it is "subject to the provisions of [the Act] and any other enactment".

9. The prescription in this area arises from section 18 of the Local Government and Housing Act 1989, under which the Secretary of State may make regulations authorising the payment of a basic and other types of allowances and expenses where they are "necessarily sustained or incurred in the carrying out" of specified duties.

10. The relevant Regulations are the Local Authorities (Members' Allowances) (England) Regulations 2003 ("the Regulations"). These provide for authorities to put in place a scheme whereby a basic allowance is paid. The Regulations are silent as to what this allowance covers – as might be expected, it is payable without conditions ie: no receipts are required.

11. Whilst the Regulations permit the scheme to provide other kinds of allowances, eg: carers, travel and subsistence allowance), which may be based on expenses and reimbursement, there is no general power for the payment of miscellaneous expenses.

12. Before a relevant local authority makes or amends a scheme, it must have regard to the recommendations made by an independent remuneration panel (see regulation 19(1)).

13. Section 18(5A) of the 1989 Act requires authorities to have regard to statutory guidance in making or operating a scheme. There is "Guidance on Regulation for Local Authority Allowances" issued by the Secretary of State. Paragraph 10 states that the basic allowance is intended to "intended to recognise the time commitment of all councillors, including such inevitable calls on their time as meetings with officers and constituents and attendance at political group meetings. It is also intended to cover incidental costs such as the use of [councillors'] homes".

14. The East Herts Council Members' Allowance Scheme revised May 2011 makes no mention of any expenses payable over and above the set allowances.

15. Relevant to this matter is the case of *Grubb v Pricewaterhouse Coopers* (2000) The Times 17 October 2000. In this case, the High Court held that limits on payment under sections 174/4 of the Local Government Act 1972 (a different provision permitting payment of travel expenses) only applied to members and not to payments made by the council direct to third parties. This is relevant here insofar as the Council was paying for the broadband/telephone directly to providers.

Consideration

16. Further to the Grubb case above, I consider it likely that the payments to BT and Orange were lawful. The Council has relied upon section 111 of the 1972 Act incidental to a broad range of Council functions. As the payments are to third parties, section 111 is not limited in its application.

17. It could be argued that the payments were unlawful on the basis of irrationality on account of Councillors already being paid the fixed £35 sum. Certainly, in my view, one or other set of payments is unlawful – either the direct payments on grounds of irrationality (or failure to take into account the double payment) or the £35 for the reasons given below. In my view, the better way to approach this is that the direct payments were lawful, as these were a continuation of the previous position.

18. The next question I asked myself was whether it was lawful for the Council to have paid the £35 to members at the same time and in circumstances in which the Independent Remuneration Panel (“IRP”) had not prior approved these payments.

19. The Regulations do not provide for a payment of a flat rate for IT expenses over and above the basic allowances. As such, in my view the payments are neither lawful as being made under the Council’s scheme (which in any event they are not, as not expressly mentioned) or placing reliance on section 111 of the 1972 Act. Section 111 is in my view limited in its application for the reasons given above (the detailed provisions of the 1989 Act and the Regulations represent the full scope of provision intended by Parliament – section 111 may not be used to circumvent this).

20. As such, in my view the £35 payments to all councillors including dual hatted councillors were unlawful. The Council has responded that: “...it could be considered unreasonable for the Council to have made payments to members to enable them to purchase IT services and at the same time to have made payments directly to service providers. The Council suggests that arguments could be made as to why both of these types of payments could be considered to be conducive or incidental to the discharge of the Council’s functions. However, the Council accepts that using one of these types of payments to make comprehensive arrangements would have been more appropriate than using both types and so creating the potential for doubt as to whether there had been some duplication.”

21. Given that these payments were made outside of the scheme, it seems irrelevant to me, for these purposes (although see below) that the IRP were not involved.

22. The next question was whether, the Member’s Allowance Scheme was effectively amended by the introduction of the £35 payment without the IRP having been consulted? In my view, the scheme has not been amended. Such amendment cannot happen “effectively” – it can only happen by virtue of a resolution of Council to amend the scheme, taking into account the formal recommendations of the IRP on review.

23. In February 2012 the Council’s IRP reviewed the scheme. It expressly noted the existence of the IT payments. This is a long time after the beginning of the payment of the sums. I believe it did not make a formal recommendation in this regard (even if this could be backdated). The Council went on to resolve to retain the scheme with only one small change to the mileage allowance. The IRP’s noting of the payments did not amount to a recommendation of change to the scheme.

24. What is potentially significant, however, is that the basic allowance was retained at the same level in February 2012, despite the IRP being made aware of the IT payments. You have argued that the IT expenses were meant to be covered by the basic allowance as set out in the Constitution. This would not mean however that the scheme has been effectively amended, rather, in my view, it would mean the Council had resolved to keep the basic allowance at the same level without taking into account a relevant factor (the payments outside of the scheme), which may in itself have been another ground of unlawfulness.

25. Finally, I looked into whether there were other matters giving rise to any legal issues ie: payments to ex councillors, payment for all calls regardless of whether Council business or private etc.

26. First, the Council continued to make direct payments for ex Councillors. These will not have been lawful as section 111 cannot properly be relied upon where the individuals benefiting from the payments were not carrying out Council functions. The Council has responded: "The Council accepts that it was not lawful to make payments to persons after they had ceased to be councillors. However, since those persons may have altered their position in reliance on a belief that the payments were lawful, the Council suggests that this should be taken into account in deciding whether steps should be taken to recover these."

27. I would query whether it was proper for payments to be made for all calls in relation to some councillors, regardless whether Council business or not. The Council has responded: "The Council also accepts that when it made arrangements to make payments for IT and telephone services, it should have ensured that it was able to identify when members used those services for Council business and it should have ensured that it only paid for the use of those services for Council business."

28. Finally, Regulation 10(9) provides that a scheme must make provision to ensure that dual hatted councillors do not receive allowances from more than one authority in respect of the same duties. As none of the payments are, in my view, further to the scheme, this issue does not arise. However, the direct payments and the flat rate £35 does appear to have been paid regardless of whether the Councillor in question is dual hatted. I have raised this issue with the Council and it has responded that it will look into whether Councillors in East Herts do sit on other councils and do receive any such allowances/payments. In my view such payments were inappropriate and should be recovered.

29. Notably, the Council does not accept my view on the legality of certain of their actions and I recommend that they seek Counsel's opinion in this regard. The Council must take steps to ensure that the Scheme and payments outside of the Scheme are made lawfully. Clearly there have been failings of process and procedure and I have addressed the necessary improvements in the recommendations overleaf.

Conclusions and recommendations

30. The Council has accepted that there have been flaws in its operation of the members' allowance scheme and payments made outside of the scheme. The Council has invited me to make recommendations and intends to work towards improvements in the scheme. My recommendations are:

- a) Seek Counsel's opinion on the operation of the Scheme and payments outside of the Scheme.
- b) takes steps to recover outstanding monies from councillors eg the £35 allowance paid where possible and where not ensure any write-offs are approved in accordance with the Council's constitution
- c) consider a more proactive approach to the reliance on S111 powers for decision making and indeed given the impact of the Localism Act, explore in more details powers that the Council relies on in decision making in new initiatives, schemes and programme.

31. It is my intention to monitor the Council's progress in response to my recommendations. We will ask the Council for an update on progress to the Audit Committee in January 2013 and subsequent meetings.

32. I have decided that this matter does not warrant an application under section 17 to the High Court or a public interest report under section 8. These issues have been raised in a public domain and are formally before the Council. As stated above, I will monitor the Council's actions in relation to the recommendations.

33. The amounts involved, whilst of concern, are not material in terms of the overall Council budget and any benefit to be obtained would, in my view, be outweighed by the cost of any further audit action at this stage, in particular the cost of initiating proceedings in the High Court under section 17.

Rights of Appeal

You have a statutory right of appeal to the court against my decision not to make an Application to the court for a declaration that an item of account is contrary to law (Section 17(4)).

Any appeal must be commenced in the High Court. An appeal must be made by filing an appellant's notice in the prescribed form (Form N161) at the Administrative Court Office, Royal Courts of Justice, Strand, London, WC2A 2LL, within 28 days, calculated from the date on which you receive this letter. The procedures relating to statutory appeals are set out in the Civil Procedure Rules 1998 (as amended) and Supplemental Practice Directions. I suggest that anyone considering an appeal should take their own legal advice.

Thank you for bringing these matters to my attention.

Yours sincerely

A black rectangular redaction box covering a signature.

Paul Dossett
Partner
For Grant Thornton UK LLP

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cc George Robertson, Chief Executive