

Our Ref KM/HBC/201112
Your Ref KJR

Mr Kevin Rowland
86 Hallam Grange Rise
Lodge Moor
SHEFFIELD
S10 4BG

8 July 2013

Dear Mr Rowland

Grant Thornton UK LLP
4 Hardman Square
Spinningfields
Manchester M3 3EB

T +44 (0)161 953 6900
F +44 (0)161 953 6901
www.grant-thornton.co.uk

**Hyndburn Borough Council – objection to audit of the accounts for
the year ended 31 March 2012: Decision and Statement of Reasons**

1. We write regarding the objection to the accounts of Hyndburn Borough Council (the “Council”) for the financial year ended 31 March 2012. We are copying in Mr Zaman who you represent in relation to this objection.
2. Your letter of objection states that it is in relation to the year ended 31 March 2012.
3. You have requested that we seek a declaration from the High Court under section 17 of the Audit Commission Act 1998. As you may be aware, only a court may decide definitively on the way in which statute is to be interpreted and in the absence of previously decided case law, we cannot pronounce definitively on the correct application of the law. As you will see, however, we have sought our own legal advice in order to assist in this matter. Whilst we have identified items of account contrary to law, our decision is not to seek a declaration from the Court or to issue a public interest report. The reasons for this are set out in this letter.

The objection

4. The objection was made in your letter of objection dated 7 September 2012.
5. The objection relates to the Council’s setting of its taxi licence fees and associated procedures. Specifically, the objection raises concerns as to:
 - (i) the Council’s failure to advertise the vehicle and operator fees that were above the prescribed limit prior to their implementation;
 - (ii) the Council’s failure to calculate and set taxi licensing fees in accordance with the statutory provisions;

Chartered Accountants

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- (iii) the accounting procedures used by the Council in respect of licensing, it being argued that these were not fit for purpose resulting in the Council being unable to correctly determine the statutory costs associated with each aspect of taxi and private hire licensing;
 - (iv) the Council acting "Wednesbury" unreasonably when setting licence fees because officers and members did not take account of the appropriate costs of running the licensing service and were not aware of the specific provisions of the legislation when setting licence fees; and
 - (v) the Council obtaining enhanced Criminal Records Bureau (CRB) certificates for drivers both before and during 2011/12 financial year although the Council had a statutory power only to obtain standard CRB certificates.
6. Please note that the scope of this objection is limited to the points originally raised. During the course of this process you have raised a number of additional concerns as new information has come to light (eg: adoption of the 1976 Act etc). We would encourage you to take these up independently through the existing lines of communication with the Council.

Work carried out

7. In the course of our inquiries we have considered:
- your written notice of objection of 7 September 2012 and the detail contained therein;
 - the Council's records regarding its taxi licensing activities;
 - work carried out by Internal Audit in respect of aspects of taxi licensing; and
 - information from a meeting with the Council's Executive Director (Legal and Democratic Services) to discuss the Council's taxi licensing activities.
8. We have also taken our own external legal advice on this matter.
9. We issued a provisional view letter which also set out the reasons for that provisional view on 23 May 2013. Further to our provisional view letter of 23 May 2013, we received a response from you, on behalf of Mr Zaman dated 14 June 2013. We have also received two letters of response from the Council, both dated 24 June 2013 and some further information from the Council.

Background; The Law

10. As you know, the Council may issue licences for hackney carriages and private hire vehicles in accordance with Part II of the Local Government (Miscellaneous Provisions) Act 1976 (the "Act"). There are three types of licence, namely driver, operator and vehicle.
11. The Act makes specific provision with regard to the costs a Council may take into account when setting the licence fees. The Act also places requirements on the Council to advertise certain information in relation to vehicle and operator licence fees, including as to when such information should be advertised before changes to the fees come into force.
12. Section 53(2) of the 1976 Act provides that:

"...a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a view to recovering the costs of issue and administration..."
13. Section 70(1) of the 1976 Act provides that:

"Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators' licences as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part –

(a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;

(b) the reasonable cost of providing hackney carriage stands; and

(c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles."
14. It is well established that a Council's ability to levy fees cannot be used as a general means of raising revenue; any such fees recovered must be limited to recovering costs of the licensing scheme (see *R v Manchester City Council ex parte King*).
15. Under sources of authority on these issues, you have raised with us a previous auditor decision in relation to taxi objections from another authority - the decision by the external auditor to Guildford Borough Council dated 10 September 2010. Whilst auditors nationally do take into account the decisions of other auditors, in this case from the District Auditor (not Grant Thornton), they are not binding in any way. Each

objection will turn on its own facts and auditors are free to disagree with other auditors as to their interpretation of the law. In this case, we have considered the decision in the Guildford objection and agree to some extent with the auditor's findings. In particular, you will see below that we agree that certain of the costs of enforcement and compliance in relation to drivers may not properly be charged under section 53(2) of the Act.

Recovery

16. We have not considered and make no finding in relation to whether any licence fees set unlawfully are recoverable by the persons who made payments because this is an issue between the Council and those charged licence fees.
17. We are aware that other local authorities have made repayments (including in relation to sums for prior years) but this has not been a direct consequence of audit intervention under sections 8 or 17 of the Audit Commission Act. Therefore, the objector would need to take his own legal advice and it would be for the courts ultimately to decide, on an action for recovery, whether any sums were payable. We understand that the objector's rights to recover any overpayment are unaffected by this audit process and, in light of our conclusions below, may be a course which he wishes to pursue.
18. We make no comment on whether or not the objector or the taxi trade should take any such legal action, but would merely point out that the audit process is not the only and indeed, in our view, not the appropriate route for the taxi trade in the Hyndburn area to seek redress.

Findings

(i) Failure to comply with the statutory requirements to advertise vehicle and operator fees above the prescribed limits prior to implementation

19. As you are aware, under section 70(3) of the Act, if the proposed fee is above the statutory maximum of £25, then there is a duty to advertise the proposed variation.
20. For the financial year ended 31 March 2012 the Council charged fees as follows:

Operator's licence – 3 year £465

Operator's licence - 1 year £200

Vehicle licence - 6 months £100

Vehicle licence – 4 months £70

21. The Council has confirmed that the last time its licence fees for operators and drivers were advertised was 28 February 2003. There have been a number of changes to the fees since that date and no adverts placed.
22. The Council has therefore concluded that the income derived from its taxi licence fees for the year of account 2011/2012 which represent a change from the fees last advertised, were not properly chargeable. We have determined that this income, if not all of the income, received in respect of the fees in the year of account under challenge was unlawful. It is unclear whether the failures to advertise rendered the whole or just part of the fees (that representing the increases) unlawful. In the event, this does not make any difference to our overall views on the way forward.
23. We have considered whether officers were unaware of the need to advertise the licence fees (in excess of the prescribed amount) in a local newspaper and to consider any representations received before setting and implementing these fees. The Council itself has investigated the reasons why the adverts were not placed when fees and charges were revised in 2004. It has been unable to identify why officers in the licensing service failed to place the advert as had been done in previous years. However, we are satisfied there is no evidence to suggest this omission was deliberate. We consider it likely the omission arose as a result of a number of factors:
- changes in key personnel;
 - the absence of a procedure manual for the licensing service;
 - lack of clarity about budget for advertising costs;
 - a poor understanding of the Council's overall framework for reviewing fees and charges; and
 - lack of senior management engagement.
- (ii) **The Council's failure to calculate and set taxi licensing fees in accordance with the statutory provisions: delegated authority**
24. You have raised a concern that the licence fees set by the Council are determined by officers under delegated powers. You consider that it is not possible to identify any relevant Council or committee reports relating to the changes made to taxi and private hire licence fees. You have also told us that neither the Council constitution nor the scheme of delegation in place at the Council identifies a committee or officer as having the delegated authority to set these licence fees.
25. The Council has now provided evidence that the Council's scheme of delegation gives responsibility for setting taxi and private hire licence fees to the Executive Director (Legal & Democratic Services). Responsibility

has been with her since September 2011 when the Council moved the licensing function to her service area. Prior to this, delegated authority was to the Head of Environmental Health. This was set out in the 2001 Scheme of Delegation which we have seen and there is nothing to indicate that the position changed between 2001 and August 2011.

26. We are satisfied that the Council's arrangements for delegated authority in relation to taxi licences in 2011/12 were therefore compliant.

- (iv) **The accounting procedures used by the Council in respect of licensing were not fit for purpose resulting in the Council being unable to correctly determine the statutory costs associated with each aspect of taxi and private hire licensing/ The Council acted "Wednesbury" unreasonably.**

Separate allocation of costs

27. We have considered whether fees were set without officers properly considering the provisions in sections 53(2) and 70 of the Act.
28. In 2011/12, the Council did not separately allocate costs for the various aspects of its licensing function. It does not moreover separate out costs associated with taxi licensing from those related to liquor, gambling, motor salvage or other types of licence. It operates its licensing function using a single ledger code.
29. In our view, the Council's failure to separately allocate costs of the licensing service between drivers, vehicles and operators' licence fees is unlawful.
30. Furthermore, the Council has been unable to produce any documentary evidence to show how the licences fees applied in 2011/12 were determined and set in accordance with sections 53 and 70.
31. We understand from the Council that a full costing exercise was completed across all Council services several years ago. Given this and the absence of documentation to show how the fees were originally determined, it is impossible for us to independently verify that the fees charged in 2011/12 have been set in accordance with the Act.
32. It may be that the fees were accurately set at some point in the past. However, given the lack of any evidence to substantiate this, in our view the fees for the relevant year of account will have been set unlawfully.
33. It is relevant for us to consider the position going forward to see if the Council has or is taking steps to put right the failings with regard to the taxi licence accounts. We have been told, and have been supplied with some evidence to support the work the Council is currently undertaking to

calculate its fees for all types of driver, vehicle and operator licences. This work is, we are told, aimed at the Council being able to demonstrate that fees are properly set in accordance with the provisions of the Act.

34. Once this work is complete, we further understand from officers that a new scale of fees will be advertised in the local newspaper, and following consideration of any consultation response, will be formally set. The Council is intending to have these fees in place by late 2013.

Enforcement – drivers’ licence fees

35. We are aware that it has been argued by some local authorities that all control and supervision/enforcement costs may be included in the drivers’ licence fees as being reasonably related to the “administration and issue of” a drivers’ licence. The objection before us argues that no such costs may be included within drivers’ and operators’ licence fees. We set out below our views on the law on this matter.
36. It seems to us that the costs relating to the “issue” of a driver’s licence, must, on a plain English interpretation, be narrow and cannot relate to anything after the physical delivery of a licence to the licence holder. Whilst superficially one might be able to argue that the term “administration” takes in anything the Council does in this regard, we are advised one cannot construe section 53 in isolation. This follows from the proposition that where there are two provisions in the same Act, they must be read together, not in isolation – this being a fundamental principle of statutory construction.
37. Thus, one has to construe “administration” in section 53 in the light of the wording in section 70, that section making separate reference to the “administrative” and the “other costs” of section 70(1) ie: recoverable costs are part “administrative” and part ‘other’. One has to assume therefore that it was the Parliamentary draftsman’s intention that ‘administration costs’ in the Act are not to cover **all** costs relating to taxi licence functions, thereby narrowing down the meaning of the word “administration”/“administrative” in both sections 53 and 70.
38. Taking as our starting point then, that “administrative” costs do not account for all costs relating to the grant of a licence, what may lawfully be included in a driver’s licence?
39. A cost which often stands apart from what one commonly thinks of as “administrative” are legal costs. Thus, it seems likely to us that certain legal costs are not included in the term ‘administration’ in section 53. The costs of externally procured legal advice (barristers, firms of solicitors, court disbursements) are generally considered to be specific specialist items of cost and not ones which fall within generic administrative costs heads. Thus, we have formed the view that external legal costs are not

recoverable in the drivers' licence fee. The position is less clear with regard to internal legal costs as these are arguably included in the term "administration" in the sense that the legal advice is emanating from officers and will be dealt with by way of an internal recharge.

40. We are also of the view that the enforcement costs incurred in relation to unlicensed drivers (ie: officer and legal costs in relation to criminal prosecutions) are also not included or, put differently, are too remote from the costs of "administration" of the grant of a driver's licence.
41. On the other hand, we consider that there is a credible argument that the non-legal costs of control and supervision of licensed drivers maybe said to be closely related to the 'administration' of drivers' licences – bearing in mind that investigation of complaints, undisclosed convictions, and condition compliance, for example, may have to be considered on an application for the grant of or renewal of a driver's licence.
42. It has been further suggested that enforcement costs in relation to operators may be recovered as part of the operators and vehicle licence fees given the wording in section 70(1) of "*any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles*". The argument here is that the costs of "control and supervision" of operators are all costs that are "*other costs in connection with the foregoing and the control and supervision of hackney carriages and private hire vehicles*". Self-evidently, the regulation of taxi operators is closely related or put differently, is in connection with, the regulation of taxi vehicles.
43. We note that you do not agree with this legal interpretation and indeed argue that no enforcement costs may be recovered in relation to operators. It is argued that as the wording in italics above only refers to the control and supervision of vehicles, no such costs in relation to operators may be included. We mention this disagreement here for completeness, but given that the Council states that no enforcement costs are in fact included within any of the licence fees, this is not immediately relevant to the objection.
44. Beyond the conclusions set out above, we do not consider it appropriate to pronounce on the correct interpretation of the legislation. We are of the view that the issues are finely balanced and indeed the Court could determine these legal issues differently to the approach we have adopted. These are not easy provisions to construe and the differences between them are hard to fathom. Until such time as a court rules definitively upon the subject, local authorities are in some difficulty ascertaining where the clear lines should be drawn in this regard.

45. Whilst we can understand that the objector wants Grant Thornton to seek a declaration from the court for the purposes of clarification of the law or to issue a Public Interest Report on the matter, we have set out below why we do not consider this to be an appropriate use of public funds in the context of public sector audit.

(v) The Council obtained enhanced CRB certificates for drivers both before and during 2011/12 financial year although the Council had a statutory power only to obtain standard CRB certificates

46. The Council obtained enhanced CRB checks for taxi and private hire drivers throughout the 2011/12 financial year. The drivers were charged for the check. The Council paid this fee over in full to CRB.
47. You have made the assertion that the Council had no legal power to do so until 26 March 2012 and have raised two specific issues in respect of this, being that:
- the income and expenditure in respect of these checks is unlawful; and
 - officers committed a criminal offence in obtaining this information given the drivers were not in prescribed occupations the relevant legislation.
48. Our view is that the Council's policy of seeking enhanced CRB checks in respect of licence applicants will have led to items of both income and expenditure that are unlawful.
49. However, it is relevant for us to consider the position going forward to see if the Council has put right this deficiency. It is our view that this is covered by the change to the relevant legislation through the Police Act 1997 (Criminal Records) (Amendment) Regulations 2012. In view of this, we do not consider any further action to be needed. The Council is now complying with the legislation and the law has been clarified.
50. We consider that the issue of criminality in the Council's actions in obtaining these checks to be outside our responsibility as the Council's auditor, although we note there is no evidence before us to indicate any criminal intent – rather there appeared to be a misunderstanding as to the law, one shared with other local authorities nationally. If you wish to pursue this aspect of the objection further, we would suggest you refer this to the police who would then need to consider taking action against the Council for seeking such information, and presumably against CRB for providing the information in the absence of a legal provision for either party to do so. However, we have noted you have expressed a view on behalf of your client and yourself that such a prosecution would not be in the public interest.

51. You have suggested that the Council should refund the charges. We have not considered and make no finding in relation to whether the amounts charged in respect of the enhanced CRB checks are recoverable by the persons who made payments – that is a matter beyond our jurisdiction. The objector would need to take his own legal advice and it would be for the courts ultimately to decide, on an action for recovery, whether any sums were payable and by which organisation.

Conclusions

52. We have considered whether it is appropriate to exercise any of the formal audit powers available to us under the Audit Commission Act. These include the power to issue a public interest report under section 8 and the power to apply to the High Court for a declaration under section 17(1) that an item of account is unlawful.
53. The Council has accepted that there was a significant failure on its part in not placing the adverts for the relevant taxi licensing fees. We find that this failure means the Council has charged licence fees contrary to law in the period 2011/12.
54. Moreover, the Council has been unable to provide evidence to support the costs for drivers' licences, vehicles' and operators' licences last advertised (in 2003) to demonstrate that these are broadly in accordance with the Act. We use the term "broadly" because, absent a court determination, it will remain difficult for anyone to say definitively what the position is in relation to these particular statutory provisions. However, the absence of any evidence for the basis of the calculation alone may be sufficient for us to conclude this has led to items of account which are contrary to law in the year under challenge.
55. We conclude that the Council has incurred items of both income and expenditure that are unlawful in respect of enhanced CRB checks. The Council charged applicants only the costs it must bear from CRB and there is no element of profit.
56. After taking account of the above, we are of the view that no further formal audit action is warranted. Given that the Council is working now on its costing model so that it can properly calculate and set licence fees, we consider that, given the amounts involved, further action would serve little purpose to the tax-payer and would incur further unnecessary expense. Similarly, the law has been changed in respect of the CRB checks so that the Council is now treating this correctly.
57. For the same reasons, it is our view that a Report in the Public Interest is not necessary.

Application to Court

58. If an item of account appears to us to be contrary to law, it is our discretion as to whether we apply to the Courts for a declaration under Section 17(1) of the 1998 Act to that effect. Relevant factors which we take into account in deciding whether to exercise this discretion to apply to the Court for a declaration include:

- the significance of the issue concerned;
- the amount of the item of account involved;
- the expense of an application;
- the practical consequences of any declaration;
- whether the Council agrees or not with our view on the unlawfulness of the item in question;
- the prospects of success; and
- whether the Courts would, in the circumstances, be likely to make an order under Section 17(2)(c) of the 1998 Act. That is, whether or not a court were to find any illegality, it would exercise a discretion as to the appropriateness of making a declaration. A broad set of circumstances would be relevant to this discretion including the position as at the date of any court hearing and the overall public interest.

59. In this case, having considered the matter carefully, and having taken all representations into account, we have decided that we should not exercise the discretion to seek a declaration under Section 17(1) of the 1998 Act. While our view is that the fees raised by the Council were unlawful by virtue of the failure to advertise and, that therefore there is one or more unlawful items of account, there is, on balance, little or no benefit from seeking a declaration to this effect from the Court. Our reasons for this view are as follows:

- The Council has accepted our interpretation that it has failed to comply with the relevant statutory provisions in advertising licence fees;
- Whilst the law is particularly unclear in relation to the inclusion of enforcement costs this is less of an issue in this authority as the Council claims that these have not been included for the year of account under challenge (and indeed previously);

- It is possible moreover that the costs queried by the objector are properly recoverable from one or other of the types of taxi licence. Whether or not this is correct and we accept that the law on this is unclear, the overall sums involved are not sufficiently great to warrant the costs of an application to the High Court. The potential legal costs involved of such action are likely to be very high and would fall directly upon local taxpayers. For the avoidance of doubt, this is our view even if the magnitude of the unlawful item of account is that put forward by the objector; and
 - The Council acknowledges that it cannot provide an audit trail to demonstrate the allocation of costs in 2011/12 and that it has complied with legislative requirements in setting the fee. However, work is now underway to establish a robust basis for allocation of costs going forward. This includes the introduction of an electronic time recording system and a procedure manual for the licensing department (although we have not had sight of any details for these as they are still in the early stages of development).
60. Consequently any application to the Court is likely to be unnecessary because the Council has already broadly accepted our conclusions and has agreed to address the main issues raised. The benefits, if there were any, from such an application to the Court would, in our view, be disproportionate to the costs to public funds which would be incurred as a result of making this application.

Public Interest Report

61. It is a matter for us in the exercise of our discretion whether to issue a report in the public interest. Relevant factors which we take into account in deciding whether to exercise my discretion to issue a report in the public interest include:
- the amount of any unlawful item or account or loss;
 - whether there were significant failings in governance;
 - whether the matters that might be the subject of a report are ongoing;
 - whether there has been significant publicity in respect of the issues; and
 - whether the auditor believes that this independent view should be expressed in public.

62. As indicated above, our view is that these matters do not justify such a report because:

- The Council has agreed in principle with our conclusions;
- We have not identified any significant failure of governance at the Council;
- The Council has also accepted that its accounting records supporting taxi licence fees in 2011/12 were not adequate and is establishing appropriate records for the future including separate costs bases and accounting for the different licence types;
- We do not consider, given the sums involved (£114,854 total income from taxi licensing) that a publicised report under section 8 is warranted;
- It is acknowledged that this matter has given rise to issues for other local authorities such that it has, for some purposes, a national aspect. In addition, the strength of feeling amongst the taxi trade nationally on this issue has been taken into account; and
- we have taken into account that this is not a financial loss to the Council which has a negative impact on all local taxpayers. There appears to be limited interest amongst the public, both locally and nationally, in these issues. In any event, we will report back to the Council's audit committee on the work undertaken as part of this objection so the matter will be in the public domain.

63. We recommend, in light of the objection and our consideration of these matters, that the Council:

- a) Carry out a detailed review to ensure that all costs are appropriately allocated to taxi licensing as opposed to other sorts of licences and appropriately allocated as between drivers, vehicles and operator's licence fees;
- b) Ensure there is a robust basis for the allocation of officer time and costs to licensing activities;
- c) Retain documented evidence to support calculations to provide an audit trail for review and to inform future exercises;
- d) Satisfy itself by regular internal review and reporting that costs are correctly recorded against types of licensing; and

- e) Ensure that licence fees are properly set in accordance with the Council's scheme of delegation and that decisions are taken on the basis of adequate information.

Right of appeal

64. You have a statutory right of appeal to the Court against our decision not to make an application to the Court for a declaration that an item of account is contrary to law. See Section 17(4) of the Audit Commission Act 1998.
65. 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. We suggest that anyone considering an appeal should take their own legal advice.

We have copied this letter to Hyndburn Borough Council.

Yours sincerely



Karen Murray
Director
For Grant Thornton UK LLP

T 0161 234 6364
F 0161 953 6901
E karen.l.murray@uk.gt.com

cc Mr T Zaman