

Merseyside Waste Disposal Authority

Advice on collaborative working with other public bodies

1. Introduction

1.1 Merseyside Waste Disposal Authority (“MWDA”) has instructed Eversheds LLP (“Eversheds”) to provide advice on opportunities for collaborative working. MWDA intends to consider opportunities for working collaboratively with Knowsley Metropolitan Borough Council, Liverpool City Council, St Helens Metropolitan Borough Council, Sefton Metropolitan Borough Council, Wirral Metropolitan Borough Council and Halton Borough Council. MWDA therefore intends to share the advice provided by Eversheds. The advice includes reference to the uses that MWDA may make of its finances and the potential for MWDA’s resources to be used for the general benefit of the whole of the Merseyside area and beyond. MWDA already provides a community fund to support community projects. In particular, consideration is being given to the use of the general fund and the sinking fund, which have been set aside as contingencies for the Resource Recovery Contract.

1.2 Structure of this advice

1.2.1 This advice describes the process for MWDA setting its levy (section 3 of this advice). It sets out information on statutory powers and some broad ideas on how the surplus funding might be used (section 4). It looks at models that can be used for collaborative working (section 5). It considers the possibility of providing funding to other bodies (section 6). It considers the option of MWDA not issuing a levy (section 7). It also sets out some summary conclusions (section 8).

2. Collaboration

2.1 Bodies in the public sector are increasingly looking for opportunities to work together to deliver efficient public services and make effective use of public funds. MWDA has a strong track record of working collaboratively with its constituent councils and Halton.

2.2 In order to ensure that any proposals for collaborative working are reasonable and compliant with the fiduciary duties of MWDA, it will be necessary to take account of MWDA’s policies. In particular, it will be appropriate to consider how any such proposals are compatible with the Joint Municipal Waste Management Strategy (JMWMS) for Merseyside.

2.3 The Joint Municipal Waste Management Strategy (JMWMS) for Merseyside acknowledges the strong track record of authorities in Merseyside working together. It refers to the memorandum of understanding and inter authority agreements between them. A section of the strategy is devoted to communications and education. The strategy recognises that the success of the JMWMS depends on changing attitudes to waste.

3. Levies

3.1 The following legislation is relevant to levies:

- 3.1.1 Section 72 of the Local Government Act 1985
 - 3.1.2 Section 74 of the Local Government Finance Act 1988
 - 3.1.3 Joint Waste Disposal Authorities (Levies) (England) Regulations 2006
 - 3.1.4 The Local Audit and Accountability Bill.
- 3.2 The Joint Waste Disposal Authorities (Levies) (England) Regulations 2006 were made under section 74 of the Local Government Finance Act 1988.
- 3.3 The Joint Waste Disposal Authorities (Levies) (England) Regulations 2006 provide power for MWDA to issue levies on its constituent authorities and make provision for apportionment of levies and interest on unpaid levies. Regulation 3(1) states that "a joint waste disposal authority may, in accordance with these Regulations, issue levies on its constituent councils to meet all liabilities falling to be discharged by it for which no provision is otherwise made".
- 3.4 Regulation 3(2) says that "A levy on a constituent council shall be issued by giving the council a demand stating the date or dates on or before which a payment or payments in respect of the levy are required to be made and the amount of that payment or each of those payments".
- 3.5 The regulations do not expressly say how money raised by the levies may be spent except for the provision in Regulation 3(1) which refers to the issue of levies "to meet all liabilities for which no provision is otherwise made". The levy is calculated to take account of anticipated expenditure to enable MWDA to meet its statutory duties and the plans it has to deliver those and the liabilities arising from them. As part of that process, it is prudent to have funds set aside to deal with contingencies. This is how a surplus has arisen in the present circumstances. Additionally, a general contingency will normally be retained.
- 3.6 Section 72 of the Local Government Act 1985 requires MWDA to keep a fund to be known as the general fund; and to carry receipts of the authority to that fund discharge liabilities out of that fund.
- 3.7 The Local Audit and Accountability Bill, which is currently going through Parliament, will amend the Local Government Finance Act 1992 to require the cost of levies to be included in the calculation made by a billing authority or major precepting authority of relevant basic amount of council tax for the purpose of determining whether that is excessive and so whether a referendum about the proposed rate of council tax will need to be held. This means that in future the decisions made by MWDA about its levy will be even more significant for the setting of council tax by its constituent councils than at present. The potential implications of this should be considered by MWDA when taking decisions about the levy.

4. **Functions and Powers**

- 4.1 Section 51 of the Environmental Protection Act 1990 is about the functions of waste disposal authorities, such as MWDA. Section 51(1) says that it shall be the duty of each waste disposal authority to arrange (a) for the disposal of the controlled waste collected in its area by the waste collection authorities and (b) for places to be provided at which persons resident in its area may deposit their household waste and for the disposal of waste so deposited.
- 4.2 Section 51(3) says that a waste disposal authority may include in arrangements made under subsection (1)(b) above arrangements for the places provided for its area for the deposit of household waste free of charge by residents in its area to be available for the deposit of household waste free of charge by residents in its area to be available for the deposit of household or other controlled waste by other persons on such terms as to payment (if any) as the authority determines.
- 4.3 Section 51(4) provides that for the purpose of discharging its duty under subsection (1)(a) above as respects controlled waste collected as mentioned in that paragraph a waste disposal authority:(a) shall give directions to the waste collection authorities within its area as to the persons to whom and places at which such waste is to be delivered; (e) may contribute towards the cost incurred by persons who produce commercial or industrial waste in providing and maintaining plant or equipment intended to deal with such waste before it is collected; and (f) may contribute towards the cost incurred by persons who produce commercial or industrial waste in providing or maintaining pipes or associated works connecting with pipes provided by a waste collection authority within the area of the waste disposal authority.
- 4.4 Section 51(4A) says that a waste disposal authority in England which is not also a waste collection authority may in directions under subsection (4)(a) above include requirements about separation that relate to waste as delivered, but may do so only if it considers it necessary for assisting it to comply with any obligation imposed on it by or under any enactment.
- 4.5 Section 51(4B) requires that before exercising its power to include requirements about separation in directions under subsection 4(a), a waste disposal authority shall consult the waste collection authorities within its area.
- 4.6 Section 51(4C) requires that in exercising its power to include requirements about separation in directions under subsection (4)(a), a waste disposal authority shall have regard to any guidance by the Secretary of State as to the exercise of that power.
- 4.7 Section 51(4D) says that a waste disposal authority which includes requirements about separation in directions given under subsection (4)(a) shall notify the waste collection authorities to whom the directions are given of its reasons for including the requirements.
- 4.8 Section 55 of the Environmental Protection Act 1990 gives a waste disposal authority powers to recycle waste. Section 55(2) says that a waste disposal

authority may: (a) make arrangements to recycle waste as respects which the authority has duties under section 51(1) above or agrees with another person for its disposal or treatment; (b) make arrangements to use waste for the purpose of producing from it heat or electricity or both; (c) buy or otherwise acquire waste with a view to its being recycled; (d) use, sell or otherwise dispose of waste as respects which the authority has duties under section 51(1) above or anything produced from such waste.

- 4.9 Section 63A of the Environmental Protection Act 1990 provides power for a waste disposal authority to do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything which in its opinion is necessary or expedient for the purpose of minimising the quantities of controlled waste, or controlled waste of any description, generated in its area. Before exercising this power, a waste disposal authority must consult every other relevant authority whose area includes all or part of the area of the first authority
- 4.10 Section 111 of the Local Government Act 1972 applies to MWDA. This allows MWDA to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of its functions. Section 111 of the Local Government Act 1972 may not be used to avoid a restriction or constraint in another statute. It may not be used to raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively or to allow MWDA to exceed specific statutory powers and duties (for example, those in the Environmental Protection Act 1990).
- 4.11 The limitations of section 111 mean that it can only use the power for activities which would be incidental to the waste disposal and recycling activities for which sections 51 and 55 and 63A of the Environmental Protection Act 1990 make provision. If MWDA intends to use the levy for expenditure on such activities, it would also need to ensure that, as with any exercise of its statutory powers, any use of the power in section 111 of the Local Government Act 1972 is reasonable.
- 4.12 As a statutory body, MWDA must ensure that every action that it takes is within its powers. This requires MWDA to identify a relevant power and act reasonably in the exercise of it. In order to act reasonably in the exercise of its powers, MWDA would need to take account of all relevant matters, disregard irrelevant matters, observe all procedural requirements, act for proper purposes, not act in bad faith and not take a decision that no reasonable waste disposal authority could take. Whilst there are likely to be a range of activities, which might be said to be incidental to the discharge of the waste disposal functions of MWDA, it would be important for MWDA to be able to show good reasons why it would be reasonable for it to exercise relevant powers to undertake particular activities.
- 4.13 Halton Borough Council is not a constituent council of MWDA and so not a council in respect of which a levy is imposed. Halton has however agreed that MWDA should discharge its waste disposal powers and in exercising those powers it may rely on its incidental powers.

4.14 One use of the levy which has been suggested to us is for MWDA to establish a development fund which could be used to assist MWDA, its constituent councils and Halton in meeting the waste minimisation and joint municipal waste management strategy targets for Merseyside. There would be a memorandum of understanding which MWDA, the constituent councils and Halton would sign to say that they would use the funding from the development fund for the purpose of meeting waste minimisation and strategy targets and commit to annual performance reporting against targets to MWDA. MWDA would retain an appropriate proportion of the fund and the rest of the fund would be divided between the constituent councils and Halton in the proportions with which they have contributed to the fund. In our view, that is something that MWDA could lawfully do. It could be regarded as incidental to the discharge of MWDA's waste disposal and management functions and therefore within the scope or MWDA's powers. It will be a matter for MWDA and the constituent councils and Halton to decide whether they regard this as a reasonable exercise of their powers and so decide to do so.

5. **Models for collaborative working**

5.1 If MWDA does decide to exercise its powers to pursue collaborative working with other authorities, it will need to consider appropriate models for this. There are many options for structures ranging from companies to mutual or social enterprise arrangements. The models that authorities often use for collaborative working are the administrative or constitutional model, the contractual model and the corporate model. It is important that the chosen model is suitable to the functions and objectives you aim to achieve. We would be happy to advise further on suitable structures once you have developed ideas for the use of the funds together. This can take account of your longer term plans as well as tax and procurement issues, amongst other things.

5.2 The corporate model and the contractual model

5.3 The corporate model involves establishing a company (or other corporate vehicle) which would provide services. The contractual model involves the use of a contract for services.

5.4 If the contractual or corporate model were to be used, there would potentially be public procurement implications. A contract for services between two distinct entities would usually be within the scope of public procurement legislation and would need to be procured in accordance with that legislation. There are some exemptions from this. There is also case law to support the position that an arrangement could be outside public procurement legislation if it involves co-operation between public authorities and does not undermine free movement of services and the opening up of undistorted competition in all Member States. Nevertheless, we advise that MWDA should consider in detail the potential procurement implications before it takes any steps to use a contractual or corporate arrangement for collaborative working.

The Administrative Model

- 5.5 The administrative model would involve the creation of a joint committee; or delegation of a function or some form of secondment of staff under section 113 of the Local Government Act 1972.
- 5.6 As we have previously advised, MWDA has power to delegate functions to local authorities and to receive functions delegated by local authorities. Section 101 of the Local Government Act 1972 allows a local authority to arrange for the discharge of functions by another local authority. It also allows local authorities to discharge their functions jointly and, where such arrangements are in force, to arrange for the discharge of functions by a joint committee or by an officer of one of the local authorities. MWDA is included in the definition of local authority for these purposes, by virtue of the application of paragraph 1(i) of Schedule 3 to the Waste Regulation and Disposal (Authorities) Order 1985 and Subsection 101(13) of the Local Government Act 1972. However, there are some restrictions on the delegation of particular functions. For example, section 101(6) of the Local Government Act 1972 requires that a local authority's functions with respect to levying, or issuing a precept for, a rate, or borrowing money shall be discharged only by the authority. It would therefore be advisable when MWDA intends to enter into any delegation arrangement to check whether any such restrictions apply.
- 5.7 Another option, instead of delegating functions, would be for MWDA to make its employees available to do work for other authorities. MWDA would have power to make its officers available on secondment to local authorities and health bodies and accept secondments of officers from local authorities and health bodies. This would be under the power in section 113 of the Local Government Act 1972, which applies to MWDA by virtue of paragraph 1(j) of Schedule 3 to the Waste Regulation and Disposal (Authorities) Order 1985 and section 146A of the Local Government Act 1972. One of the advantages of a secondment arrangement is the ability of the officer to take binding decisions on behalf of the authority to which it has been seconded as well as decisions of its employing authority.

6. Providing funding to other bodies

- 6.1 MWDA could also consider the use of section 63A of the Environmental Protection Act 1990 to allow it to work with other public bodies for the purpose of waste minimisation. Section 63A of the Environmental Protection Act 1990 provides power for a waste collection authority or a waste disposal authority to do, or arrange for the doing of, or contribute towards the expenses of the doing of anything which in its opinion is necessary or expedient for the purposes of minimising the quantities of controlled waste or controlled waste of any description generated in its area. The waste collection authority or waste disposal authority must first consult every other waste collection authority and waste disposal authority whose area includes all or part of the area of the first authority. It must get their views but a duty to consult does not mean MWDA

has to follow the outcome of the consultation so long as it is properly and thoroughly considered.

7. **Deciding not to issue a levy**

7.1 We have provided earlier in this paper details of the legislation under which MWDA issues its levies. The relevant legislation provides MWDA with power to issue levies and imposes some obligations on MWDA in respect of its levies. The legislation does not impose a duty on MWDA to issue levies in every financial year. Therefore, if MWDA finds itself in the position of being able to meet its liabilities without needing to use all of the finance that it has received as a result of its levies, it could consider using the remaining finance in future years and not issuing levies again until it is in the position of needing finance. The rationale of this approach would be that since the levy is intended to fund liabilities not otherwise provided for, then it is not needed because other provision in the form of balances is available.

7.2 A decision not to issue a levy or to reduce the levy will be subject to all the usual tests of reasonableness and must be taken in the light of the Authority's fiduciary duty. The Authority will need to consider:

7.2.1 Its actual budgeted requirements for the forthcoming financial year.

7.2.2 The level of balances it is reasonable to hold and the effect of a reduced levy on those balances.

7.2.3 Its financial forecasts for future years and the need to ensure a smoothing of income flow.

7.2.4 The need to make provision for contingencies and unforeseen items of expenditure.

7.2.5 Whether it is lawful to set a levy in excess of its identified needs as set out in its budget.

7.3 Although it is not strictly a matter for the Authority, the effect of reducing the levy will be significant for constituent authorities. Reducing the levy will flow through directly to the budgets of each of the constituent authorities who will have to make important decisions about how to manage the effect of a reduced levy.

7.4 Some constituent councils may wish to reduce budgets and thus Council Tax; others may wish to apply the benefit to services or facilities. Whilst it is not necessary for constituent councils to act identically, presentation and management of this situation will be key. It will not be possible to pre-condition a levy reduction with constituent councils or to fetter their discretion but some common understanding may be thought prudent to avoid reaction from Council Tax payers or accidentally triggering a referendum.

- 7.5 The implications for the constituent councils of a decision by MWDA not to issue a levy would be even more significant if the provisions contained in the Local Audit and Accountability Bill which require the cost of levies to be included in the calculation of a relevant basic amount of council tax are included in the Bill when it is enacted. A high levy could have the effect of bringing a council's council tax above the threshold at which a council tax referendum is required. However, a low levy or a decision to impose no levy could have the effect of bringing a council tax down so low that the increase which the relevant council needs to apply in future years is likely to bring it above the level for a council tax referendum. MWDA would need to consider whether it would be reasonable for it to take decisions about its levy which would cause significant practical difficulties to its constituent councils.
- 7.6 Although the Local Audit and Accountability Bill has not yet received Royal Assent, we suggest that MWDA should not take decisions about its levy before the Bill is enacted, in the expectation of avoiding the implications of the changes in legislation. The Bill has already made provision for a different referendum threshold to be set in future years for authorities which increased their council tax above the referendum threshold in 2013-2014 but did not hold referendums because of the rises in levies that had not been included in their calculation. Therefore, if MWDA were to seek to take quick decisions in the expectation of avoiding the relevant changes in legislation, it may find that the Government introduces further changes.

8. **Conclusion**

- 8.1 MWDA has two options for its aspiration to work in collaboration with local authorities.
- 8.2 Firstly, it may use its powers to undertake activities either independently or jointly with its constituent councils and Halton Borough Council. In this scenario any proposed action must be within the scope of the relevant powers and represent a reasonable exercise of powers. This effectively means that any activities must be directed to its waste disposal and waste minimisation functions or incidental to them as described above. This could include the establishment of a development fund to be used by MWDA, its constituent councils and Halton to meet waste minimisation targets.
- 8.3 Alternatively, MWDA could decide not to impose or to reduce its levy, It would need to consider the implications of this, both for MWDA and its constituent councils. Clearly, a decision to reduce the levy gives more flexibility as to use of the funds because the constituent councils may use the consequent budget savings for any of their functions. However, the MWDA would not then have a say in the decisions. Also, once the Local Audit and Accountability Bill becomes law, the effect that MWDA's decisions about its levy will have on the setting of council tax by its constituent councils may mean that this is not an option which MWDA and its constituent councils will be willing to consider in the future.