

EXECUTIVE DECISION RECORD SHEET**PH/051/11**

Name of decision maker:	Councillor Andrew Williams and Councillor Nicholas Tiley
Portfolio:	Leader of the Council and Finance and Resources
Date of Portfolio Holder Decision:	23 November 2011

Title of Decision:
Highbarns Chalk Mine Project – Approval of Offer of Funding made by the Homes and Communities Agency

Decision made and reasons:
To approve the offer of funding made by the Homes and Communities Agency in respect of the Highbarns Chalk Mine Project.
To authorise officers to commence the procurement process for the contractor who will be responsible for carrying out the completion of the investigative survey works in the Highbarns area and to delegate authority to the Group Manager (Commercial Assets and Property Development) to award the contract for the investigation works.
The reason for the decision is to secure the release of up to £2,045,349 by the Homes and Communities Agency from the Land stabilisation Programme to be used by the Council to fund the investigation surveys into the extent of the chalk mine and the carrying out of the necessary treatment works.
The treatment works are necessary in order to make safe the properties affected by the chalk mine and to remove the current blight from the area.

Reports considered: (here reference can be made to specific documents)
Report to the Cabinet meeting held on 13 September 2011.

Officers/Councillors/Ward Councillors/Stakeholders Consulted:
Highbarns Steering Group, Highbarns Residents Group James Doe – Assistant Director (Planning, development and Regeneration) Sally Marshall – Corporate Director (Finance and Governance) Corporate Management Team Cabinet Mike Penning MP Cllr Stephen Holmes, Cllr Geoffrey Doole

Monitoring Officer comments:

This report has been prepared by the Monitoring Officer. The Monitoring Officer is satisfied as to the terms and conditions which are attached to the offer. Members need to be aware of the Council's contingent liabilities if it accepts the offer. These are explained in more detail in the Background Report and in the Appendix. However, if the Council did not accept the offer of funding it would be forgoing the opportunity to secure external funding for this project. The Council would be left with having to find the funds from its own resources if it wished to continue with the project. The Council is not legally obliged to arrange for the carrying out of the remedial works in respect of the Highbarns chalk mine. Until now the Council has played a co-ordinating role on behalf of the local residents who are adversely affected by the presence of the chalk mine. However, by accepting the offer of funding the Council will be taking on the responsibility for ensuring the completion of the remedial works in this particular case.

It is therefore important to make clear that acceptance of the offer of funding is not to be construed as acceptance by the Council for liability in respect of any other mine workings that may be subsequently discovered, either in the Highbarns area, or elsewhere in Dacorum. If other mine workings were to be discovered the Council's position would be the same i.e. it would act in a co-ordinating role and would seek to secure external funding for any works that may be required.

Various conditions attached to the offer of funding are identified in the risk section below and the body of the report.

S151 Officer comments:

In particular, attention is drawn to Condition 4 Annex 1, which identifies responsibilities accepted by the Council in accepting this offer. Specifically the key responsibilities relate to the cap on funding available £2,045,349; no allowance for contingencies; cost overruns; and a cap on specific types of expenditure without the HCA's approval for a material variation. Therefore, in

accepting the offer the Portfolio Holders should be satisfied that the Council will commit to financing any shortfall in funding resulting from any unexpected works required or cost overruns.

The Council's capital programme will also require amendment to incorporate the cost and funding of these works.

Implications:

Acceptance of the offer of funding will enable the Council to be able to proceed with the Highbarns Chalk Mine Project and arrange for the remedial works to be carried out. This will remove the current risks to the health and safety of the residents of the properties in the Highbarns area who are affected by the existence of the chalk mine. It will also remove the blight which currently afflicts the area.

Risk:

The offer of funding is subject to conditions under which the risk of costs overrun is passed on to the Council. This means that if the actual cost of the project exceeds the amount of funding offered the Council may be liable to fund any difference unless the Homes and Communities Agency agree to a material variation.

The treatment works themselves carry an inherent risk to properties. For this reason properties will have to be vacated while the works are undertaken. However, if the treatment works are not carried out the risk of a further collapse in the medium to long term is far greater. The possibility of future collapses poses a much greater risk to the properties and to the safety of the residents.

Options Considered and reasons for rejection:

The other option would be not to accept the offer of funding. This option should be rejected as it would leave the Council with no other external source of funding. The Council would therefore be unable to arrange for the investigation surveys and treatment works to be carried out unless it could provide the funding itself.

Portfolio Holders Signature: **Cllrs Williams and Tiley**

Date: **23 November 2011 (Cllr Williams) 22 November 2011 (Cllr Tiley)**

Details of any interests declared and any dispensations given by the Standards Committee:

For Member Support Officer use only

Date Decision Record Sheet received from portfolio holders: 23/11/2011

Date Decision Published: 23/11/2011 Decision No: PH/051/11

Date of Expiry of Call-In Period: 30 November 2011

Date any Call-In received or decision implemented:

BACKGROUND REPORT

1. At its meeting on 13 September 2011 the Cabinet considered a report which brought Members up to date on the current situation regarding the Council's application to the Homes and Communities Agency for funding to enable the Council to arrange for the carrying out of further investigation and remediation works in respect of the abandoned chalk mine in the Highbarns and Pond Road area of Nash Mills, Hemel Hempstead.
2. The report also advised Cabinet as to the next stage of the project and to seek delegated authority for the acceptance of the offer of funding for the project when this has been received from the Homes and Communities Agency. The Cabinet resolved:

To delegate authority to the Leader of the Council in conjunction with the Portfolio Holder For Finance and Resources to approve the offer of funding in respect of the Highbarns Chalk Mines Project when this has been received from the Homes and Communities Agency, subject to the Section 151 Officer and the Monitoring Officer being satisfied as to the terms and conditions which may be attached to the offer.

3. An offer letter dated 7 October from the Homes and Communities Agency (HCA) was received by the Council on 10 October. However, the offer was subject to a condition that the treatment works and the surface reinstatement would have to be completed by 30 November 2012 and 24 December 2012 respectively. The Council needed to ask the HCA to agree to change these dates as it would have been impossible for the Council to have met those completion dates. It appeared that the HCA had used the original outline programme which had been submitted with the Council's application in October 2010 and the HCA had not taken into account the impact on the programme caused by the delay in the project being approved for funding.
4. The Council submitted a revised outline project programme which the HCA has accepted. The HCA have issued a revised offer letter dated 7 November (received on 8 November) with amended completion dates which are in line with the Council's revised programme.
5. The offer letter is subject to the Council's acceptance of the terms and conditions set out in the offer. The main conditions are summarised in the appendix to this report. The conditions are quite stringent and make clear that if the cost of the project exceeds the approved costs in the offer letter the Council is liable to fund the difference. There is a provision which allows the Council to make a request to the HCA for a 'material variation' to the works and/or the approved costs, but the HCA reserves the right to refuse such a request either in whole or in part.

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6. To expedite the next stage of the Project it is requested that authority be delegated to officers to proceed with the procurement and appointment of the contractor who will complete the investigative survey works. It is envisaged that the contractor will be appointed from an existing framework agreement and thereby avoid the delay of carrying out a tendering process.

APPENDIXMAIN TERMS AND CONDITIONS OF THE OFFER LETTER

The offer letter is dated 7 November 2011.

The offer letter is in the standard format and there is unlikely to be much room for negotiation.

Recitals

Reference is made to the Council's application dated 18 October 2010 for funding from the HCA.

The offer letter confirms that the site has the potential for collapse and is considered to be a significant risk to public safety and property thereby causing blight. Accordingly, the HCA has determined that DBC is eligible for investment under the Derelict Land Act 1982 and offers to reimburse the Council 100% of the eligible costs specified in Annex 1 (of the offer letter) subject to the Council's acceptance of (and in accordance with) the terms and conditions set out in the offer letter.

Condition 4

Subject to the terms and conditions of the offer letter, the HCA agrees to reimburse the Council in accordance with condition 9 (see below) the Approved Costs specified in the table in Annex 1 incurred by the Council in respect of the corresponding item described in Annex1.

Annex 1**Works**

Treatment cost advanced works	£197,000		
Treatment cost	£1,433,000	£1,630,000	£1,630,000

Level Surveys	£3,900	£3,900	£1,633,900
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Professional fees

Geo-technical consultant fees	£369,949	£369,949	£2,003,849
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Other

Insurance payments	£5,500		
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Compensation payments	£15,000		
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Rent of land – site compound	£20,000		
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Road closure/diversion	£1,000	£41,500	£2,045,349
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Total LSP Grant Assistance			£2,045,349
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The Council acknowledges and agrees that:

- the total grant shall be the total Approved Costs i.e. £2,045,349
- the HCA has not allowed any contingency sums and any expenditure over and above these amounts will be borne by the Council
- the grant for each individual item in Annex 1 is capped at the level of the Approved Costs specified for each such item

- the Council is fully responsible for paying any sums due under any contracts it has let for the works as well as being responsible for receiving, expending and accounting for all amounts received or expended with respect to the Project and/or the works

Subject to condition 8.2, the Council is entirely responsible for:

- any costs overrun incurred with respect to each of the individual items described in Annex 1; and/or
- any costs greater than the total Approved Costs; and/or
- any costs that do not directly relate to the Works (“Works” means all of the works to be carried out by the Council for the purposes of the Project broadly described in the works specification in DBC’s application)

Condition 8.2 allows the Council to request a Material Variation to the Works and/or the Approved Costs. This means that, although the grant for each individual item in Annex 1 is capped, the transfer of resources between these individual items may be possible with the HCA’s approval. The HCA may refuse a request for a Material Variation or approve in whole or part or require a new application for a grant under the LSP.

The Council must notify HCA within 21 working days if it becomes aware that its expenditure for any item described in Annex 1 is going to be less than the amount specified for that item. It is therefore important to keep the HCA regularly informed.

The Council must notify HCA within 5 working days if it receives financial assistance with respect to the Project from another source and this could result in the HCA revising the amount of the grant and/or reclaiming all or any part of it.

Condition 5

This condition makes clear that the grant is not paid over automatically and that the Council must comply with condition 6 (implementation of the works).

Condition 6

This condition sets out a number of requirements concerning the implementation of the Project and the Works by the Council. These requirements relate to the Council’s responsibilities for managing –

- health and safety
- obtaining all necessary consents, licences, permissions, etc
- monitoring and reporting on progress, risks and costs, change control and early warning procedures
- compliance with CDM Regulations
- compliance with the European procurement regime

Condition 7

This condition states that the Works will be completed by 10 May 2013 and the investigation and surface reinstatement by 3 June 2013. These dates are based on the revised outline programme prepared by the Council’s consultants (Hyder Consulting).

Condition 8

This condition prohibits the Council from consenting to, permitting, instructing or initiating any Material Variation to the Works and/or Approved Costs unless –

- in the event of an emergency or in mitigation of any risk of increased cost or delay, or

- with the approval of the HCA in response to a request by the Council for a Material Variation under condition 8.2

“Material Variation” is defined as –

- any increase or decrease in Approved Costs
- any change to the works specification
- changes to the Project milestone for the completion of the investigation and surface reinstatement
- abandonment of any part of the Project

Condition 9

This condition sets out how claims for payment shall be made. When returning its acceptance of the offer letter the Council must provide the HCA with a quarterly profile of the claims for payment to be submitted to the HCA by the Council in relation to the Project.

Claims for reimbursement of Approved Costs must be submitted quarterly on the basis of gross expenditure and in accordance with the submitted profile. Claims must be supported by documentary evidence.

Under Condition 9.5 the HCA will only reimburse up to 95% of the contractor's costs. Payment of the remaining 5% will be withheld until the HCA receives the audited Final Claim Form from the Council's External Auditor. This means that a 5% retention must be built into the contract with the Council's contractor. The Final Claim Form must be submitted by 10 May 2014 at the latest unless a Material Variation has been agreed. . HCA is not liable for any delays in the payment of claims unless the delay is caused by its negligence.

Any overpayment of grant must be repaid on demand or immediately the Council becomes aware of the overpayment, even where due to error on the part of the HCA.

Condition 11

If DBC commits a “Material Breach” the HCA can –

- require the Council to remedy the breach within 30 working days, or
- withdraw the grant immediately

In effect, any Material Variation without the approval of the HCA under condition 8.2 would be a Material Breach for the purposes of condition 11. This would include any change to the works specification or delays to the programme. Changes to the programme may well occur and therefore emphasises the importance of keeping the HCA informed and obtaining the necessary approvals for any Material Variation.

Failure to complete the Works or the investigation and surface reinstatement by the completions dates specified in condition 7 also constitutes a Material Breach unless these dates have been extended by the HCA.

Condition 12

This condition, in effect, excludes the HCA from any liability whatsoever in respect of any aspect the Project and the Council will indemnify the HCA from any claim that may be made against them.

This exclusion extends to any liability for loss or damage caused by the HCA not being able to make any payment to the Council at the due time.

Condition 19

The Council has 4 weeks to accept the offer i.e. before 5 December 2011.

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