REPORT OF **Head of Communities and Place**

To: **Full Council**

Subject: **Brunswick Wharf Land Release Fund**

Date: **12th December 2022** **Reference:**

PURPOSE OF REPORT:

To inform members of the details of conditionality that Department for Levelling Up, Housing and Communities (DLUHC) require in relation to the spend of the Land Release Fund award to Torridge District Council for Quay wall works at Brunswick Wharf and to agree the basis on which the funding should be released to Red Earth.

1. INTRODUCTION

In September 2021 it was reported to Full Council that an award of £797,000 had been made to TDC to assist the developer of Brunswick Wharf with the cost of repairing the Quay Wall, as enabling work for the future development of the site for housing purposes.

Full Council resolved that a sum of £797,000 is added to the Council's Capital Programme to Quay Wall works at Brunswick Wharf in accordance with the Land Release Fund (LRF) funding criteria and an agreed specification of work with Red Earth.

2. REPORT

Following the previous committee resolution the Council has sought advice and guidance from OPE on how it might manage the risk of grant clawback in the event that the site does not yield housing as set out in the application for funding. Investigations into the risk of grant clawback have concluded and while the primary objective of the funding award was to ensure that sites are released for the purposes of house building and that has been achieved, the risk of grant clawback (from the Council) remains until the site has delivered 53 units of housing.

The Council has therefore been investigating way of managing the financial and reputational risk to the authority in the event that the grant funds are awarded to the contractor, the Quay Wall work is completed but housing is not delivered on site.

3. IMPLICATIONS

Legal Implications

A grant funding agreement with OPE has been agreed and signed by the S151 Officer.
Red Earth are contracted to agree a specification of quay wall works with TDC and make the agreed improvements to the TDC Asset. TDC would then with Red Earth to provide financial

assistance toward the cost of that work to a maximum amount of £797,000 (the LRF grant amount).

Financial Implications

The sum of £797,000 will need to be added to the capital programme if the grant is to be accepted and used for quay wall improvements. Any payments to the contractor doing the quay wall works will be retrospective on evidence of cost to a maximum amount of £797,000. Any amount not spent of quay wall works under the £797,000 will need to be returned to the OPE programme.

Red Earth

Following the discussions with OPE that concluded in no further guidance on how the council could protect its position, further conversations were held with Red Earth.

These resulted in the proposal to Red Earth the either a Personal Guarantee from Mr Friend or a charge on the property would provide the Council with the assurance it requires.

Red Earth/Mr Friend have informed us that neither of those suggestions would be acceptable. They feel that a personal guarantee is out of the question and that a charge would not be acceptable to the key lenders that will finance the development.

Red Earth have spoken with their lenders and have suggested that a subordinate charge would be more acceptable.

A subordinate charge is secondary to a primary charge. The charge that is being proposed for TDC to take will rank below any other charges or securities. We understand that the financiers will not accept a primary charge being taken by TDC.

Red Earth have provided the following comment for inclusion within this report:

I think it would be helpful for you and ultimately the members when they review this at Full Council on 12th December to consider the following points.

Overall financial structure of Red Earth Bideford Ltd

1. Red Earth Bideford Ltd is a SPV with no other debts or interests other than the Brunswick Wharf site. There is equity invested in the project. It is tied into the development by way of a Joint Venture Agreement which is solely for the purpose of this project and cannot be used for other sites or purposes. The JV partners (who are all family members) have no rights to charges over the property. Only just over a third of that equity has so far been spent or committed.

Phase 1 – up to signing of contract for main construction works

2. The first phase of the development, the quay wall works will be funded from equity and from the grant. There will be no bank loans.

3. The only charge on the whole development site through that phase will be the Council's charge

4. The total costs are confidently assessed to be £900,000 as we have a negotiated tender in from TMS Ltd. Therefore, a contract for completion of the works will be entered into *and fully funded contemporaneously with the payment over of the grant and the creation of the Council's charge.*

5. At the completion of phase 1, the necessary preparatory works will have been completed, the planning permission will have been implemented and the site would, at that point, be ready for residential led development. There would still be no other charges on the land. If the project ceased at that point and DLUHC sought repayment of the grant, the Council would be adequately secured. At that point, of course, the site would be "ready to go" for significant residential development.

Phase 2 – the Construction

6. On completion of phase 1, it is anticipated that a single contract will be let for the construction of the whole of the scheme. The development of the housing will then commence. The risk of any attempt by DLUHC to recover any grant from that point would be de minimis because it would know that under the fully funded (see below) construction contract the housing will be completed.

7. Phase 2 will be largely funded by bank loans - and the Council charge would be subordinate to the bank's charges. The bank loans would be drawn down only after the equity had been spent in the early part of Phase 2 and as the development progresses.

8. There will be a point – just before sales of the completed units commences – when the capital invested from equity and bank loans will peak but the bank facilities will be sufficiently high to cover that peak. The financing structure will mean that the bank and the company will have every incentive to complete the project. There will be a contract in place for the complete construction.

9. During the construction period it would be impossible for DLUHC to lawfully seek repayment of the grant because the conditions of the grant would be being met.
The Result

10. The result is that the Council will effectively have a first charge (because there would be no other charge above it) for Phase 1 when there may be a risk of DLUHC seeking repayment and there would be ample equity (and land value) to give that charge full value. Once a contract for the completion of all the housing has been entered into, the risk of DLUHC recoupment disappears as the housing is being delivered and DLUHC will know that it will be delivered. Even if the project somehow failed during the works (which is implausible given the confidence the equity providers and the banks will have had to have in it before signing the construction contract) the Council would have recourse to the subordinate charge. But even in these circumstances it seems implausible that there would be any possible risk as that stage of DLUHC demanding repayment of the grant because the circumstances would have to be wholly exceptional at that point for the project to fail.

I hope this provides further clarity and reassurance.

<u>Risk Management</u>

If the Council were to decide not to accept the grant funding there is potential for reputational risk in being seen to not support regeneration or boost its local economy in the post-Covid-19 world. Construction inflation has increased significantly since the application was made to the LRF and this has further increased the viability gap on the proposed scheme. There is a risk that without this financial assistance the site will remain undeveloped or that development will be further delayed.

The Council could be viewed to be unsupportive of housing delivery at a time of stated housing need, in fact Bideford Town Council has declared it's own Housing Emergency. It is also likely that future applications to OPE or LRF schemes would be considered less positively.

The proposed works provide flood risk prevention for the surrounding area of East the Water.

There is a risk that if the financial assistance is not provided to the contractor the work done to the quay wall will be completed to the minimum acceptable standard. TDC will have ongoing maintenance responsibility for this wall and the riverside walk. The grant funding will provide room for an agreed specification of improvements, assisting TDC in the reduction of maintenance liabilities in the coming years.

The risk of grant claw back will be nil on completion of the 53rd unit of housing on the site. The grant is intended as enabling and so making the funding available to Red Earth after delivery of the 53rd unit of housing would not be in the spirit of the LRF award to TDC.

If the grant award is agreed with Red Earth the Council will not release funds in advance of the quay wall work being completed to a satisfactory standard. It might be necessary to agree a schedule of retrospective stage payments with the contractor.

Subordinate charges are only repayable after other debts/charges that rank higher have been repaid.

Grant Conditionality

Previous discussions with the OPE team have confirmed that the primary in criteria for use of the LRF monies was achieved at the point that the contract of sale became unconditional (Planning Permission for the current scheme was achieved). This, in effect, means that it is **unlikely** that DLUHC would seek to reclaim the grant funding if the delivery of housing is delayed beyond the reporting timetable agreed with them.

During those discussions DLUHC also confirmed that they would recommend the Council seeks assurance from Red Earth that the land will not be used for purposes other than those described within the consented scheme. They have suggested that, to protect the Council in the event that less than 53 units of housing are delivered on the site, Red Earth agree that a charge is placed on the land. This charge would seek to ensure that in the event of an alternative non residential use being delivered Red Earth, or the property owner at that time, would be liable should DLUHC seek to reclaim the grant funding.

Further written advice from the OPE Team will not be forthcoming and they have referred the council to the terms of the original grant agreement. They consider that it is for the Council to decide how the claw back risk is managed.

Reputation

While the above mitigation would seem to secure the site for housing delivery at some point in the future the Council has no control over delivery timescales or indeed who will deliver the units of accommodation.

As previously reported, it is a possibility that Red Earth might seek to use the grant funding to meet its contractual obligation and secure a commencement on site (thus making the planning consent extant) and then stall delivery or even sell the site at a value far in excess of the price that they paid for it. In that event the land charge would at least secure the use of the land for the purposes that the Council intended to sell it and protect the council in the event that alternative uses where sought in the future. This might help to negate any negative public sentiment that the LRF funding was primarily used to add value to the site for the benefit of Red Earth alone. This reputational issue is a real concern for the OPE team and one that they are keen to manage in partnership with the Council.

Red Earth assert that it is their ongoing intention to develop the site to completion, in line with the existing planning consent, and that they have no intention to sell the site once the Quay wall work is finished.

4. CONCLUSION

It is concluded that if the Council wishes to make the grant award to Red Earth for the Quay Wall enabling works the risk of grant clawback cannot not be managed entirely until 53 units of housing have been delivered on the site.

If the Council does not make the grant award to Red Earth for the Quay wall enabling works the viability of the entire development is called into question and the delivery of on site regeneration may be delayed or not happen at all. The site has been sold and the Council will have no control over the development of the site, other than through its Local Planning Authority role.

The development of Brunswick Wharf for regeneration purposes has been a priority of the Council for a number of years.

5. RECOMMENDATIONS

It is recommended that Members consider the following options and select one:

A) Accept the principle of a subordinate charge and make the grant award to Red Earth for the Quay Wall work. The sum of £797,000 should be added to the capital programme. (this option provides limited risk management but would facilitate the enabling works for the development).

B) Make the grant award to Red Earth for the Quay Wall work without a subordinate charge of any other form of risk mitigation. The sum of £797,000 should be added to the capital programme. (this option provides no risk management of grant clawback in the event of non delivery of housing but would facilitate the enabling works for the development).

C) Do not make the grant award to Red Earth (accepting that as a consequence they might be further delay or the development might not proceed. There is no grant clawback risk for the Council)

SUPPORTING INFORMATION

Consultations:	Date of Consultation – Nov 22 Officers Consulted – Chief Executive, Head of Legal and Monitoring Officer, S151 Officer, Major Projects Manager
Contact Officer:	Head of Communities and Place