

**South Lakeland District Council
Cabinet**

Wednesday, 9 March 2022

Structural Repair Works to River Wall, Gooseholme

Portfolio: Finance and Assets Portfolio Holder
Report from: Director of Customer and Commercial Services
Report Author: Sion Thomas – Operational Lead Delivery and Commercial Services
Wards: Kendal Town;
Forward Plan: Key Decision included in the Forward Plan as published on 08.02.2022

Links to Council Plan Priorities:

Addressing the climate emergency – Working with the EA to deliver the Kendal Flood defence scheme.

1.0 Expected Outcome and Measures of Success

1.1 To provide funding for the Environment Agency (EA) to undertake structural repair works to riverside wall to ensure that the flood defence works remain on programme.

2.0 Recommendation

2.1 It is recommended that Cabinet

(1) Approves the transfer of funding in the sum up to £265,000 to the Environment Agency to undertake the structural repair work to the river side wall within the Gooseholme area; and

(2) Delegates Authority to the Director for Customer and Commercial Services in consultation with the Lead Specialist for Finance and Lead Specialist for Legal, Governance and Democracy, to prepare and enter into the necessary funding and legal agreements.

3.0 Background and Proposals

3.1 Cumbria County Council as part of ongoing bridge maintenance works surveyed sections of the River Kent. Cumbria County Council informed SLDC Officers and the EA of deterioration to the foundation of the retaining wall within the Gooseholme area which is in the ownership of South Lakeland District Council. Location of wall shown in Appendix 1.

3.2 The Council approved and undertook works to complete a temporary repair to make the section of wall safe to stop further deterioration in the Summer of 2021 whilst further survey works could be undertaken. Structural Report as shown in Appendix 2.

3.3 Following survey work and dialogue between SLDC and the EA, it has been estimated that the cost of the repair works is in the region of £265,000. Furthermore, this potentially could have a significant impact on the programme for the Environment Agency if structural repairs are not undertaken to the section of wall within the Gooseholme area.

- 3.4. Discussions have been ongoing with the EA as to responsibility for the wall repair in light of the new flood defence scheme being built through Kendal. The works in relation to the flood defence scheme are being carried out by EA and funded by European Regional Development Funds (ERDF). SLDC has agreements in place with EA and the Secretary of State for Housing, Communities and Local Government in connection with the flood defence scheme, further described at paragraph 7.1.1.
- 3.5 The majority of the river walls are in serviceable condition, but would not stand up to modern design standards and or the additional loadings of flood walls being built on top of them. Replacing/repairing extensive lengths of river retaining walls through the town to modern design standards would ultimately be cost prohibitive. Therefore, the EA have allowed for limited reuse of existing wall areas. This wall is to be re-used in some capacity but condition of the wall means that flood defences would need to be set further back if structural repair works were not undertaken, leading to delay and further redesign of flood wall alignments in this area.
- 3.6 It is proposed that SLDC support the structural repair works up to a value of £265,000 (the cost of the repair required to the wall which is SLDC's responsibility), and that the EA deliver the repairs as part of the flood scheme to ensure that their programme is unhindered. It is proposed to use the EA's contractor to benefit from having the designers and contractors already on board. EA will enter into the contracts with the contractor to carry out the works. This proposal also means that there is only one Principal Contractor working in this area and meets with the CDM Regulations 2015.
- 3.7 It is proposed that Cabinet approve the monies to be transferred to the EA on completion of funding/ legal agreements, completion of full design with tendered costs and that delegation to be given to officers to grant up to £265,000.

4.0 Appendices Attached to this Report

Appendix No.	Name of Appendix
1	Location Plan
2	Structural Report
3	Health and Sustainability Impact Assessment

5.0 Consultation

- 5.1 Consultation has taken place with the Commercial and Delivery Manager, Corporate Management Team, Portfolio holder, and the Environment Agency.

6.0 Alternative Options

- 6.1 To not approve the works or contribution. This would have significant impact on the EA's programme and budget. Potential re-design of the area may be needed if monies are not forthcoming and this would require additional planning applications, further business case review and put this area at risk.

7.0 Implications

Financial, Resources and Procurement

- 7.1.1 The Council is also currently engaged with the EA on its ERDF programme where South Lakeland District Council is the lead applicant and the EA the delivery body for delivery of £5.34m flood defence works to provide flood defences for businesses in Kendal. As part of this project, the Council engaged and entered into the necessary funding and legal agreements and this included detail around procurement and best value. The overall flood defence scheme must be OJEU compliant meaning that a full Water and Environment Management (WEM) Framework competitive tender exercise will be undertaken for the entire scheme. The work required to the wall will also be

built into the EA existing procurement working with their approved designers and contractors to ensure best value. The process for the EA's procurement has been as follows:

Supplier allocation for the Kendal FRMS has been made by using a four stage process:

Stage 1: All procurement is undertaken within the WEM Framework rules and stipulations.

Stage 2: The Programme Delivery Unit (PDU) has been set up by the EA as the default delivery route for projects within the WEM Framework. All phases within the Kendal FRMS, will be procured from PDU7.

Stage 3: A workshop was held in January 2018 involving the EA project team, Defra commercial, EA PDU7 management team and PDU7 suppliers. During this meeting, suppliers were allocated to specific projects and phases within the Kendal package depending on their previous knowledge and experience, skills, past performance and current workload.

Stage 4: A comprehensive target cost setting exercise for each project ensures that the EA is getting value for money from each allocated PDU supplier, and there is no obligation to award the contract if a Target Cost cannot be agreed.

7.1.2 Council are being asked to approve a grant of up to £265k for the works. The EA will be asked to provide full design details and tendered costings prior to grant funding being released to the EA as part of this work. This section of wall will be a separate tender to the overall works package.

7.1.3 The Council approved the Capital Programme in February 2022 and this included £265k for repairs to the retaining wall in Gooseholme.

Human Resources

7.2 There are no Human Resource implications with this project/ scheme.

Legal

7.3.1 The wall belongs to South Lakeland District Council and repairs to it are the Council's responsibility. The Council's capital programme, including funding of £265k for repairing the wall, was approved by Council in February 2022. This report is seeking approval for the funding to be granted to EA to enable the works to be carried out as part of a wider programme of works they are carrying out in the same area in connection with the Kendal flood defence scheme.

7.3.2 Legal advice has been taken from external solicitors in connection with this approval. The initial advice received has been focussed on the powers of the Council to provide funding to EA to carry out these works, the subsidy control and procurement position, and wider risks associated with the works.

7.3.3 In respect of powers, the advice is that:

7.3.4 The general power of competence under s.1 of the Localism Act 2011 (LA) provides a source of powers for the Council to make a grant to the Environment Agency for repair of the wall. This is on the basis that repairing assets owned by the Council, and providing a grant to the EA for these purposes is within the scope of things that an individual generally may do. In each case, these powers are subject to pre and post commencement limitations, but the Council's legal advisors are not aware of any limitations which would impact upon this advice.

7.3.5 In respect of the procurement position, legal advice is that if the Council provides a grant to EA in order to carry out repairs to the wall (as opposed to entering into an

agreement with EA which is in the nature of a services agreement), then this will not be a procurable contract which falls within the scope of the Public Contracts Regulations 2015 (PCR). This reflects the Council's intentions and so it is very unlikely that the agreement with EA would be seen as a procurable contract which is subject to the PCR. Even if it were, it would be below the current threshold for works contracts under the PCR (currently £5,336,937) and therefore no procurement process would be required to award the contract. In order to mitigate any potential procurement risk, the Council will seek to draft the agreement as a true grant, therefore falling outside of the scope of the PCR. The procurement risk in connection with this transaction is therefore very low. The procurement risk in connection with this transaction is therefore very low.

- 7.3.6 In respect of the subsidy control position, legal advice is that where a public body provides funds to another public body in connection with their public functions, this would sit outside of the subsidy control regime, on the basis that the recipient of funds is not an economic actor in this context and is therefore not capable of receiving a subsidy. The subsidy control risk in connection with this transaction is therefore very low.
- 7.3.7 The legal advice has highlighted the following risks associated with the transaction, and proposes the following mitigations:
- 7.3.8 There may be an interaction between the agreements that the Council has entered into with the Secretary of State for Communities, Housing and Local Government (SOS) and the EA in connection with the flood defence scheme. This might be the case if (for example) the repairs to the wall in question might impact upon the works which are carried out under the arrangements between SLDC and EA. The interaction between the proposed works to the wall, and the flood defence scheme will be reviewed and to the extent that there is any interaction, any risks arising as a result of that interaction will be considered and appropriate mitigations will be sought to manage them and protect the Council's position.
- 7.3.9 There may be risks that flow from the Council contributing to the costs of repairing a wall which is then incorporated into a flood defence, for example in relation to liability in connection with the construction of the wall. The Council will seek to put in place appropriate provisions in the grant agreement to mitigate these risks as far as possible.
- 7.3.10 Following the legal advice, it is clear that the Council has the powers to enter into this transaction. The risk of granting an unlawful subsidy or breaching the Council's obligations under the Public Contracts Regulations 2015 is very low. There are potential risks associated with the transaction, but these will be explored in detail prior to entering into any grant agreement with EA, and appropriate mitigations will be sought to protect the Council's position.

Health and Sustainability Impact Assessment

- 7.4 Have you completed a Health and Sustainability Impact Assessment? Yes
- 7.5 If you have not completed an Impact Assessment, please explain your reasons: See Appendix 3

Equality and Diversity

- 7.6 Have you completed an Equality Impact Analysis? No
- 7.7 If you have not completed an Impact Analysis, please explain your reasons: Not felt required

Risk Management	Consequence	Controls required
Flood defence budget and programme will be put at significant risk.	Significant delays and costings implication for the EA if the work is not approved.	Report to be approved and agreements to move forward in line with the EA programme.
There may be an interaction between the agreements that the Council has entered into with the Secretary of State for Communities, Housing and Local Government (SOS) and the EA in connection with the flood defence scheme.	This might be the case if (for example) the repairs to the wall in question might impact upon the works which are carried out under the arrangements between SLDC and EA.	The interaction between the proposed works to the wall, and the flood defence scheme will be reviewed and to the extent that there is any interaction, any risks arising as a result of that interaction will be considered and appropriate mitigations will be sought to manage them and protect the Council's position.
Liability in relation to wall construction / repairs which are then incorporated into Flood Scheme	There may be risks that flow from the Council contributing to the costs of repairing a wall which is then incorporated into a flood defence, for example in relation to liability in connection with the construction of the wall.	The Council will seek to put in place appropriate provisions in the grant agreement to mitigate these risks as far as possible.

Contact Officers

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Tracking Information

Signed off by	Date sent	Date Signed off
Section 151 Officer	26.01.22	28.02.22
Monitoring Officer	26.01.22	28.02.22
CMT	26.01.22	24.02.22

Circulated to	Date sent
Lead Specialist	N/A
Human Resources Lead Specialist	N/A
Communications Team	N/A
Leader	N/A
Committee Chairman	N/A
Portfolio Holder	26.01.22
Ward Councillor(s)	N/A
Committee	N/A
Executive (Cabinet)	N/A
Council	N/A