

COUNCIL

17 OCTOBER 2013

SPECIAL URGENCY DECISIONS

Report from: Neil Davies, Chief Executive

Author: Perry Holmes, Monitoring Officer

Summary

This report details the use of urgency powers by the Director of Regeneration, Community and Culture.

1. Budget and Policy Framework

- 1.1 The Constitution requires that urgent action, in relation to matters reserved to Council, shall be reported to the next available Council meeting.

2. Background

- 2.1 In relation to Council responsibilities, subject to consultation with the Leaders of all the groups which comprise at least 1/10th of the membership of the Council (or their nominees), and the provisions for urgent decisions which are contrary to any plan or strategy which has been approved or adopted by the Council or which are contrary to or not wholly in accordance with the budget approved by the Council (set out in Chapter 4, Part 3 of the Constitution), the Chief Executive and directors shall have the power to act on behalf of the Council in cases of urgency only where the urgent matter is of such a nature that it may be against the Council's interest to delay and where it is not practicable to obtain the approval of the Council.
- 2.2 Following the decision, the decision taker will provide a full report to the next available Council meeting explaining the decision, the reasons for it and why the decision was treated as a matter of urgency.

HR Matter

- 2.3 An ex-employee took out a claim against the Council at an Employment Tribunal in Ashford. Although the Council believed it had a good case to defend its decision to make the employee redundant,

Counsel advised the Council it could lose the case and a better and safer course of action was to offer up to an agreed sum. An urgent decision was required as officers' delegated powers extend to settlements up to £10,000. In the absence of the Chief Executive, the Director of Regeneration, Community and Culture, acting as Deputy Chief Executive, consulted with the Deputy Leader, Councillor Alan Jarrett (in the absence of the Leader) and also Councillor Maple, as required by the Constitution. Both agreed with the course of action on 3 July 2013. The terms of payment were not agreed until after the last Council meeting (25 July 2013) and are therefore being reported to this Council meeting.

- 2.4 Further details relating to this use of urgency powers are set out in an exempt appendix.

Housing Revenue Account

- 2.5 The HRA reserve (working balance) is a part of the HRA business planning development and featured in the budget approved by Council on 21 February 2013.
- 2.6 The Local Government and Housing Act 1989 (LGHA) established the HRA as a ring-fenced account dealing with expenditure and income related to the landlord function associated with the Council's housing stock. It is commonly understood that the General Fund of the Council can neither benefit from nor be encumbered by financial decisions relevant to the HRA and that the HRA should operate as a stand-alone sustainable account. This has been the case since the creation of the HRA in the former Gillingham Borough Council timeframe and has continued since the incorporation of the account within Medway Council.
- 2.7 The balance on the account at the 31 March 2013 was £4.346m. Against this balance £1.664m is committed as a contribution to the funding of the HRA capital programme in 2013/14 and £0.750m is a prudent set-aside for contingency purposes. This leaves £1.932m of the HRA reserve as a resource within the business planning regime. However as the recent report on the Business Plan indicated the HRA is operating at a surplus and that surplus will grow to some £133m over the 30 year life of the plan. This healthy financial position is in no small part as a consequence of the ending of the former Government Subsidy regime on the 1 April 2012.
- 2.8 The LGHA contained a clause in Schedule 4, Part III, paragraph 2 that stated that:
A local housing authority to whom no Housing Revenue Account subsidy is payable for any year may carry the whole or part of any credit balance shown in their Housing Revenue Account for that year to the credit of some other revenue account of theirs.

2.9 This circumstance applied to every Housing authority post 1 April 2012 but its obscurity and apparent contradiction to the principles of the ring-fence meant that the Council was unaware of its existence.

2.10 On the 10 September the Council's treasury advisors Sector wrote to the Chief Finance Officer and brought the following to his attention:

Further to Bob Davy's article in August's edition of CityWatch, it really is important that consideration is given to the following opportunities of transferring surplus HRA balances to the General Fund (set out below) where this is deemed appropriate by authorised finance officers and members.

The introduction of HRA self-financing was accompanied by the abolition of housing subsidy to the HRA. Schedule 4, Part III, paragraph 2 of the Local Government and Housing Act provides as follows:-

A local housing authority to whom no Housing Revenue Account subsidy is payable for any year may carry the whole or part of any credit balance shown in their Housing Revenue Account for that year to the credit of some other revenue account of theirs".

*The ability for English housing authorities to do this will cease as from **1st October 2013** following the coming into force of the Localism Act 2011 (Commencement No. 9) Order 2013.*

In order to ensure legality, it is suggested that any authority wishing to transfer balances in this manner obtains a formal resolution under their internally approved processes, and carries out an appropriate accounting entry by 30th September.

2.11 Following this notification and subsequent investigation the Director of Regeneration, Community and Culture, Chief Executive and the Finance Portfolio Holder were informed and a decision made to seek to progress the opportunity.

2.12 Initial discussion with the Council's Auditor and onwards with the Audit Commission confirmed that this appeared to be a legitimate action that is being actively pursued by a number of Councils. The more considered view of the Auditor is attached as Appendix 1. The Council's Monitoring Officer had also confirmed that in his opinion the action was consistent with existing legislation but would cease to be possible after 1 October 2013. Given the potential for challenge to the decision leading Counsel opinion was sought which was strong in confirmation of the legitimacy of the action, confirmed the Monitoring Officer's view and indeed at paragraph 20 expresses the view that it is a fiduciary duty to consider such action. That opinion is attached in the exempt appendix.

- 2.13 The Council had a choice to leave the HRA balance intact and absorbed within a draft business plan model that has an accumulated 30 year surplus of £133m by 30 September 2013 opportunity to transfer a responsibly determined sum to the General Fund where it could supplement an ever scarce resource for financing new investment for the community at large. Such investment is now only possible by borrowing for which there is no revenue funding; asset sales that are already over-committed; or Government grants that are now few and focussed on Central rather than Local priorities.
- 2.14 It was therefore proposed to transfer £2m of the HRA reserve balance at 31 March 2013 to the General reserve of the Council and to earmark this sum for use in the expansion of the Community Hub projects at Strood and Twydall, and the refurbishment/relocation of Riverside 1. In the case of the latter, surveys have indicated that at least £800,000 needs to be spent to enable the building to continue to be used as the Council's principal housing and benefits reception point. Alternative locations are being investigated to achieve better value for money to the expenditure but there will be significant costs associated with such a relocation. Detailed proposals for the use of these funds will be presented to Council for inclusion in the Capital Programme in due course (a report regarding Strood Community Hub is elsewhere on this agenda).
- 2.15 The Director of Regeneration, Community and Culture consulted with the Leader, Councillor Rodney Chambers and also Councillor Maple, as required by the Constitution on 27 September 2013. Councillor Chambers was supportive of the proposals whilst Councillor Maple accepted that he had been properly consulted.
- 2.16 In addition, the Director of Regeneration, Community and Culture obtained the approval of the Chairman of the Business Support Overview and Scrutiny Committee, Councillor Clarke, that in accordance with Chapter 4 (Rules), Part 3 (Budget and Policy Framework Rules) it was not practical to convene a quorate meeting of the Full Council and that the decision needed to be made a matter of urgency.
- 2.17 The Director of Regeneration, Community and Culture Overview and Scrutiny Committee having consulted the Group Leaders and acquired the written agreement of the Chairman of Business Support Overview and Scrutiny Committee, acted, on behalf of the Council, to approve the transfer of £2m from the HRA reserve to the General reserve and allocates this sum for the creation of community assets.

3. Financial, legal and risk implications

- 3.1 The requirement to report decisions taken under urgency provisions is set out within the Constitution.

3.2 Detailed financial, legal and risk implications are set out in the exempt appendix.

4. Recommendation

4.1 That the report be noted.

Lead officer contact

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Background papers

None



Mick Hayward
Chief Finance Officer
Medway Council
BY E-MAIL

23 September 2013

Dear Mick

Proposed transfer of balances involving the Housing Revenue Account

We have been discussing the possible transfer of amounts from Medway's Housing Revenue Account (HRA) balance to its General Fund balance in the light of the circulation of information by Sector in this area. In my opinion, the legal position is not clear and given that a transfer may be seen as contrary to the intention of the HRA ring-fence I thought it would be helpful to set out the steps I believe a council acting reasonably would follow, as shown below:

- 1) Obtain legal advice, from an appropriately qualified person, on whether the Council has authority to make the transfer and to ensure that it exercises its discretion reasonably in line with the Wednesbury principle.

Matters to consider may include, for example, whether:

- the Local Government and Housing Act 1989 (LGHA) permits the transfer of balances that have been generated in years during which an Authority was in receipt of housing subsidy or only in the year that the transfer is proposed
- the Council is following due process and acting consistently with other policies and decisions
- the HRA is sufficiently resilient to withstand the loss of funds and is supported by a robust 30 year business plan.

- 2) Consider the governance and accounting issues with making a transfer, for example, whether:

- the Council could suffer reputational loss by being seen to take advantage of a technical loophole to use funds that it should be protecting for council tenants to improve general council finances
- central government might take retrospective action. The amendment of the LGHA indicates

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central government may not be supportive of transfers of this nature.

- (how) any decision would need to be reflected within the 2012/13 financial statements, for example as a non-adjusting post balance sheet event, and the 2013/14 financial statements.

Given the stated (by Sector) deadline of 30 September for Councils to determine such a transfer, I would ask you to give your urgent consideration to the above comments and provide the Council's response. It would be very helpful if Members involved in the decision making process were provided with a copy of this letter and I would ask that you circulate it to them should the Council decide to proceed with its proposal.

I look forward to hearing from you.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Robert Grant', with a long horizontal flourish extending to the right.

Robert Grant (Partner), for and on behalf of BDO LLP

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copy

N Davies, Chief Executive

P Holmes, Monitoring Officer