

Report title: Housing Infrastructure Fund – Contract for A120/A133 Link Road and Colchester Rapid Transit Development	
Report to: Councillor David Finch, Leader of the Council	
Report authors: Andrew Cook – Director, Highways and Transportation and Steve Evison – Director, Sustainable Growth	
Date: 20 October 2020	For: Decision
Enquiries to: Gary MacDonnell - Programme Manager M: 07415 791950 email: gary.macdonnell@essex.gov.uk	
County Divisions affected: All Essex	

1. Purpose of Report

- 1.1 To seek approval to enter into a grant determination agreement with Homes England as part of the Housing Infrastructure Fund (HIF) which could result in the grant of £99.9m to ECC to continue with works to develop the A120/A133 Link Road and Colchester Rapid Transit System (the “Project”).

2. Recommendations

- 2.1 To agree to enter into a Grant Determination Agreement with Homes England for £99.9m of funding for the Project.
- 2.2 To agree that the Executive Director, Place and Public Health is authorised to agree terms with TDC and CBC regarding joint working arrangements for the delivery of the Project.
- 2.3 To note that by entering into the Grant Determination Agreement with Homes England, ECC is placing reliance on the receipt of a substantive amount of S106 funding (£10m) as set out in paragraph 3.10(e). The Recovery Recycling Strategy assumes that the total amount capable of recovery is £64m, ECC will seek to receive the first allocation of this to fund final delivery of the Project through the Infrastructure Delivery Strategy. Should S106 contributions not be received, the scope of the project will be scaled back accordingly with the consent of Homes England

3. Summary of issue

- 3.1 HIF is a government capital grant programme from the Ministry of Homes Communities & Local Government (MHCLG) of up to £5.5 billion, which aims to help to deliver up to 100,000 new homes in England in the areas of greatest housing demand.
- 3.2 A call for expressions of interest (Eols) for HIF funding was made by MHCLG in July 2017. ECC submitted 4 Eols on 28 September 2017, 3 were successful including the bid for the Project. The three successful Eols were developed into

formal bids which were agreed by Cabinet in March 2019 and submitted to Homes England later that month. In August 2019, ECC were informed that the bid for the Project had been successful.

- 3.3 The Project will release sustainable housing growth in Essex. The grant funding will allow ECC to gain initial funding to develop infrastructure giving the market confidence to provide further investment and make more land available for development and future homes.
- 3.4 ECC has been collaborating with CBC and TDC on the bid and the Project and there is strong local support for these projects from CBC, TDC and the relevant Essex MPs. The infrastructure provision would support local councils in the delivery of their Local Plan growth, as well as supporting key Government priorities to deliver housing and economic growth nationally.

The Project - A120/A133 Link Road and Colchester Rapid Transit System

- 3.5 The Project includes the delivery of two key infrastructure components: (1) A new link road running between the A120 and A133 to provide strategic road network improvements and provide access to Tendring Colchester Borders Garden Community (TCBGC); and (2) a Rapid Transit System (RTS), funding a route from the Garden Community into key destinations within Colchester including the town centre and the mainline railway station.
- 3.6 This infrastructure supports the CBC and TDC Local Plans to deliver the TCBGC, providing capacity and access to enable the TCBGC to be delivered ahead of schedule. The Project also offers improved access to the University of Essex and would provide a connection into a proposed new employment park in the vicinity of the University.
- 3.7 The A120 and A133 provide vital transport links across this part of Essex. The A120 connects towns from east to west as well as linking into the A12 - a major freight route through Essex and Suffolk - with the A133 as the main commuter route from Clacton-on-Sea into Colchester. The proposed A120-A133 Link Road will run from the A120 in the north to the A133 in the south and will unlock land to enable the development of TCBGC. It will also improve connectivity locally and within the wider region. The Link Road will also serve proposed new 'Park and Choose' sites which are part of the wider strategy for management of traffic and travel linked to the Local Plan and the developments coming forward to relieve traffic going to the University of Essex and its Knowledge Gateway technology and research park. Both are major employers and key contributors to the local and UK economy.
- 3.8 The RTS will provide an attractive public transport alternative to car use and is fundamental to the planned longer-term modal shift strategy for TCBGC. The RTS is an essential part of the CBC growth strategy and has the potential to unlock further new homes. The RTS will link the University of Essex, through the Knowledge Gateway, the research and technology park on the University of Essex Colchester Campus, the employment zone to Colchester Town Centre and key destinations including the rail stations and hospital.

- 3.9 In order to secure the release of the HIF funding, ECC are required to enter into a comprehensive grant determination agreement with Homes England (the "GDA"). The GDA sets out the terms of the funding and the deliverables for the Project including various warranties, conditions precedent and milestone dates that must be achieved by ECC in order for the funding to be released.
- 3.10 There are some areas of risk for ECC entering into the GDA which include the following:
- (a) The grant funding is being allocated on the understanding that the infrastructure works will be completed in accordance with the delivery plan so as to facilitate the delivery of the housing. If there is slippage then Homes England can withhold all further funding. All funding is claimed in arrears, exposing ECC to a risk that housing is not delivered and we are unable to reclaim money we have spent or committed to spend. This could be a significant sum. ECC is to use reasonable endeavours to ensure that any third parties responsible for delivering the housing achieve the target dates.
 - (b) To the extent that ECC has or will have a legal interest in the housing site, ECC is under an absolute obligation to deliver the housing. It is not currently envisaged that ECC will own the housing site.
 - (c) ECC must procure that the infrastructure works commence on time and are completed by the date of practical completion listed in the GDA and in any event by 31 March 2024. If delivery, which may require compulsory purchase orders to be made and implemented, is delayed then Homes England can withhold further funding as set out in (a) above,
 - (d) ECC must comply with a number of conditions before it draws down each tranche of funding. Some of these relate to land ownership which are particularly onerous given that some of the land is owned by third parties and will need to be acquired, possibly compulsorily purchased. Some land is also owned by TDC and CBC. ECC is warranting that with respect to the land it acquires there are no securities, covenants or restrictions on any of the land that could hinder the works. Further information also needs to be provided to Homes England to demonstrate compliance with necessary consents, valuations of the land and certificates of title satisfactory to Homes England. ECC will not be able to make any claims for any money with the exception of the preliminary costs until it has acquired all land for the whole project with a clean title and HE is satisfied with the position. This represents a significant risk.
 - (e) ECC have committed in the GDA to ensure that the developer of the housing pays £10,000,000 from developer s106 contributions to be used to support the Project. However, the only way to achieve this is via the planning application process. Planning authorities have to determine applications in accordance with policy prevailing at the time and without regard to the funding agreement. The emerging TDC and CBC Local Plan include policies requiring TCBGC to deliver the HIF infrastructure so there is a strong policy

basis for negotiating this contribution. However, there is no guarantee that this contributions will be made, which would mean that ECC is legally required to offer £10,000,000 from its own resources to this scheme or otherwise the scope of the scheme would have to be revised – but this would only be possible with the consent of Homes England.

(f) The GDA requires ECC to oversee the delivery of housing at the Garden Community (referred to as 'housing outputs'). The delivery of these outputs are not in the control of ECC; they are in the control of the housing developer(s) and, to some extent, TDC and CBC as local planning authorities. If the housing outputs are delayed or reduced, then Homes England has a right under the GDA to cease further funding. This could leave ECC at risk of covering the cost of the remainder of the delivery of the Project.

(g) Where a default occurs the GDA sets out various remedial action which can be taken, but should this remedial action fail, the GDA will terminate, and Homes England may withhold and/or cancel any HIF funding.

Terms of Agreement with TDC and CBC

3.11 ECC have been working with TDC and CBC to understand how the GDA obligations can be most appropriately shared with the local planning authorities. Partnership working between ECC and the local planning authorities will be essential given that the GDA creates obligations on ECC to oversee the delivery of housing at the Garden Community.

3.12 ECC has already been working closely with TDC and CBC for many years in the planning of the Garden Community through NEGC Ltd and its role as statutory authority covering highways, education, etc. A draft MoU has been approved in principle by the three authorities (ECC, TDC and CBC) to continue this partnership working and to commit the parties to deliver the GDA obligations relating to housing delivery and recovery of funding from the development.

3.13 TDC and CBC have stated that they are not prepared to enter into legally binding indemnity agreements and but have agreed to enter into non legally binding agreements with ECC. A legally binding agreement would provide significantly more protection to ECC and, if ECC cannot secure this, it will need to rely on partnership working between the three authorities.

4. Options

4.1 Option 1 – Enter into the Grant Determination Agreement and enter into non legally binding agreements with TDC and CBC

Option 1 is to enter into the GDA. Entering into the GDA would unlock the funding that is available and enable ECC to recover some of the preliminary costs it has incurred to date. However, option 1 is not without risk due to the detailed obligations and provisions in the GDA relating to delivery of the Project

in accordance with the agreed dates and compliance with warranties and conditions precedent as set out in paragraph 3 of this report. It is also envisaged that compulsory purchase orders will be required to obtain some of the land. The overall deliverability of the Project will also be dependent on third parties including the professional team, contractors, CDC and TBC carrying out their obligations in accordance with the agreed timescales.

4.2 Option 2 - Enter into the Grant Determination Agreement and enter into further discussions with TDC and CBC about a legally binding agreement

Option 2 would provide all the benefits of Option 1 in that we will enter into grant agreement, but it would also allow for further negotiations with TDC and CBC about the terms of the agreements that will be in place between TDC/CBC and ECC. The agreement of robust terms with TDC and CBC will assist ECC with delivering the Project and meeting the timescales and requirements set out in the GDA. It is possible to negotiate legally binding agreements with TDC and CBC since the Garden Community project is key to the delivery of long term housing growth in their areas. However, there is a small risk that Homes England could withdraw the offer of funding during the negotiations given the spending review expected in the next six weeks. Discussions with TDC and CBC have suggested that indemnity agreements with ECC would have to be approved by their respective Cabinets, delaying ECC's securing of the funding although this requirement has been known about for many months. A withdrawal of funding leave the infrastructure without a confirmed source of funding but it would also mean that the £4.126m of costs already incurred could not be claimed back.

4.3 Option 3 – Do not enter into the Grant Determination Agreement

This would potentially undermine both CBC and TDC's Local Plans and would result in the housing and associated business developments not coming forward. Reputationally, there is also a risk that that ECC would be viewed as an authority that Government and Governmental Departments would not want to do business with given the significant amount of resources that have been committed to get the Project to this stage. ECC would also not be able to recover the costs that it has incurred to date in undertaking some of the preliminary works for the Project.

5.0 Financial implications

5.1 The total cost of the A133/A120 Link Road and RTS project is estimated to be £111.9m, funded by £99.9m of HIF and £12m of S106 contributions. Of the S106 contributions £2m has been secured and £10m is anticipated from TCBGC. The table below sets out the current capital programme allocation for this scheme

	2019/20 Historic Expenditure	2020/21 Budget	2021/22 Aspirational Budget	2022/23 Aspirational Budget	2023/24 Aspirational Budget	Total MTRS Budget
	£000	£000	£000	£000	£000	£000
A133/A120 Link Road	2,016	1,000	7,500	30,000	17,886	58,402
RTS	4	1,000	3,500	6,000	41,500	52,004
Total	2,020	2,000	11,000	36,000	59,386	110,406

The most recent profile of spend and funding is shown below, adjustments will be made to the capital programme via quarterly reporting to Cabinet to ensure it reflects the most recent profile of expenditure.

Expenditure	Outturn	Forecast	Forecast	Forecast	Forecast	Forecast	TOTAL
	2019/20	2020/21	2021/22	2022/23	2023/24	Future Years	
	£000	£000	£000	£000	£000	£000	£000
A133/A120 Link Road	2,020	1,949	7,729	32,865	24,439	-	69,002
RTS	-	2,680	12,080	10,008	8,135	10,000	42,903
Total	2,020	4,629	19,810	42,873	32,573	10,000	111,905
Funding							
HIF	2,020	4,629	19,810	42,873	30,573	-	99,905
S106	-	-	-	-	2,000	10,000	12,000
ECC	-	-	-	-	0.2	-	0
Total Funding	2,020	4,629	19,810	42,873	32,573	10,000	111,905

5.2 There are the following key financial risks to ECC associated with this scheme:

5.2.1 It has been confirmed by MHCLG that any cost overruns will be the responsibility of the bidding authority, therefore ECC will be the funder of last resort and expected to fund any cost overruns. Contingency has been factored into the HIF ask totalling £16.2m which represents 17%, but anything above and beyond contingency will fall to ECC to fund. The project team assessment is that this represents a sufficient level of contingency for projects at this stage of design and noting the ability that projects teams have to alter the scope of work on the RTS to ensure compliance with budget allocations. There is no formal benchmark to evidence that the contingency allocation is sufficient.

5.2.2 Current guidance issued by Homes England stipulates that the HIF funding is required to be spent by March 2024. The current spend and funding profile reflects this requirement is met. However, there is a risk that any programme delays could result in this target date being missed. There is a risk that any HIF funding unspent as of March 2024 will be clawed back by Homes England and the resulting funding gap will require funding from ECC where ECC is the funder of last resort.

5.2.3 The £10m of S106 funding that is anticipated to be received post March 2024 to fund final delivery is at risk as the agreement is yet to be negotiated (although the principle of the contribution has been established with the housing developer through the Local Plan examination process) and the future of S106 contributions could change due to the proposals in the current Planning for the Future White Paper. If this funding is not confirmed and received within the required timeframe, the scope of the project will need to be scaled back with the consent of Homes England to be contained within budget or ECC will be required to find alternative equivalent funding. If equivalent funding is not sought it could lead to a potential funding gap with the authorities considering alternative sources of funding such as through the

Recovery & Recycling Strategy (to recoup the HIF grant from the Garden Community's development), or from their own capital resources.

- 5.2.4 The contract requires the total value of historic expenditure that has been incurred before the date the agreement is signed to be stipulated as well as this value being approved by Homes England (in its absolute discretion). ECC has forward funded £2.020m of expenditure incurred in 2019/20 and £2.160m to date in 2020/21. The project team are currently preparing the necessary evidence and anticipate receiving all money expended (excluding legal fees) to be refunded in the first drawdown. There is a risk that Homes England do not authorise this historic expenditure resulting in a funding gap.
- 5.2.5 The contract asks for the total preliminary costs to be stipulated, the total is £4.599m, there is a risk that if the amount stipulated in the contract is less than actual preliminary costs incurred that ECC may be liable to fund additional costs.
- 5.2.6 The contract stipulates that where 'fundamental default' has occurred Homes England shall require ECC to immediately repay the HIF funding and all other amounts due under the agreement together with interest. A fundamental default will occur whereby a report or direction is made, ECC, or where applicable, any Contractor, subcontractor, employee, officer or agent commits any prohibited act under the contract (in respect of which the Waiver Condition has not been satisfied), there has been an act/omission on the part of the Grant Recipient, or any of its contractors (including contractors) that in Homes England's opinion (using its absolute discretion) harms the reputation of Homes England, the HIF Programme or to brings Homes England into disrepute.

6.0 Legal implications

- 6.1 The risks associated with the drawdown of funding under the GDA are set out in detail in section 3 of the report . In particular, the acquisition of the sites, the provisions of certificates of title acceptable to Homes England, compliance with all necessary consents and planning permission all need to be achieved before the funding will be available.
- 6.2 ECC will need to follow appropriate procurement procedures when appointing the professional team and contractors. There are specific requirements within the GDA that must be covered in contracts with contractors in order to comply with the terms of the GDA.
- 6.3 Separate reports to cover the formal governance for specific project matters relating to the preferred route of the Link Road (completed May 2020), land, procurement and Compulsory Purchase Orders (if required) will need to be prepared at the relevant time and in sufficient time to meet the milestones set out in the GDA.
- 6.4 As part of the bid, ECC obtained a legal opinion from Counsel that confirmed that the provision of this funding did not amount to state aid. There is an

ongoing requirement that ECC obtain regular state aid opinion throughout the life of the contract at intervals of every 12 months.

- 6.5 ECC will be agreeing to a number of obligations when entering into the GDA which are outside of ECC's control including the delivery of housing outputs. Housing outputs are linked to the milestones under the Contract and failure to deliver milestones will amount to a default of the GDA. Whilst there will be opportunity for ECC to remedy any default, if it cannot, the ultimate consequence may be that the GDA is terminated, resulting in no further payment of HIF funding. Funding will be claimed by ECC in arrears and this could therefore leave ECC with a substantive shortfall.
- 6.6 Any fundamental default of the GDA will enable Homes England to terminate the GDA in its entirety, suspend or alter the timing of the payment of any HIF funding, withhold and cancel any further payment of HIF funding due to ECC under the Contract, and require the Grant Recipient to immediately repay the HIF Funding and all other amounts due under the GDA together with interest.
- 6.7 HIF funding may also be reduced in the event that there are variations arising out of the operation of the delivery plan and/or expenditure forecast, changes to the infrastructure works or the housing outputs agreed between the parties or increases in income or other sources of financial assistance becoming available to ECC or a Contractor in relation to the delivery of the infrastructure works.
- 6.8 ECC will need to ensure that it has adequate sub-contracts and appointments in place to protect itself, in so far as possible, and to assist it in complying with the terms of the GDA.

7.0 Equality and Diversity implications

- 7.1 The Public-Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 7.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).

7.3 The equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic. The TCBGC development will be subject to further equality impact assessments by CBC and TDC as the relevant local planning authorities.

8.0 List of appendices

8.1 Equality impact assessment.

9.0 List of Background papers

9.1 MHCLG Guidance on applying for Housing Infrastructure Fund weblink: <https://www.gov.uk/government/publications/housing-infrastructure-fund>

I approve the above recommendations set out above for the reasons set out in the report.	Date 11/11/2020
Councillor David Finch, Leader of the Council	

In consultation with:

Role	Date
Executive Director, Place and Public Health Mark Carroll	10/11/2020
Executive Director for Corporate and Customer Services (S151 Officer) Nicole Wood	9/11/2020
Director, Legal and Assurance (Monitoring Officer) Paul Turner	9/11/2020