

APPENDIX 1

FINAL DRAFT

**MEMORANDUM OF UNDERSTANDING**

relating to

**THE HARLOW & GILSTON GARDEN TOWN ROLLING INFRASTRUCTURE FUND**

**PARTIES**

- (1) EAST HERTFORDSHIRE DISTRICT COUNCIL
- (2) EPPING FOREST DISTRICT COUNCIL
- (3) ESSEX COUNTY COUNCIL
- (4) HARLOW DISTRICT COUNCIL
- (5) HERTFORDSHIRE COUNTY COUNCIL

each a “**Council**”, and together “**the Councils**”.

**INTRODUCTION**

- A The Councils are collaborating to facilitate the delivery of the Harlow and Gilston Garden Town (“**Garden Town**”).
- B HCC, on behalf of all the Councils, successfully submitted a bid to the Ministry for Homes, Communities and Local Government (acting through Homes England) for approximately £171 million funding of the Housing Investment Grant to forward fund infrastructure in the Garden Town area. HCC subsequently entered into the Grant Determination Agreement in respect of the funding.
- C In the Grant Determination Agreement, HCC committed to the establishment of a Rolling Infrastructure Fund (“**RIF**”), through which the HIG Funding would be recovered from

developers and made available for forward funding of and completing the wider Garden Town sustainable transport corridor network and other infrastructure in the Garden Town area; where possible that funding would also be recycled, creating a rolling basis for infrastructure investment.

- D The Councils are entering into this Memorandum of Understanding (“**Memorandum**”) to record and set out the basis on which they will collaborate with each other to establish and operate the RIF.
- E The Councils acknowledge that the arrangements described in this Memorandum will require development over time, to reflect both changing circumstances and the further detail the parties will need to agree in due course in respect of operation and governance of the RIF. Any such development will be subject to agreement of all the Councils.

## 1. DEFINITIONS

In this Memorandum, the following terms shall have the meanings given below:

“Agreed Proportions”	has the meaning given in paragraph 5.2
“CIL”	means a community infrastructure levy or similar
“District Councils”	means, together, East Hertfordshire District Council, Epping Forest District Council and Harlow District Council (and “District Council” means each of them)
“Garden Town Board”	means the board established by the Councils, and including a representative from each Council, to promote and facilitate cooperative working to oversee delivery of the Garden Town
“Garden Town Development”	means a development or proposed development within the area of the Garden Town for which a planning application is (or has been) submitted
“Grant Determination Agreement”	means the agreement dated 31 March 2021 and entered into between HCC and Homes England relating to provision of the HIG Funding
“HCC”	means Hertfordshire County Council
“HIG Bid”	means the bid for the HIG Funding, as referred to in paragraph B of the Introduction to this Memorandum

“HIG Funding”	means the funding made available or to be made available to HCC by Homes England under the Grant Determination Agreement secured by the Councils from the Housing Investment Grant towards the Initial Projects, which as at the date of this Memorandum is expected to be in the region of £171 million
“Infrastructure Delivery Plan”	means the infrastructure delivery plan developed jointly by the Councils in relation to Garden Town infrastructure, as updated from time to time
“Initial Projects”	has the meaning given in paragraph 4.1
“Section 106 Obligations”	means planning obligations imposed by a Council under section 106 of the Town and Country Planning Act 1990
“STC”	means the Sustainable Transport Corridor network intended to be created at the Garden Town

## **2. ESTABLISHMENT OF THE ROLLING INFRASTRUCTURE FUND**

- 2.1 Each Council agrees to the establishment of the RIF.
- 2.2 Each Council agrees that the RIF will be built from payments secured by the Councils from developers of Garden Town Developments in contribution to the cost of the STC and other Garden Town infrastructure, in accordance with this Memorandum. The first such payments will arise in respect of the Initial Projects, which will be unlocked by the HIG Funding.
- 2.3 For practical reasons, the RIF will not initially be held by a single entity. Each Council that receives relevant payments from developers will hold those sums as a separately-identifiable interest-bearing fund. The aggregate of all such funds will constitute the RIF.
- 2.4 The Councils acknowledge that they will seek, over time, to put governance arrangements in place that will allow these disparate funds to be brought together and held and managed by a single entity for the benefit of and on behalf of the Councils. Development of such arrangements will form part of the ongoing review of the RIF to which paragraph 9 refers. This Memorandum does not commit any Council to this arrangement which shall be subject to a separate decision.

### **3. ROLLING INFRASTRUCTURE FUND GOVERNANCE**

- 3.1 If any decision is required in relation to the RIF (in particular in relation to expenditure from the RIF) which impacts a Council, such Council shall follow its own decision making process to determine the decision to be taken. The Garden Town Board may make a non-binding recommendation to such Council(s). Such Council(s) shall consult with the remaining parties to this Memorandum prior to taking such decision to the extent that such decision impacts on the recovery of the HIG Funding.
- 3.2 Any amendment to the terms of this Memorandum will require the unanimous approval of all five Councils.
- 3.3 Any decisions taken in respect of the RIF shall take due account of any relevant provisions of the Grant Determination Agreement and the Delivery Agreements.

### **4. INITIAL PROJECTS – FORWARD FUNDING**

- 4.1 In accordance with the Grant Determination Agreement and subsequent discussions, the HIG Funding will be used to fund delivery of the following projects:

- 4.1.1 the expansion of Central Crossing (5th Avenue) to extend the STC between the Gilston Area and Harlow Town Railway Station and Burnt Mill Roundabout;
- 4.1.2 the Eastern Stort River Crossing, comprising:
  - (a) realignment of the Eastwick Road and new junction allowing access to Terlings Park and Pye Corner;
  - (b) Pye Corner bypass including junction between north-south section and east-west section;
  - (c) remainder of Eastern Crossing including River Way Bridge;

(Note: It is proposed that funding is provided for the Eastern Stort Crossing both directly and indirectly, through being made available to the relevant developer to fund on-site works within the Gilston Area thereby allowing the developer to prioritise development cash flow for the completion of delivery of the Crossing works. This has been agreed due to the time constraints of the HIG funding availability)

- 4.1.3 the extension of the STC from Burnt Mill Roundabout through to the Town Centre; and
- 4.1.4 the new Cambridge Road/River Way junction,

(together, the “**Initial Projects**”).

- 4.2 The Councils acknowledge that HCC has entered into the Grant Determination Agreement with Homes England and that HCC is the contracting body in respect of the HIG Funding.
- 4.3 The Councils further acknowledge that, in order to secure delivery of the Initial Projects, HCC has entered into delivery agreements with:
  - 4.3.1 Places for People, pursuant to which Places for People will be obliged to deliver the projects referred to in paragraphs 4.1.1 and 4.1.2; and
  - 4.3.2 Essex County Council, pursuant to which Essex County Council will be obliged to deliver the projects referred to in paragraphs 4.1.3 and 4.1.4,

(each a “**Delivery Agreement**”).

- 4.4 HCC hereby confirms its intention to draw down the HIG Funding in accordance with the Grant Determination Agreement, to pay such funding to the relevant counterparty in accordance with each Delivery Agreement, and to enforce its rights under each Delivery Agreement to secure delivery of the relevant infrastructure.
- 4.5 In the event of any conflict between this Memorandum and either the Grant Determination Agreement or any of the Delivery Agreements, the Grant Determination Agreement or Delivery Agreement (as relevant) shall take precedence.

## **5. INITIAL PROJECTS – RECOVERY OF CONTRIBUTIONS**

- 5.1 The Councils acknowledge that it is their collective intention:
  - 5.1.1 to seek to recover 100% of the HIG Funding, for inclusion in the RIF;
  - 5.1.2 that such amounts will be recovered from developers promoting relevant Garden Town Developments, pursuant to section 106 of the Town and Country Planning Act 1990; and
  - 5.1.3 that such amounts will be recovered from developers in the Agreed Proportions.
- 5.2 The “**Agreed Proportions**” are (as applicable):
  - 5.2.1 those set out in the Infrastructure Delivery Plan or other associated evidence (as updated from time to time);

- 5.2.2 those set out in any “Developer Contribution Guidance” or related policy applicable to the Garden Town that is developed and agreed by the Councils; or
  - 5.2.3 (if relevant) the proportions required by the relevant District Council’s planning policy.
- 5.3 In respect of Section 106 Obligations (whether by way of bilateral agreement or unilateral undertaking) relating to a planning application for a relevant Garden Town Development, each District Council will:
  - 5.3.1 use its reasonable endeavours to ensure that the Section 106 Obligations require the relevant developer to make financial contributions towards the cost of the Initial Projects in the Agreed Proportions (either directly or by reference to a separate agreement under which the developer is obliged to repay the applicable portion of the Initial HIG Funding over time);
  - 5.3.2 use its reasonable endeavours to enforce the terms of such Section 106 Obligations in order to recover monies due from the developer in respect of the Initial Projects; and
  - 5.3.3 retain the contributions received from developers pursuant to Section 106 Obligations (or related agreements) which form part of the RIF as separately-identifiable funds.
- 5.4 Each District Council agrees to work with the other Councils and the Garden Town legal advisers to develop standard clauses for use within section 106 agreements and undertakings in respect of the payment of contributions. To the extent such clauses are developed and agreed, each District Council agrees to use reasonable endeavours to ensure the clauses are included in relevant section 106 agreements /undertakings.
- 5.5 If a District Council, in negotiating Section 106 Obligations, considers that it would be appropriate to agree with a developer an amount lower than the Agreed Proportions (such that there would be a shortfall in payments back to the RIF), that Council shall consult with the other partner Councils and have due regard to their representations before coming to a decision. The Councils acknowledge that this should be avoided wherever possible and that the recovery of contributions for the RIF should be treated in accordance with the importance set out in the Infrastructure Delivery Plan.
- 5.6 The Councils recognise that adoption by a District Council of a CIL could affect the value of contributions sought from development and the process for agreeing how collected CIL monies are allocated and spent for the funding of infrastructure and other projects. Any Council that considers the adoption of a CIL will consult with the other partner Councils and have due regard to their representations before coming to a decision

regarding the adoption of a CIL charging schedule and how collected CIL monies are allocated to the Initial Projects and subsequent projects.

- 5.7 If the existing Planning Bill introduces new Infrastructure Levy arrangements, the District Councils will work cooperatively with the other Councils to put measures in place which ensure that contributions continue to be made to the RIF in line with the principles set out in this Memorandum.
- 5.8 Without prejudice to the preceding provisions of this paragraph 5, in the event of any conflict between this Memorandum and any agreement entered into by a Council pursuant to section 106 of the Town and Country Planning Act 1990, the section 106 agreement shall take precedence.

## **6. SUBSEQUENT PROJECTS**

- 6.1 The Councils acknowledge that, at the present time, the following projects (listed in no particular order of timing or priority) have been identified in the HIG Bid as priorities for future RIF funding as set out in Schedule 1:
- 6.1.1 replacement of Central Crossing Rail Bridge (excluding such works included within the widening and subject to outcome of structural assessment indicating it as necessary and according to the timescale of that necessity);
  - 6.1.2 Eastern STC between Town Centre, Enterprise Zone and East Harlow Garden Community;
  - 6.1.3 Western STC between Town Centre, National Institute for Health Protection/Pinnacles and Water Lane Garden Community;
  - 6.1.4 Southern STC between Town Centre and Latton Priory Garden Community; and
  - 6.1.5 to the extent not covered by paragraphs 6.1.2 to 6.1.4, the Town Centre STC and any associated interchange and hub.
- 6.2 The Councils acknowledge that the STC network, where located outside of the allocated new garden community sites, is treated in the Infrastructure Delivery Plan as a single item of infrastructure (as represented by the schemes referred to in paragraph 4.1.3 and parts of those referred to in paragraphs 6.1.2 – 6.1.5). The total cost of this off-site STC infrastructure will exceed the total of the contribution provided by HIG for the STC and the amount recovered into the RIF. The Councils each agree to cooperate in an effort to close this funding gap including using reasonable endeavours to secure developer contributions for this purpose (including by way of section 106 or Community Infrastructure Levy contribution from Garden Town Developments both referred to and those not referred to in the Infrastructure Delivery Plan). The Councils agree that such

Developer Contributions will be allocated to the RIF and will seek to act in accordance with paragraphs 5.3.2 and 5.3.3 in respect of the same.

- 6.3 The Councils agree to use reasonable endeavours to secure additional grant or revenue funding for the delivery of the STC network and, where appropriate, to allocate such funding to the RIF, subject always to any terms and conditions attaching to such funding.
- 6.4 The Councils commit to work together to develop an investment strategy to guide future decisions about which projects should benefit from RIF funding beyond the Initial Projects including but not necessarily exclusive to those set out in paragraphs 6.1.1 to 6.1.5. The Councils acknowledge that the projects funded by the RIF may vary from those listed in paragraphs 6.1.1 to 6.1.5.
- 6.5 The Garden Town Board will be responsible for recommending to the Councils infrastructure schemes for funding from the RIF in future. In making any recommendation the Garden Town Board will principally seek to use the RIF for measures to achieve the active and sustainable mode share targets of the Garden Town and to unlock the provision of further new homes, and will have regard to the Infrastructure Delivery Plan (as updated from time to time) and other associated evidence, the investment strategy agreed by the Councils and the amounts available in the RIF.
- 6.6 Unless otherwise agreed by all the partner Councils in any particular case, RIF funding will only be allocated to projects if arrangements are put in place for the recovery of the funding from developer contributions (or other sources) over time, in line with the principles in paragraph 5, with the aim of ensuring that the RIF is continually replenished.
- 6.7 Any proposal for expenditure from the RIF beyond the Initial Projects will require the unanimous approval of all partner Councils (unless otherwise agreed by the Councils).

## **7. FUND HOLDERS' OBLIGATIONS**

- 7.1 As noted in paragraph 2.3, initially the RIF will not be held by a single entity. Each Council that receives relevant payments from developers will hold those sums as a separately-identifiable fund. The aggregate of all such funds will constitute the RIF.
- 7.2 Specifically:
  - 7.2.1 in respect of the infrastructure referred to in paragraphs 4.1.1 and 4.1.2, HCC will receive and hold the payments made by the Gilston Area Villages 1–6 landowners (Places for People and/or any successors) pursuant to HIG recovery payments secured through s.106 obligations assumed by those parties associated with relevant planning consents;



- 7.2.2 each of the District Councils and/or County Councils may receive and hold payments made in respect of section 106 obligations (or, if relevant, the Community Infrastructure Levy) in relation to the infrastructure referred to in paragraphs 4.1.1 and 4.1.2 and the STC network, which includes the infrastructure referred to in paragraphs 4.1.3 and 4.1.4, and that referred to in paragraphs 6.1.2 to 6.1.5; and
  - 7.2.3 any of the Councils may receive and hold payments made in respect of section 106 obligations (or, if relevant, the Community Infrastructure Levy) in relation to subsequent infrastructure projects funded by the RIF.
- 7.3 Each Council that receives payments from developers in relation to the Initial Projects or any subsequent projects funded by the RIF will:
  - 7.3.1 retain such payments as a separately-identifiable interest-bearing fund, acknowledging that relevant funds form part of the RIF and can be used only in accordance with this Memorandum and the purpose for which they were provided;
  - 7.3.2 provide to the other Councils full transparency of all such amounts received, and all amounts held as part of the RIF at any particular time; and
  - 7.3.3 not permit any RIF monies to be expended other than in accordance with this Memorandum and the purpose for which they were provided (and if money is paid out in breach of this commitment, the relevant Council shall replenish the RIF as soon as practicable upon becoming aware of the same).
- 7.4 Any interest earned in relation to RIF monies held by any Council shall itself be considered part of the RIF and each Council shall add any such interest to the RIF monies it is holding from time to time.
- 7.5 As Contracting Authority, HCC will seek to ensure that all costs to administer the HIG programme will be met within the £171m funding envelope. In the event that HCC incurs reasonable and evidenced costs and expenses in respect of its role as contracting body to the HIG Funding beyond the contracted completion date of 31 March 2025, HCC will in the first instance seek additional funding for administrative costs required to maintain a scaled down functional service until the Infrastructure Works as set out in Part 1 Schedule 1 of the Grant Determination Agreement have been completed. If such costs and expenses cannot be recovered via the Grant Determination Agreement (and/or the connected back-to-back agreements) HCC shall be entitled to retain an appropriate portion of any monies it receives from developers in accordance with this paragraph 7 as reimbursement for the costs and expenses it incurs as contracting body to the HIG Funding. Following an assessment of the current administrative requirements, it is

anticipated that as the Works referred to above relate specifically to activities after the funded programme which ceases on 31 March 2025, they will be evaluated over a financial year and be no greater than £80,000 per annum. All requests will be fair and reasonable and supported with appropriate evidence.

- 7.6 HCC shall produce all evidence as is reasonably required by the other Councils to demonstrate the quantum and appropriateness of such retention as detailed in clause 7.5. HCC shall provide the evidence at the request of the other Councils but provided that HCC shall not be obliged to provide such evidence more than twice in any calendar year. Any evidence supplied by HCC shall be presented in accordance with generally accepted accounting standards and practice
- 7.7 Notwithstanding any other provision of this Memorandum, HCC will not be entitled to recover costs or make a claim to recover its costs from the RIF to the extent that it has already recovered them pursuant to any other sources, agreements (including but not limited to Homes England and/or the GDA) or has received or is able to apply for funding in relation to them. HCC will recover its costs from Homes England or alternative sources before seeking to recover them from the RIF; it is acknowledged and agreed that alternative sources do not include HCC's own funding.
- 7.8 In the event that any of the Councils objects to the quantum of the retention made pursuant to paragraph 7.5, such dispute shall be resolved in accordance with paragraph 12.

## **8. DURATION**

- 8.1 This Memorandum shall remain in place until such time as:
- 8.1.1 the Councils agree that it should be superseded by an alternative agreement or arrangement which sets out the manner in which the RIF will be operated by the Councils; or
- 8.1.2 this Memorandum is terminated pursuant to paragraph 8.2.
- 8.2 This Memorandum may be terminated only by unanimous agreement of all five Councils. Any such agreement must specify how funds remaining in the RIF at the relevant time are to be allocated between the Councils. Such funds must be spent in accordance with the Grant Determination Agreement and section 106 of the Town and Country Planning Act 1990 on infrastructure to unlock housing developments.

## **9. REVIEW AND DEVELOPMENT OF THE RIF**

- 9.1 The Councils will request the Garden Town Board to review the terms of this Memorandum and the operation of the RIF on a six-monthly basis (or at such other

frequency as the Councils may agree), and to report its findings and any recommendations to the Councils.

- 9.2 The Councils acknowledge that there is potential to develop the manner in which the RIF is governed and operated in order to improve its effectiveness as a vehicle to enable the forward funding of infrastructure delivery in the Garden Town. The Councils will work together in good faith to explore ways in which this might be achieved, including consideration of the ability to forward fund infrastructure in reliance on future developer contributions.

## **10. NO FETTER**

Nothing in this Memorandum shall fetter the discretion of any Council in the exercise of any of its statutory rights, powers, duties, discretions or functions, including in particular its role as local planning, highway or education authority.

## **11. STATUS**

- 11.1 This Memorandum is not intended to be legally binding and no legal obligations or legal rights shall arise between the Councils as a result of this Memorandum. Each Council enters into this Memorandum intending to honour all of its commitments but shall not be bound by them.
- 11.2 No legal partnership is created or intended to be created by the terms of this Memorandum.

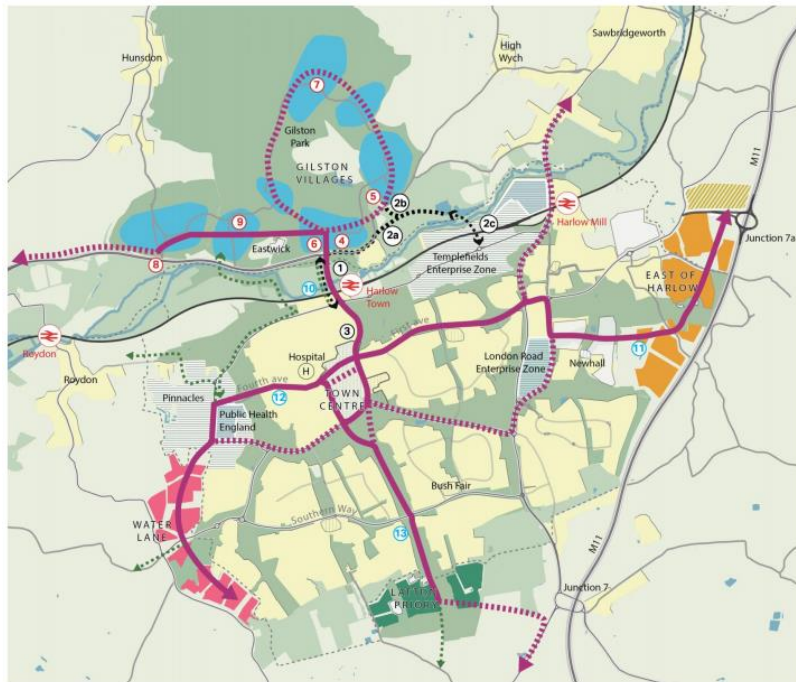
## **12. DISPUTE RESOLUTION**

- 12.1 Any dispute arising in relation to the quantum of the retention made pursuant to clause 7.5 ("Dispute") shall be resolved in accordance with this paragraph 12.
- 12.2 If a Dispute cannot be resolved by the Councils within 10 working days of the dispute arising, any Council can, by written notice to the other Councils, require the Dispute to be escalated. In such circumstances the Dispute will be referred to the respective Chief Executives of the Councils who shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.
- 12.3 If the Dispute is not resolved by consultation under paragraph 12.2 within 10 working days of the Dispute being escalated, any Council may invite the others to attempt to resolve the dispute through mediation. The other Councils shall act reasonably in deciding whether or not to accept such invitation. A mediator will be selected by agreement of the Councils.
- 12.4 If:



- 12.4.1 the consultation required by paragraph 12.2 has taken place and the dispute remains unresolved;
  - 12.4.2 the Councils are unable to reach agreement to proceed with mediation; or
  - 12.4.3 following such mediation the dispute remains unresolved,
- any Council may refer the matter for expert determination.
- 12.5 An expert ("Expert") is a person appointed in accordance with paragraph 12.6 to resolve a dispute arising in relation to the quantum of the retention made pursuant to paragraph 7.5.
  - 12.6 The Councils shall agree on the appointment of an independent Expert and shall agree with the Expert the terms of their appointment.
  - 12.7 If the Councils are unable to agree on the identity of the Expert or the terms of their appointment within seven days of a Council serving details of a suggested expert on the others, any Council shall be entitled to request the President of the Chartered Institute of Arbitrators to appoint an Expert with experience in determining the quantum of costs.
  - 12.8 The Councils are entitled to make submissions to the Expert and will provide (or procure that the other Councils provide) the Expert with such assistance and documents as the Expert reasonably requires for the purpose of reaching a decision.
  - 12.9 The Expert shall act as an expert and not as an arbitrator. The Expert shall provide to all the Councils his written decision on the dispute, within 28 days of appointment (or such other period as the Councils may agree). The Expert's written decision on the matters referred to them shall be final and binding on the Councils in the absence of manifest error or fraud
  - 12.10 Each Council shall bear its own costs relating to the reference of the Dispute to the Expert. The Expert's fees and any costs properly incurred by them in arriving at their determination (including any fees and costs of any advisers appointed by the Expert) shall be borne by the Councils equally or in such other proportions as the Expert shall direct.
  - 12.11 The Councils shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the Dispute and notwithstanding the referral of the Dispute under this paragraph 12 and shall give effect forthwith to every decision of the Expert.



**SCHEDULE 1 – Extract from HIG Bid - Plan indicating the infrastructure to be funded by the HIG, Developer and the RIF**



1. Expansion of Central Crossing to extend Sustainable Transport Corridor (STC) between Gilston Area and Railway Station and Burnt Mill Roundabout.
2. Eastern Stort River Crossing (comprising Items 2a, 2b and 2c below)
  - 2a. Realignment of the Eastwick Road and new junction allowing access to Terlings Park and Pye Corner.
  - 2b. Pye Corner bypass including junction between north-south section and east-west section
  - 2c. Remainder of Eastern Crossing including River Way Bridge
3. Extension of STC from Burnt Mill Roundabout through the Town Centre.
4. Enhanced sustainable transport hub in Village 1.
5. Access to Gilston Area Village 2.
6. Access to Gilston Area Village 1 (north of Eastwick junction) and creation of STC link within Village 1.
7. Gilston Area STC "inner loop" connection to Villages 3, 4, 5
8. Access to Village 7.
9. Gilston Area STC "inner connection" opening up sustainable access and highway between Village 7 and Village 1.
10. Replacement of Central Crossing Rail Bridge.
11. Eastern STC between Town Centre, Enterprise Zones and Harlow East Garden Community.
12. Western STC between Town Centre, PHE/Pinnacles and Water Lane Garden Community.
13. Southern STC between Town Centre and Latton Priory Garden Community.

-  Funded by the HIF
-  Funded by the Developers
-  Funded by rolling infrastructure fund