



Essex County Council

Place Services and Economic Growth Policy and Scrutiny Committee

10:30	Thursday, 30 June 2022	Committee Room 1 County Hall, Chelmsford, CM1 1QH
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For information about the meeting please ask for:

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		Pages
**	Members of the Corporate Policy and Scrutiny Committee have also been invited to attend and participate in the discussion on agenda item 6.	
1	Membership, Apologies, Substitutions and Declarations of Interest	4 - 4
2	Minutes from the previous meeting To approve as a correct record the Minutes of the meeting held on 21 April 2022 and to consider any matters arising.	5 - 8
3	Appointment of Vice-Chairman To appoint a new Vice-Chairman of the Committee to replace Councillor Laureen Shaw.	
4	Questions from the Public A period of up to 15 minutes will be allowed for members of the public to ask questions or make representations on any item on the agenda for this meeting. No statement or question shall be longer than three minutes and speakers will be timed. If you would like to ask a question at this meeting, please email Democratic Services by 12 noon the day before (Wednesday 29 June).	
5	Work Programme To receive an update (PSEG/13/22) on the current Committee Work Programme.	9 - 13

- | | | |
|-----------|--|----------------|
| 6 | Future of the Mechanical Biological Treatment (MBT) Tovi Facility
To receive a report (PSEG/14/22) on the termination of the contract for the MBT Facility in Basildon from Councillor Malcolm Buckley, Cabinet Member for Waste Reduction and Recycling. | 14 - 22 |
| 7 | Initial Response to LHP Task and Finish Group Review
To receive a response (PSEG/15/22) to the Task and Finish Group's recommendations from Councillor Lee Scott, Cabinet Member for Highways Maintenance and Sustainable Transport. | 23 - 32 |
| 8 | Date of Next Meeting
To note that the next meeting of the Committee is scheduled to take place on Thursday 21 July 2022 at County Hall. | |
| 9 | Urgent Business
To consider any matter which in the opinion of the Chairman should be considered in public by reason of special circumstances (to be specified) as a matter of urgency. | |
| 10 | Urgent Exempt Business
To consider in private any other matter which in the opinion of the Chairman should be considered by reason of special circumstances (to be specified) as a matter of urgency. | |

Exempt Items

(During consideration of these items the meeting is not likely to be open to the press and public)

The following items of business have not been published on the grounds that they involve the likely disclosure of exempt information falling within Part I of Schedule 12A of the Local Government Act 1972. Members are asked to consider whether or not the press and public should be excluded during the consideration of these items. If so it will be necessary for the meeting to pass a formal resolution:

That the press and public are excluded from the meeting during the consideration of the remaining items of business on the grounds that they involve the likely disclosure of exempt information falling within Schedule 12A to the Local Government Act 1972, the specific paragraph(s) of Schedule 12A engaged being set out in the report or appendix relating to that item of business.

Agenda item 1

Committee: Place Services and Economic Growth Policy and Scrutiny Committee

Enquiries to: Justin Long, Senior Democratic Services Officer

Membership, Apologies, Substitutions and Declarations of Interest

Recommendations:

To note

1. Membership as shown below
2. Apologies and substitutions
3. Declarations of interest to be made by Members in accordance with the Members' Code of Conduct

Membership

(Quorum: 5)

Councillor A Goggin	Chairman
Councillor S Barker	
Councillor D Blackwell	Vice-Chairman
Councillor S Crow	
Councillor P Gadd	
Councillor P Honeywood	
Councillor D Land	
Councillor R Moore	
Councillor J Newport	
Councillor L Scordis	
Councillor M Skeels	
Councillor M Steel	
Councillor M Vance	
Councillor H Whitbread	

Minutes of the meeting of the Place Services and Economic Growth Policy and Scrutiny Committee, that was held in the Council Chamber, County Hall, Chelmsford on Thursday, 21 April

[A YouTube recording of the meeting is to be found online.](#)

Present:

Members:

Councillor A Goggin	Chairman
Councillor D Blackwell	Vice-Chairman
Councillor P Honeywood	
Councillor D Land	
Councillor R Moore	
Councillor J Newport	
Councillor L Shaw	Vice-Chairman
Councillor M Skeels	
Councillor M Steel	
Councillor M Vance	

ECC Officers:

Louise Fitton	Head of Essex Culture and Green Spaces
Mark Rowley	Commercial Operations Manager
Sam Kennedy	Director Environment and Climate Action
Justin Long	Senior Democratic Services Officer (clerk to the meeting)
Lisa Siggins	Democratic Services Officer
Michael Hayes	Democratic Services Assistant

Councillor G Butland, Cabinet Member for Devolution, the Arts, Heritage and Culture
Councillor M Durham, Deputy Cabinet Member for Devolution, the Arts, Heritage and Culture

Welcome and Introduction

Councillor Goggin, the Chairman of the Place Services and Economic Growth Policy and Scrutiny Committee, welcomed those in attendance.

1. Membership, Apologies, Substitutions and Declarations of Interest

The report on Membership, Apologies and Declarations was received, and it was noted that:

1. The membership of the Place Services and Economic Growth Policy and Scrutiny Committee was as shown in the report, and the Chairman welcomed Councillor Newport to his first meeting as a member of the Committee.
2. Apologies had been received from Councillors Crow, Scordis and Whitbread.

3. No Declarations of interests were made.

The Chairman, Councillor Goggin, reminded members that any interests must be declared during the meeting if the need to do so arose.

2. Minutes and Matters Arising

The Minutes of the meeting held on Thursday 24 March 2022 were approved as a correct record and were signed by the Chairman.

Further to discussion at the members' pre-meeting, it agreed that a 'matters arising' report would be included as a part of the agenda going forward.

3. Questions from the Public

It was noted that no questions had been received from the public.

4. Work Programme

The updated Work Programme was noted.

5. County Parks

Councillor Butland introduced the presentation on Country Parks, which can be found [here](#).

Following the presentation, members were invited to ask questions and provide comment.

Key points raised during this discussion included:

Work was underway with partners to define how the vision and targets outlined in the presentation would be measured and reported, as well as the links to countywide climate, natural environment, and economic growth targets.

An update was provided on Hadleigh Country Park and work to reopen mountain bike trails.

Educational visits and events at the country parks had taken a 'step back' during the pandemic, but it was the aspiration to reintroduce them (including self-led nature trails) with an initial focus on Danbury Country Park and Thorndon Country Park.

Members suggested more events and initiatives such as concerts and plays could be organised to encourage visitors to country parks.

In response, it was noted that there was a delicate balance between supporting the commercial operations of country parks and protecting their character whilst some previous attempts to stage events had not been commercially successful. However,

it was reported that an extensive programme of activities was taking place including as a part of the [2022 Summer of Culture](#).

A Local Nature Partnership had been setup to develop a Local Nature Recovery Strategy; details on this partnership and the emerging strategy would be shared with the Committee.

A key aspect of the strategy would be developing green infrastructure with ECC working in partnership with local landowners to achieve the target to create wildlife areas to cover 30% of Essex.

Officers outlined the tangible benefits of 'Green Flags' as a way to define good management and provide assurance to potential visitors, and their comparability to 'Blue Flags'.

A consistent maintenance and investment programme was needed to update visitor amenities such as pathways, car parks and toilets at the country parks.

Officers outlined that if they had significant extra investment then improving access to country parks (such as a bus service to every park) would be a priority.

6. Date of Next Meeting

The committee noted that the next scheduled meeting of the Committee would take place on Thursday 19 May, 10:30am at County Hall.

7. Urgent Business

No items were raised.

Chairman

PSEG – Matters Arising from April 2022

Date	Agenda Item	Action	Status
21 April 2022	Country Parks	Details to follow on the 2022 Summer of Culture.	Link here and guide circulated to members.
		Details of the emerging Local Nature Recovery Strategy to be shared with the Committee.	Item added to Committee's Work Programme.

Work Programme

Agenda Item 5

Reference Number: PSEG/13/22

Report title: Work Programme	
Report to: Place Services and Economic Growth Policy and Scrutiny Committee	
Report author: Justin Long, Senior Democratic Services Officer	
Date: 30 June 2022	For: Discussion
Enquiries to: Justin Long, Senior Democratic Services Officer at justin.long@essex.gov.uk.	
County Divisions affected: Not applicable	

1. Introduction

- 1.1 The work programme is a standard agenda item.

2. Action required

- 2.1 The Committee is asked to consider the work programme in the Appendix and suggest any additional items.

3. Background

3.1 Developing a work programme

Work has continued on identifying priorities and future agenda items. This has included discussions with Committee Members, Cabinet Members and Officers as well as the other Policy and Scrutiny Committees via the Scrutiny Board.

This work has reflected the adoption of the *Everyone's Essex – Our Plan for Levelling Up the County: 2021-2025* organisation strategy at Council last October.

The current work programme is attached in the **Appendix**.

4. Everyone's Essex

The Committee should take account of the *Everyone's Essex – Our Plan for Levelling Up the County: 2021-2025* strategy when considering the work programme and future items.

Particular attention should be paid to the strategic ambitions (and associated commitments and performance measures) most relevant to the work of the Committee: 'Strong, Inclusive and Sustainable Economy', and 'High Quality Environment'.

Work Programme

5. Update and Next Steps

See Appendix.

6. Appendix – Current work programme

Place Services and Economic Growth Policy and Scrutiny Committee (PSEG) Work Programme – June 2022

Provisional Dates (2022)	Topic Title	Lead Contact / Cabinet Member	Purpose and Target Outcomes	Relevance to Scrutiny Theme (where applicable)	Cross-Committee Work Identified (where applicable)
30 June	Local Highway Panels – Task and Finish Group	Councillor Scott, Cabinet Member for Highways Maintenance and Sustainable Transport	To receive a response to the recommendations from the Cabinet Member and identify next steps		
30 June	Tovi Eco Park	Councillor Buckley Cabinet Member for Waste Reduction and Recycling	To consider the ending of the Tovi contract, and the implications for the Council's waste strategy		Joint session with CPSC
21 July	Culture and the Arts	Councillor Butland, Cabinet Member for Devolution, the Arts, Heritage and Culture	To consider plans to support the arts and culture in Essex		
21 July	LED Streetlight Rollout	Councillor Scott, Cabinet Member for Highways Maintenance and Sustainable Transport	To provide an update on the project following a request at the January 2022 meeting		

Place Services and Economic Growth Policy and Scrutiny Committee (PSEG) Work Programme – June 2022

TBC	Highways Maintenance Update	Councillor Scott, Cabinet Member for Highways Maintenance and Sustainable Transport	To receive a quarterly performance report on Highways Maintenance including the latest budget situation		Link to the performance/budget monitoring work of the CPSC
TBC	Freeport East	Councillor Wagland, Cabinet Member for Economic Renewal, Infrastructure and Planning	To consider the proposals and specifically the option for a Company Limited by Guarantee		Possible joint session with CPSC
TBC	Climate Change Update	Sam Kennedy, Director, Environment and Climate Action / Councillor Peter Schwier, Climate Tsar	To receive an update on Climate Change work across ECC and response to Essex Climate Action Commission	Climate Change	Link to the performance monitoring work of the CPSC
TBC	Minerals Local Plan Update	Richard Greaves, Chief Planning Officer/ Cllr Wagland, Cabinet Member for Economic Renewal, Infrastructure and Planning	To consider the latest developments including feedback on the public consultation and 'call for sites' engagement		

Place Services and Economic Growth Policy and Scrutiny Committee (PSEG) Work Programme – June 2022

TBC	Essex Enhanced Partnership	Councillor Scott, Cabinet Member for Highways Maintenance and Sustainable Transport, Helen Morris, Head of ITPU	To consider the Essex Enhanced Bus Partnership	Scrutiny of the Corporate Strategy (modal shift from cars into bus/bike/foot) and Climate Change	Link to the performance monitoring work of the CPSC
TBC	Local Nature Recovery Strategy	Sam Kennedy, Director, Environment and Climate Action	To receive information on the emerging Local Nature Recovery Strategy (format tbc)	Climate Change	
TBC	LHP Task and Finish Group	Councillor Scott, Cabinet Member for Highways Maintenance and Sustainable Transport	To consider emerging policies following response to Task and Finish Group's recommendations		

Report title: Future of the Mechanical Biological Treatment (MBT) Tovi Facility	
Report to: Place Services and Economic Growth Policy and Scrutiny Committee	
Report author: Nicole Wood – Executive Director for Finance and Technology	
Date: 30 June 2022	For: Discussion and identifying any follow-up scrutiny actions
Enquiries to: Jim Aldridge – Programme Director for waste transformation	
County Divisions affected: All Essex	

1. Introduction and Purpose

- 1.1 The purpose of this Report is to provide the Place Services and Economic Growth Policy and Scrutiny Committee with background information regarding the termination of the contract for the MBT Facility in Basildon and to outline the future plans for the MBT Facility.
- 1.2 Everyone's Essex sets out the Council's strategic purpose, including the aim of developing a high-quality environment as well as a net zero target objective in relation to greenhouse gas emissions. A review of past decisions and activities in relation to major waste contracts is important to ensure that learning is cemented in future waste management activities that support Everyone's Essex.

2. Action required

- 2.1 The Committee is asked to consider this report prior to the meeting planned for 30 June 2022.

3. Background

- 3.1 In 2007, Essex County Council (the "**Authority**") produced the Joint Municipal Waste Management Strategy (the "**Waste Strategy**") for Essex in collaboration with the county's twelve district and borough councils. The Waste Strategy was a 25-year plan for the management of waste across the county. Its core objective was to develop a sustainable waste-management solution that prioritised the reduction, re-use and recycling of waste and which minimised the amount of waste disposed through landfill. The Waste Strategy was also developed in order to comply with the Authority's legal obligations.
- 3.2 To deliver the objectives of the Waste Strategy, the Authority and Southend-on-Sea Borough Council ("**SBC**") prepared an Outline Business Case in July 2009 proposing the procurement of a mechanical and biological waste treatment ("**MBT**") plant in order to process the county's and SBC's residual waste (black bag) stream. The contract would be entered into pursuant to the government's private finance initiative ("**PFI**"). The Outline Business Case assumed that the project would be supported by Waste Infrastructure Credits ("**WICs**") of £100.9

million from the Department for Environment, Food & Rural Affairs (“**DEFRA**”). The funding provided by the WICs was critical to the viability of the project.

- 3.3 Following the requisite procurement process, on 31 May 2012, the Authority entered into a 25-year contract (the “**PFI Contract**”) with UBB Waste (Essex) Limited (the “**Contractor**”) for the design, construction, financing, commissioning, operation and maintenance of an MBT plant in Basildon to process the county and SBC’s residual waste (the “**Facility**”). All other separately collected waste (recycling, green waste and food waste) would continue to be processed elsewhere.
- 3.4 The Contractor is ultimately owned by Urbaser, S.A.U. (a Spanish company specialising in waste management) and Balfour Beatty Group Limited (an English company specialising in the construction) and was incorporated (as is entirely customary in PFI projects) as a ‘special purpose vehicle’ for the purposes of the project. The PFI Contract was a very detailed commercial contract with the main body of the contract running to 100 clauses and over 141 pages, but much of the detail was set out in 33 schedules. The PFI Contract was based on the standard form required under the PFI.
- 3.5 In conjunction with the funding of the Facility, the Contractor entered into an approximate £125,000,000 secured senior loan facilities agreement with a syndicate of banks, in addition to equity funding provided by the sponsors of the project (i.e. the shareholders in the Contractor).
- 3.6 The Facility was built and on 25 November 2014 it was independently certified as having passed the “Readiness Tests” which marked the end of the construction phase of the project. The Facility then entered the Commissioning Period and was required to pass certain “Acceptance Tests” (meeting contractual performance requirements in a number of different respects in terms of the treatment of waste) before the extended Planned Services Commencement Date of 12 July 2015. The facility never passed the Acceptance Tests either by such date or by the Acceptance Longstop Date of 12 January 2017. In fact, such were the issues with the facility that the Contractor could never undertake the required tests.
- 3.7 A major dispute between the parties arose as a consequence of this failure to meet the requisite tests within the required deadline and this resulted, ultimately, in proceedings in the High Court in London in May 2019. The parties also engaged in multiple dispute resolution procedures under the PFI Contract in relation to individual specific disputes. The High Court proceedings effectively resulted from the appeal of the first of these dispute resolution proceedings but addressed the overall issues relating to the Facility and the position of the parties under the PFI Contract. The Authority contended in the proceedings that the Contractor had failed to design and to construct the Facility so that it was capable of passing the Acceptance Tests, and that the Contractor’s failure either to pass the Acceptance Tests, or to attempt to do so by the Acceptance Longstop Date, was an event of default under the PFI Contract. In bringing the High Court proceedings, the Authority sought, amongst other relief, damages and a declaration that it was entitled to terminate the PFI Contract.

- 3.8 The Contractor denied any default and argued, in summary, that the Facility was capable of passing the Acceptance Tests, but for the Authority's failure to deliver waste of the required composition under the PFI Contract. It therefore argued that the Authority was in breach of the PFI Contract and the Contractor sought damages in excess of £77 million as well as declaratory and injunctive relief that would have shifted the entire costs of the defective design of the Facility to the Authority, and accordingly, to Essex taxpayers. The Contractor also alleged that the Authority and individual Council officers had failed to act in good faith, or to act honestly and reasonably in order to, effectively, engineer the ability to terminate the PFI Contract for convenience, and dressing this up as termination for contractor default. These, self-evidently, are serious allegations to have been made against the Authority and its Officers.
- 3.9 In view of the seriousness of the allegations made against it, and the failure to make any meaningful progress in settlement discussions (as to which see below), the Authority had little choice but to go forward and prosecute its case, and to defend itself against the allegations made against itself and its Officers.
- 3.10 The issues in the High Court proceedings were complex, and the main court hearing itself lasted 25 days. The decision was not issued until 18 June 2020, but in a damning judgment, Mr Justice Pepperall held in his decision that:

"Standing back from the trees, the shape of the wood can be clearly seen:

... The fundamental problem with this project was that UBB made a number of serious design errors:

a) Its density assumptions were based on little more than calculations on the back of the proverbial fag pack such that the biohalls were seriously undersized and incapable of processing the guaranteed tonnage of waste.

b) Its bid in respect of BMW reduction was inadequately researched, ambitious and set with a view to scoring well in the procurement exercise. It has not been achievable.

c) Its confidence that it could accept the composition risk and meet the performance guarantees notwithstanding significant variations in the waste proved to be misplaced

..."

- 3.11 The Judge made highly critical comments of the Contractor's case, and the evidence provided by a number of its witnesses and concluded that it was *"hopeless to suggest that the Authority was under a contractual obligation to agree fundamental changes to the contract and the Acceptance Tests in order to keep the project on track"*. UBB failed on all of its claims except for a relatively minor issue unrelated to the main dispute (regarding the Authority stopping deliveries for a short period of time during when it believed there may have been an asbestos issue with the processing of material at the Facility). The Judge noted that doubt was cast on the integrity of the Contractor's lead witness, and that *"this attitude to commercial integrity ... was part of a widespread culture*

within UBB.” The Contractor had concealed the density issue with the Facility, and had not designed it “with reasonable skill and care”. In summary “UBB therefore designed and built a facility that simply could not pass the Acceptance Tests.”

3.12 The Judge granted declaratory relief to the Authority declaring that the Contractor failed, in breach of contract, to achieve Service Commencement by the Acceptance Longstop Date under the contract, that the Contractor was not entitled to operate certain modifications it had made to the Facility, and which would therefore make it impossible for the terms of the PFI Contract ever to be met, and that the Authority was entitled to terminate the PFI Contract for Contractor Default. In addition, the Authority was awarded damages in the amount of £9,038,428 to the end of February 2019 and continuing losses thereafter at £99,563 per month. On the asbestos issue, the Contractor was granted compensation of £745,234.

3.13 In a subsequent ruling, the Judge also ordered that UBB pay 95% of the Authority’s legal costs, such costs to be assessed on an indemnity basis. The 5% deduction was to account for costs in considering the asbestos issue, but no discount was to apply looking forward where the Authority’s recovery was 100%. In the costs judgement it was noted that indemnity costs are appropriate only where the conduct of the paying party is unreasonable “to a high degree”, and Mr Justice Pepperall noted:

“I am pleased to say that the making of allegations of commercially unacceptable conduct without any proper evidential foundation – as happened in this case – is “out of the norm”. In my judgment, it is important that it should remain so and that parties realise that they cannot make unjustifiable allegations of a lack of good faith with impunity. While I do not equate the allegations in this case with fraud, I nevertheless conclude that UBB’s conduct in making widespread allegations of a lack of good faith against the Authority and its officers without any proper foundation was “out of the norm” and, of itself, justifies an order for costs on the indemnity basis.”

3.14 He also noted:

3.15 *“In my judgment, UBB’s counterclaim can properly be described as speculative, weak, opportunistic and thin. I infer that its determined prosecution by UBB combined with its unfounded allegations of a lack of good faith were designed to bring commercial and political pressure to bear on the Authority not to press its own claims to trial. Such conduct was “out of the norm” and, of itself, justifies an order for costs on the indemnity basis.”*

3.16 The Contractor then sought permission to appeal on 28 separate grounds, but Mr Justice Pepperall refused to grant consent on each such ground. Even then the Contractor sought leave to appeal in the Court of Appeal on 8 grounds, but the Rt. Hon. Lord Justice Coulson refused permission, noting in multiple instances that the argument raised by the Contractor had “no realistic prospect of success”, or that it was “untenable”, or “unarguable”. He also noted the “unchallenged findings by the judge that UBB were in breach of contract”. At this point, the Contractor’s legal remedies were exhausted.

- 3.17 The Authority had been left with little or no choice but to proceed with the High Court proceedings given it was evident to the Authority that the Contractor was in breach of the PFI Contract, had made fundamental design errors in the design of the Facility (for which it was solely responsible for designing), and had built a facility which, as the proceedings determined, was simply incapable of meeting the performance standards required under the PFI Contract. It was also necessary to defend against the attempt to shift blame and costs for these errors and breaches to the Authority itself, and to defend against the entirely unfounded allegations made about the conduct of the Authority and its Officers, which Mr Justice Pepperall determined were unjustifiable and resulted in a costs award on an indemnity basis being made against the Contractor.
- 3.18 Notwithstanding this, prior to the commencement of the High Court proceedings, the Authority, its Officers and advisers engaged in almost continuous discussions with the Contractor, its banks, sponsors and advisers with a view to resolving the dispute. These discussions were conducted on a without prejudice basis, but unfortunately no solution could be found which did not shift risk and significant liability for the issues at the Facility to the Authority. In any event, it was obvious that the Facility could not meet the performance requirements of the PFI Contract, and thereby deliver on its contributions to the Waste Strategy. The impact on the continuing availability of the WICs from DEFRA (which could, at DEFRA's discretion, be removed if the project did not remain in line with the approved Final Business Case) also had to be considered.
- 3.19 Likewise, the Authority considered whether, technically, the Facility could be put into a position where it could meet the requirements of the PFI Contract, but no viable technical, commercial or legally deliverable solution was feasible. Equally, no alternative solutions were possible in terms of providing a value for money solution for an alternative use of the Facility (and which, in any event, would not deliver on the objectives of the Waste Strategy while retaining DEFRA's support).
- 3.20 The Authority considered a wide range of alternative waste related uses with input from external technical advisors including: waste transfer, waste composting, lower performing MBT, and materials sorting; together with a range of non-waste commercial uses such as open storage and covered storage. No solution could be found which would satisfy a value for money analysis, with significant fixed overheads such as national non-domestic rates and uncertain environmental pollution risks rendering the options unviable. Potential alternative commercial uses for the Facility were assessed with input from external property advisors, all of which entailed very significant demolition or modification costs for the Authority that could not be confidently recovered through the increased rental income or otherwise.
- 3.21 The Contractor entered into administrative receivership on 27 July 2020, the day before the Court's deadline for the Contractor to pay the damages award. The Contractor accordingly defaulted on both the payment of damages and costs due the following day.
- 3.22 It is important to note that the Contractor is a special purpose vehicle incorporated solely for the purpose of implementing the project under the PFI Contract. Also,

as entirely standard in relation to PFI financing arrangements, the Authority was required, very simply, to subordinate its claims against the Contractor to those of the banks providing finance to the project. This was done pursuant to an agreement called the “Direct Agreement” entered into by the Authority at the time the senior credit facilities for the project were entered into.

- 3.23 Given that the Contractor was a special purpose vehicle and insolvent, and given the Authority was an unsecured creditor of the Contractor, with its claims subordinated to the claims of the senior lenders (the administrative receivers of the Contractor were acting on behalf of the interests of the secured creditors), there was no realistic way in which the Authority would be able to recover the damages and costs directly from the Contractor.
- 3.24 In relation to costs, the Authority therefore began preparation to bring a third-party costs claim against both the sponsors of the project and the banks. This was on the basis that they directed the Contractor’s litigation strategy, and funded it through the proceedings. Faced with this potential claim, the project sponsors agreed to a settlement and to pay the Authority £13,450,000, being the substantial portion of the Authority’s costs claim. The Authority also exercised its set-off rights under the Contract to set-off an amount of £961,654.49 that it owed the Contractor pursuant to a commissioning invoice for waste that had been processed at the Facility.
- 3.25 Practically speaking, the Facility was, from the time the Contractor entered into administrative receivership, mothballed, but the Contract would remain in place until the Authority decided to exercise its right to terminate, which the Authority was not bound to exercise (it could do so entirely at its discretion).
- 3.26 However, in accordance with the standard terms for PFI contracts, even when the contract is terminated for contractor default, there is a complex assessment of the valuation of the facility, which could result in the Authority having to pay compensation on termination to the Contractor. While counterintuitive, the purpose of this structure is to provide credit support for the secured lenders who, even if their borrower (i.e. the Contractor) is in default, still need to be repaid. But, this would mean that, having forced the Authority into proceedings to protect the Authority’s interests, and with a judgment firmly in the Authority’s favour, the Authority could end up having to make a substantial payment to the defaulting Contractor. Even then, the Authority would be assuming ownership of a failed facility, with all of the potential ensuing liabilities, including exposure to environmental liabilities which could not be quantified.
- 3.27 Faced with the fact that the Authority was not going to terminate, and thereby no compensation on termination would be paid, the secured lenders agreed to enter into an arrangement whereby the debt related to the project was sold to a sponsor entity at a very significant discount. The secured lenders thereby suffered a significant loss on their investment.
- 3.28 At the same time the sponsors had to incur significant further liability in order to fund the purchase of the debt from the banks. This was all done at no cost to the Authority. Any settlement discussions, going forward, would be directly between the sponsors and the Authority.

- 3.29 The Authority subsequently commenced further High Court proceedings seeking declarations that, following the sponsors' purchase of the debt, an effective repayment of the senior secured debt had occurred, and this would then enable the Authority to take direct action (unrestricted by the subordination provided for in the Direct Agreement, as mentioned above) against the sponsor entity that acted as the construction contractor for the Facility for its design and build errors, and also potentially against the sponsor parent companies as guarantors of the Contractor obligations. The claim would be for the amount of the awarded damages under the previous High Court proceedings (i.e. £9,038,428, plus interest).
- 3.30 Immediately after these proceedings were commenced, the sponsors sought further engagement on a settlement of the dispute. The starting condition imposed by the Authority, and accepted by the sponsors, was that, notwithstanding the terms of the PFI Contract, no compensation on termination would be paid. This also has to be considered in the context of the senior lenders suffering significant losses, and the sponsors incurring significant liabilities in making the discounted purchase of the debt.
- 3.31 The key question for the Authority was whether the Facility should be handed back to the Authority, or whether it should be demolished, and a vacant site handed back (clean from any environmental exposure) to the Authority. Despite significant technical analysis, no commercially viable alternative use for the Facility could be identified. If the Facility were handed back, the Authority would be assuming responsibility for a mothballed plant which did not meet its specifications, and could never meet the required performance standards, and the Authority would become responsible for all costs of maintenance and all ongoing risks and liabilities associated with taking control (including environmental exposure). There was a high degree of certainty that the Authority would have to demolish the Facility, and incur costs in the region of around £11,000,000 in so doing (albeit this would depend significantly on whether material environmental issues were discovered during demolition – the Authority was already aware of a number of potential concerns, including with the drainage system). A handback of the Facility would also involve a protracted and difficult negotiation (with material costs) with complicated legal issues to be determined, for example, establishing what warranties as to condition would need to be provided by the sponsors (knowing the Facility did not meet its specifications in any event).
- 3.32 The Authority determined that a demolition option would largely mitigate all of these risks, and result in the best value for money outcome for the Authority. Accordingly, the Authority entered into final settlement discussions with the sponsors on the basis that, notwithstanding the terms of the PFI Contract, no compensation on termination would be paid, the facility must be demolished subject to stringent environmental requirements, and all works must be undertaken at the sole cost of the sponsors and the Contractor. The Authority's environmental and technical consultants would monitor the works and would be required to certify compliance in order for handback of the vacant site to be completed. In addition, the sponsors would have to provide an unlimited guarantee and indemnity of performance, and which would continue to apply for

three years post-handback in case any latent environmental defects were discovered. The PFI Contract would be amended to define these conditions of handback, applicable on termination of the PFI Contract, and upon handback (i.e. after satisfactory completion of all works), the PFI Contract would be terminated. Each party would release all claims against the other parties, and in the case of the Authority, this would mean releasing the Contractor from the obligation to pay the damages (which the Authority would likely never be able to recover from the Contractor given that it was insolvent). In conjunction with this, the sponsors lost their entire equity investment in the project, they incurred significant additional liabilities in the discounted purchase of the debt, they have assumed all liability for the demolition of the Facility and meeting all conditions of handback, they have provided an unlimited guarantee and indemnity, and paid over £13,000,000 in settling the Authority's costs of the High Court proceedings. The banks also suffered a material loss on the discounted transfer of the debt to the sponsors (and all remaining outstanding debt was written off).

- 3.33 As a consequence of the settlement, the Authority would avoid the costs and uncertainties associated with future litigation (which could be substantial), it would not assume responsibility and liability for a defective Facility, and the potential for unquantifiable environmental liabilities, and the Authority would have flexibility in respect of its future waste strategy and in terms of the use of the site going forward. The long-running dispute would finally be brought to an end. All liabilities associated with the settlement terms would be for the Contractor's account, while the Authority would have the comfort of the continuing sponsor guarantee and indemnity for a further three years post-termination of the PFI Contract. The settlement agreement was entered into based on these principles on 21 April 2022.
- 3.34 The demolition of the Facility will commence shortly, and the Contractor has given an estimate that it will be completed in approximately 18 months. Following demolition of the Facility and satisfaction by the Contractor of stringent environmental clean-up requirements, the site will be handed back to the Authority for future use.
- 3.35 Due to the Facility (that was required to treat Essex's residual waste for the next 25 years) not being available, it is clear that a new waste strategy for the county is required. The Authority has begun the substantial process of working with the districts and borough councils to decide options for treating, not only its residual waste, but all the recycling, food and green waste streams. The new strategy will ensure that councils can respond to the Environment Act and support the work of the Essex Climate Action Commission. In due course, a full public consultation will take place on the recommendations that emerge from the work with the district councils.

4. Next Steps

Monitor the demolition of the facility by UBB and the subsequent environmental clean-up activities.

5. Appendices

None.

Report title: Initial Response to LHP Task and Finish Group Review	
Report to: Place Services and Economic Growth Policy and Scrutiny Committee	
Report author: Daniel Maclean, Highway Liaison Officer Team Leader	
Date: 30 June 2022	For: Discussion
Enquiries to: Daniel Maclean – (Daniel.Maclean@essexhighways.org)	
County Divisions affected: All Essex	

1. Introduction

- 1.1 This report presents an initial response to the Local Highway Panel (LHP) Task and Finish (T&F) Group report, for discussion at the Place Services and Economic Growth (PSEG) Policy and Scrutiny Committee on 30 June 2022.
- 1.2 It acknowledges each of the summary findings made within the LHP T&F Group Report, provides an initial response, and details a number of actions that could be taken forward.

2 Findings and recommendations made within the report

2.1 Page 12 of LHP T&F Group Report:

<p style="text-align: center;">Summary Findings - Regions</p> <p>In future, the distribution of the additional budget could take the inconsistency of activity into account and could be focused towards areas with a larger queue.</p> <p>By definition, when LHPs were started 10 years ago, there would not have been a long queue of schemes awaiting funding. Therefore, those regions that were most 'successful' in bringing forward schemes, may now be suffering from that success and left with an inability to address them all.</p> <p>To address the inconsistency across the county and the apparent lack of awareness of the LHP guides among councillors, additional training may therefore be needed including the sharing of best practice between LHPs. It is also proposed that scheme requests be accompanied by a justification which references the appropriate guide and criteria.</p> <p>The schemes awaiting allocation stretch over several years and are unlikely to come to fruition, raising the question of how realistic it is to deliver the area's demands.</p>
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- 2.1.1 It is agreed that the additional £200,000 allocated to the LHPs in 2021/22 (and subsequently rolled over into 2022/23) could have been distributed in line with the LHP allocation formula or with a focus on those areas with longer Schemes Awaiting Funding lists; however, as most LHPs have committed funds and prepared their programme of work for 2022/23, it is proposed that each LHP retains the additional £200,000 that they were allocated.
- 2.1.2 Should additional funding for LHP be made available in future years, the allocation can be distributed in line with the formula.
- 2.1.3 It is proposed that where a LHP has funds remaining within their capital budget following the June panel of any given year, the remainder should enter a collective pot of underspent capital funds, which can then be distributed to those panels where schemes require funding (possibly through a bidding or ranking process or via a Chairman's Panel, details of which will be presented later in this report at 2.5.2).
- 2.1.4 Agree that additional training should be offered to all Members. Training should include:
- An overview of the Members' Guides, providing Cllrs with a full understanding of the various types of schemes that the LHPs can fund.
 - How scheme costs are determined, providing full transparency and a breakdown of each stage.
 - Explanation of timescales for each type of scheme.
- 2.1.5 Agree that the current lifecycle is too long, and we are looking at ways to improve this. We will return to the Committee with our proposals on this matter in due course.

2.2 Page 12 of LHP T&F Group Report:

Summary Findings Budget

The Task and Finish Group has evaluated the schemes submitted by the 12 LHPs and have identified the following:

At the point of investigation there were a total of 1098 schemes listed, valued at over £12.2M, with £6.8M of those, still awaiting allocation of funding. In addition, there are a further 369 schemes identified as awaiting cost estimation. As such, the allocated budget is severely inadequate to address demand, and this partially explains why schemes take anything up to 5 years for full implementation.

The additional budget of £200,000 per local authority in 2021/22 should not have been distributed equally and was disproportionate to the original budget and has led to underspend. Going forward, the total budget should be distributed in line with the approved formula.

The schemes awaiting allocation stretch over several years and are unlikely to come to fruition raising the question of delivery to fulfill the area demands.

The Group conclude that the existing budget is far from adequate and in its current format will never meet the demand placed on the local LHP's and until either the budget is increased, the cost of schemes is radically overalled or a wider structural change takes place.

If the LHPs are contributing to the Safer, Greener, Healthier agenda, then such budgets need to be explicitly directed towards LHPs.

2.2.1 As above, should additional funding for LHP be made available in future years, the allocation can be distributed in line with the existing formula.

2.3 Page 16 of LHP T&F Group Report:

Summary Findings – Cost of Schemes

The perception that schemes are too expensive needs to be addressed, perhaps with more training. Specifically, LHP members need to better understand the constituents of the whole delivery price with design costs being a major part of the total cost, and LHP management 15% and total overheads as 25% of the total price.

2.3.1 As above, full training will be offered to all LHP members to provide a better understanding of cost breakdowns.

2.4 Page 19 of LHP T&F Group Report:

Summary Findings – Delivery Times

The perception that LHP schemes take too long needs to be addressed by training LHP members on the lifecycle.

The timing of design task is a critical element in determining the timescale and has to be scheduled to a limited resource. Furthermore, shortage of design resource is causing some delays.

The implementation of the new scheduling and reporting database coupled with scheduling software should improve matters going forward.

There is a wealth of information on the LHP websites, but not all LHP members are aware of it. Furthermore, a deeper understanding of the scheme lifecycle would be beneficial.

2.4.1 As above, training will be offered to all members on scheme lifecycle / timescales.

2.4.2 Officers are currently working to implement a new scheme reporting and tracking system which will allow members to:

- Raise LHP requests quickly and efficiently via a web-based platform.
- Access a map showing all scheme requests that have been submitted across the County.

- View the status of each scheme request (i.e., in validation, design, total scheme etc).

2.4.3 Details of the new reporting tool will follow later in this report at 2.10.1.

2.5 Page 21 of LHP T&F Group Report:

Summary Findings – Appropriateness of Schemes

With such large schemes in scope, there is a danger that LHPs will be dominated by delivery of a small number of schemes rather than many schemes across a whole region, benefitting more people.

The option to set a £50,000 cap and move consideration of larger schemes to a Super LHP should be explored on the basis that the Super LHP attracts alternative Greene/Healthier funding.

The concept that maintenance tasks are not in LHP scope should not be changed. However, this needs to be addressed by improving the maintenance performance.

2.5.1 Whilst it is currently within the LHPs' power to focus on implementing smaller scale schemes (up to £50k) should they wish, placing a cap on scheme costs would limit the existing freedom of the panels and could be seen as a step away from devolution. Therefore, we propose that a cap is not placed on scheme costs and that LHPs retain the option to fund larger schemes with their capital budget should they wish.

2.5.2 To address the concern that the LHPs could be dominated by small numbers of large schemes that do not serve the wider demographic, it is recommended that this matter should be investigated by a separate Chairmen Panel, consisting of all twelve LHP chairmen (in line with the proposed Super Panel).

2.5.3 The main purpose of the Chairmen Panel would be to share best practice and ensure that the panels are managed and run in a consistent and efficient manner.

2.5.4 An additional responsibility of the Chairmen Panel could be to adopt the responsibility for the collective underspend from all LHPs following the June panels. The Chairmen Panel could work with officers to review those schemes that have been listed as awaiting funding for an extended period of time, ultimately deciding whether they should be funded by the Chairmen Panel or removed from the Schemes Awaiting Funding List for that district.

2.5.5 An additional benefit to the Chairmen Panel would be the provision of a further layer of authority for a scheme to be approved/denied.

- 2.5.6 As the Chairmen's Panel would have to be resourced by existing funds, officers are currently working to determine exactly how it would operate, as well as the criteria against which a scheme would be assessed. We will return to the Committee to present our suggestions in due course.

2.6 Page 23 of LHP T&F Group Report:

Summary Findings – LHP Membership

LHP makeup ranges from 7 to 23 (Braintree) including officers and others; this can be considered top heavy.

The Group conclude that there is scope to reduce the number of members that make up these panels and suggest that they should consist of county councillors, 1 representative from district level, 1 parish representative.

The officer attendance could be reconsidered but should always include a member from the design team (to ensure there is sufficient consideration of this element).

The Group conclude that decision making (voting) should be restricted to the ECC councillor membership. Local parish councils should be part of the application process through the ECC member.

The Group believe that residents should input via their ECC member.

- 2.6.1 There is an inconsistency across the panels with regard to membership numbers. Whilst it is agreed that in some cases panel membership could be reduced, it is important that we retain the local knowledge of the District members.
- 2.6.2 It is proposed that all members on the panel have a voting right as restricting this to only County members could be seen as a step away from devolution. We do however recommend that it remains a requirement for County Members to approve all scheme requests before they can progress to the validation stage.
- 2.6.3 It is recommended that to ensure consistency, each LHP should consist of all County Members, two District Members and one Parish Council representative.

2.7 Page 24 of LHP T&F Group Report:

Summary Findings – Overlap with Maintenance

LHP scope should continue to exclude maintenance aspects; however, for this to happen, the highways maintenance performance needs to be improved

PSEG should review Highway Maintenance performance on a quarterly basis.

- 2.7.1 The scope of the LHP will be clarified as part of the planned member training programme, detailing that which falls under maintenance and outside of the panels' remit.

2.8 Page 25 of LHP T&F Group Report:

Summary Findings – Delivery and Implementation

The expansion of the use of Direct Delivery Gangs is supported

More consideration should be given to the use of Highways Rangers including expanding their capabilities.

Options to contract out work should be explored.

LHP meetings should be at least every quarter and review progress of all the schemes.

- 2.8.1 As noted in the T&F report, the preferred method for LHP scheme delivery is via Direct Delivery, offering the cheapest and most effective delivery method.
- 2.8.2 For those schemes that are outside of the Direct Delivery Gang's remit, we work within the parameters of the Essex Highways contract and use a supply chain partner (SCP), selected via a competitive tender process to ensure best value for money.
- 2.8.3 A full explanation of how schemes are costed and delivered (including the associated timescales) will be included as part of the proposed members' training sessions.
- 2.8.4 All LHPs meet quarterly; however, it remains at the panels' discretion as to whether they meet more frequently or on an ad-hoc basis.

2.9 Page 27 of LHP T&F Group Report:

Summary Findings – Centralisation versus Devolution

Decision Making for schemes of less than £50,000 should stay with existing LHPs with bigger schemes considered by a new LHP Super Panel.

2.9.1 As above, it is proposed that a spending cap should not be placed on the LHPs; however, a Chairmen's Panel could be formed to take responsibility for those schemes that are unlikely to be funded by the 12 LHPs.

2.10 Page 29 of LHP T&F Group Report:

Summary Findings – LHP reporting System

The Task and Finish Group support the improvement to the scheme request and data capture system and promote its roll out by mid-2022

It is noted that the new database will be able to provide in depth data for members.

The Group recommend a two-tier reporting system, one for the public and a more in-depth one for members.

The Group support the new online reporting system but note that some minor changes could be made e.g. the inclusion of a "recommended solutions" category choice.

2.10.1 An online LHP scheme request and tracking tool has been developed and HLOs are currently working with developers to ensure that it meets all requirements. The target for rolling this out to members is mid-2022. Full guidance on how the system will work will be included as part of the proposed members' training programme.

2.10.2 As recommended, we are working with the developers to devise an option for members of the public to submit suggested schemes, which will notify the local County Member via email when a scheme request has been submitted for within their division. If in support, the member can then approve the submission for referral to the HLO to be progressed to validation.

3 Actions

3.1 Below is the list of initial actions that will be taken forward, with a further update to be presented to the Committee in due course.

- 3.2.1 **Additional funding:** In the instance that additional funding becomes available to the LHPs in any given year, it will be distributed across the 12 panels in line with the existing allocation criteria.
- 3.2.2 **Date for completion:** Ongoing.
- 3.3.1 **Chairmen Panel:** Officers will work with the Cabinet Member for Highway Maintenance and Sustainable Transport and the 12 LHP Chairman to form a Chairmen Panel, the purpose of which will be to:
- Share best practice;
 - Identify potential issues and inconsistencies; and
 - Adopt the responsibility for LHP underspend.
- 3.3.2 **Date for completion:** The aim will be to implement the Chairmen Panel in December 2022, to run for a trial period of one year from January 2023 to January 2024, for further review by the PSEG Policy and Scrutiny Committee in April 2024.
- 3.4.3 Officers will present their proposals for how the Chairmen Panel would operate at the PSEG Policy and Scrutiny Committee in September 2022.
- 3.4.1 **Members Training:** Officers will produce a number of training sessions for Members, covering a number of different topics.
- 3.4.2 As part of this work, the Members' Guides will all be reviewed and updated where necessary.
- 3.4.3 Officers will present their proposals as to what the training will cover/the number of modules, the level of detail that will be covered and the number of cohorts at the PSEG Policy and Scrutiny Committee in September 2022.
- 3.5.1 **Review of scheme lifecycle:** Officers will determine the best means to:
- Address the length of time a scheme takes from its request to being implemented; and
 - The length of time that a scheme can sit in the Schemes Awaiting Funding list.
- 3.5.2 Officers will present their proposals on how these timescales can be reduced at the PSEG Policy and Scrutiny Committee in September 2022.
- 3.6.1 **Online reporting tool:** Officers will rollout the new online reporting tool to allow Members the opportunity to quickly and efficiently log new scheme requests and track those that are already in the system.
- 3.6.2 Officers are working with the developers to finalise the tool, with a target for rolling this out to Members in August 2022.

- 3.7.1 **Membership numbers:** A review of membership from across all twelve panels will be carried out by officers in conjunction with the proposed Chairmen Panel to determine whether a consistent approach of all County Members, two District Members and one Parish representative would work for all.
- 3.7.8 Officers will present their proposals for panel membership at the PSEG Policy and Scrutiny Committee in September 2022, with a view to implementing any changes in April 2023.