

12 July 2023		ITEM: 11
		Decision: 110657
Cabinet		
Lower Thames Crossing Development Consent Order Update and Planning Performance Agreement		
Wards and communities affected:	Key Decision:	
All	Yes	
Report of: Leigh Nicholson, Assistant Director Planning, Transport & Public Protection		
Accountable Assistant Director: Leigh Nicholson, Assistant Director, Planning, Transport & Public Protection		
Accountable Director: Mark Bradbury, Interim Director of Place		
This report is Public		

Executive Summary

The National Highways (NH) submission of its Lower Thames Crossing (LTC) application for a Development Consent Order (DCO) was formally accepted by the Planning Inspectorate (PINS) in October 2022.

This report sets out the Council's current understanding of the LTC DCO pre-examination work process and timescales of the LTC DCO Examination.

In May 2023 the Council attended the LTC DCO Programming Meeting to make representation and formally request a delay to the programme in consideration of the suspension of work necessary due to the Council's financial situation and subsequent S114 notice. The Council requested the LTC DCO process was extended by 7 weeks.

Following a pause whilst the S.114 implications of proceeding with the Council's objection were assessed the technical review team has been remobilised and is undertaking a review of the LTC DCO documents submitted as these are likely to be different to the information previously provided by National Highways (NH) prior to submission. This is complex work and requires substantial external resource and management.

Despite a strong case for an extension and support from other stakeholders the Examining Authority (ExA) confirmed in its Rule 8 letter, issued after the Preliminary Meeting (Part 1) which was held on 6 June, that the programme would be unchanged.

The Examination therefore commenced on 20th June and is scheduled to be completed by 20th December 2023. The ExA will then take 3 months to make its recommendation report to the Secretary of State for Transport. The ExA recommendation report is then sent confidentially to the Secretary of State for Transport to consider the recommendations.

A formal announcement on planning determination for this scheme might be expected from

summer to late 2024, although this may be influenced by the dates of the General Election currently expected in May 2024.

Part of the cost of Thurrock Council's engagement with the process to date is met by National Highways as set out in a Planning Performance Agreement (PPA) between the Council and National Highways. That PPA terminated when the DCO was accepted by PINS.

Officers have worked closely with National Highways to agree the terms of a new Agreement to take us through the Pre-Examination and Examination phase. Terms have now been agreed that will deliver a higher contribution from National Highways than the previous PPA (and greater than agreed with other affected authorities to reflect Thurrock's current financial position). The agreed draft is attached as appendix 2.

The Department for Transport (DfT), the Department for Levelling Up, Housing & Communities (DLUHC) and more recently the ExA have made clear the importance of Thurrock Council being properly resourced to fully participate in the Examination process.

The ExA has asked for confirmation that the PPA will be approved and signed early in the Examination process.

Commissioner Commentary

The LTC has consequences for the 'Place Leadership and Growth' theme within the Improvement and Recovery Plan. Unless properly mitigated, the LTC presents a significant risk to Thurrock, in terms of economic, environmental, and social impacts.

1. Recommendation(s)

- 1.1 That Cabinet notes the DCO pre-examination process and draft examination timetable and the ongoing role of the Lower Thames Crossing Task Force.**
- 1.2 That Cabinet approves entering into a further Planning Performance Agreement with National Highways and delegates authority to the Director of Place to effect this decision.**

2. Introduction and Background

- 2.1 The Lower Thames Crossing is intended to create additional road capacity across the Thames and relieve pressure on the Dartford Crossing. The proposed route includes 14.3 miles of new road connecting the M2/A2, A13 and M25 and the longest road tunnel in the UK, stretching for 2.6 miles. The project also includes around 50 new bridges and viaducts. About 70% of the infrastructure will be in Thurrock.
- 2.2 The Council has endeavoured to work with National Highways to influence and improve the scheme but remains opposed to the scheme in its current form due to the magnitude of unmitigated economic, environmental, and social impacts levied disproportionately on Thurrock and the Council's concerns about the ability of the scheme to deliver its stated objectives.
- 2.3 The Lower Thames Crossing Task Force has met regularly from September 2017 and has consistently sought to hold National Highways to account. Cabinet has received regular updates in accordance with agreed terms of reference.

- 2.4 In October 2022 National Highways resubmitted its DCO application to the Planning Inspectorate. The Council submitted its Adequacy of Consultation (AoC) representation highlighting very serious concerns about the consultation, transparency of communication, and local understanding of the scheme impacts.
- 2.5 The Planning Inspectorate decided to accept the DCO application on 28 November 2022. There is no basis to challenge this decision except through Judicial Review later and PINS is not required to provide any substantive justification as to how they considered the Council position.
- 2.6 The Council reaffirmed clear all-party support for continuing to challenge the current LTC scheme in response to a Motion at its meeting on the 25th January 2023.
- 2.7 The DCO application has now proceeded to the more formal Pre-Examination and Examination stages.
- 2.8 The DCO Pre-Examination and Examination timetable and related work programme and indicative timescales for future work are out in tabular form in Appendix 1. This represents current understanding of the timetable, which is subject to change.

3. Issues, Options and Analysis of Options

- 3.1 The Lower Thames Crossing is the largest single infrastructure project currently in planning in the UK. Thurrock Council is also managing other major projects through DCOs, Local Development Orders and Planning Applications.
- 3.2 Managing the Council's response to a complex DCO has been and will continue to be time and resource hungry. It is estimated that the remainder of the process will require expenditure of around £2.5 million by the Council on the preparation of evidence, responses to information supplied by the applicant and ExA and representation through the Examination process.
- 3.3 An improved PPA is essential to ensure that the financial burden on Thurrock residents and Thurrock Council is kept to the minimum possible. Officers have negotiated an improved PPA which goes significantly further than the previous PPA (and PPA's that have been agreed with other affected Councils) to reflect both the scale of the impact on Thurrock and the Council's current financial position.
- 3.4 The ExA has requested that Thurrock confirm that it has approved and entered into the PPA at the earliest possible stage in the examination process. Officers have indicated to the ExA that it is their intention to bring a decision to the July Cabinet meeting.
- 3.5 Not entering into the PPA would not allow the Council to be properly prepared and represented through the examination process at the lowest possible cost to the Council. The Council would not be in a position to fully participate without an addition of circa £2 million to the Council's budget for the current financial year.

4. Reasons for Recommendation

- 4.1 In accordance with the terms of reference for the LTC Task Force Committee a paper is submitted to Cabinet to update the Council on the current status of the scheme as it progresses through the planning process. This paper sets out the current stage of the process and the forthcoming steps as they are presently understood to meet that

requirement.

- 4.2 Entering into the PPA will allow the Council to be properly prepared and represented through the examination process at the lowest possible cost to the Council.

5. Consultation (including Overview and Scrutiny, if applicable)

- 5.1 The Lower Thames Crossing Task Force has been (and will continue to be) updated on the Examination process and Thurrock Councils representations. The most recent meeting was on 19th June 2023 and the members of the task force supported the Council's continued position.

6. Impact on corporate policies, priorities, performance and community impact

- 6.1 The LTC Examination will have a significant impact on the Council's ability to continue with some planned activities during the remainder of 2023. Whilst a substantial and experienced team of consultants has been established to undertake the bulk of the work required, substantial inputs will be required from a wide variety of Council officers.
- 6.2 The ExA will often require detailed responses and Council decisions at short notice. Although this has been mitigated as far as possible the requirements of the DCO process will undoubtedly place additional pressure on Council resources. Time requirements for Council officer inputs have been identified and all those involved have been informed.
- 6.3 All Council staff time spent on the LTC DCO and the majority of the consultant team support is reimbursable to the Council via the proposed Planning Performance Agreement (PPA) which has been agreed and is awaiting Council governance approval. All Council time will need to be recorded to be reimbursable. Visibility of funding will enable the Council to bring in additional resource to assist delivery of normal workload during 2023 although this will require planning and approval.
- 6.4 Delegated powers have previously been established to enable the Council to expedite crucial decisions related to the LTC DCO during the Examination process.
- 6.5 This work is essential to secure mitigation of the likely economic, environmental and social impacts of the LTC project on Thurrock during the proposed construction period 2024-2032 and post opening of the scheme if the DCO is approved.

7. Implications

7.1 Financial

Implications verified by: **Laura Last**
Senior Management Accountant

All Council staff time spent on the LTC DCO is reimbursable to the Council via a Planning Performance Agreement (PPA). An amendment to the current PPA agreement is now close to being signed off. The terms of the PPA have been agreed by all parties.

Counsel fees are excluded from the PPA and budget has been provided to fund this element of the project. All Council time will need to be recorded to be reimbursable. Visibility of funding will enable the Council to bring in additional resource to assist delivery of normal workload during 2023 although this will require planning and approval.”

7.2 Legal

Implications verified by: **Caroline Robins**
Locum Principal Solicitor

This is an update report from the Lower Thames Crossing Task Force and there are no direct legal implications arising from this report.

The Development Consent (DCO) process is a planning process which falls outside the decision making powers of the local planning authority. The process relates to projects of national significance and is run by the Planning Inspectorate. If granted, the consent is contained within a statutory instrument known as a Development Consent Order. The Council is a consultee to the process, and the manner in which the Council engages with the process will influence the nature of the legal implications.

Host and neighbouring local authorities have an important role in the DCO process. The Council is a host authority because part of the proposal will be sited within the borough. Participation is not obligatory but is strongly advised. Relevant authorities are strongly encouraged to discuss and work through the issues raised by NSIP (nationally Significant Infrastructure Project) proposals. A local authority will provide an important local perspective, in addition to the views expressed directly to the developer by local residents, groups and businesses.

Thurrock Council would likely become responsible for discharging many of the requirements (akin to planning conditions) associated with the DCO if development consent is granted and would also likely to have a role in monitoring and enforcing many of the Development Consent Order (DCO) provisions and requirements.

In addition, the DCO if granted, could result in material implications for the Council and its assets, with attendant cost. Further implications could include statutory consents such as stopping up highways and discharge of water. The Council's involvement in the process can result in the securing of the mitigation of such effects. The DCO process includes Protective Provisions which will form part of the Statutory Instrument which would be issued upon the granting of the Order. These will need to be negotiated with NH's lawyers.

The DCO process runs on tight and inflexible timetables, and whether or not the DCO process is suspended, speed will be the essence for the Council to find ways of mitigating adverse impacts, including Protective Provisions.

Looking ahead, if the DCO is granted, and the Council sees fit to challenge the decision, a judicial review must be made very promptly (asap within 6 weeks of the decision),

The imperative for speed requires early preparation and it should be noted that before a judicial review challenge can proceed to a full hearing, it must be accepted by a court which must be convinced the case is arguable. Delay in investigating potential areas of

challenge could risk the Council missing an opportunity for the decision to be judicially reviewed.

Paragraphs 2.3 and 2.4 allude to a part of the process (Adequacy of Consultation) which the Council might now consider investigating potential for judicial review challenge. For this to occur (including obtaining initial advice regarding prospects of success), internal enabling processes should be put in place without delay.

The main grounds for challenge are: illegality, procedural unfairness, and irrationality.

The Council should remain vigilant for further potential judicial review challenge opportunities.

In view of the complexity and cost implications of a judicial review, a group action could be considered, if appropriate. Given the tight timetabling of the Judicial Review process, early engagement in this respect is recommended.

7.3 **Diversity and Equality**

Implications verified by: **Becky Lee**

Team Manager - Community Development and Equalities, Adults, Housing and Health Directorate

The Council remains opposed to the scheme as currently proposed due to the magnitude of unmitigated economic, environmental, and social impacts levied disproportionately on Thurrock and the Council's concern about the ability of the scheme to deliver on its stated objectives. These concerns have been incorporated within the Council's submitted Principal Areas of Disagreement (PADs) and will be further detailed within the Local Impact Report.

7.4 **Other implications** (where significant) – i.e., Staff, Health Inequalities, Sustainability, Crime and Disorder, and Impact on Looked After Children

N/A

8. **Background papers used in preparing the report** (including their location on the Council's website or identification whether any are exempt or protected by copyright):

- None

9. **Appendices to the report**

- Appendix 1 – Pre-Examination and Examination Timetable and work plan

Report Author:

Leigh Nicholson, Assistant Director Planning, Transport & Public Protection

Appendix 1

Key DCO Event	What is Required	Deadlines
Comments on DCOv1 (Pre-DCOv2 Submission)	Detailed technical input depending on the topic	Done through many Technical Document responses during 2021 and then Community Impacts Consultation (CIC) and Local Refinements Consultation (LRC) responses
Ongoing discussions on Issues Logs/Themes and the draft Statement of Common Ground (SoCG)	Review of DCOv1 + technical responses from LTC + attendance at SoCG meetings	Up to October 2022
DCOv2 SUBMISSION	N/A	31 October 2022
Counsel (QC) Consultations	Initial preparation of Examination Strategy and AoC / Local Impacts Report (LIR)	1 March and 11 October 2022
Adequacy of Consultation (AoC) representation	Potential input on key matters, but no external LTC meetings	Submitted to Planning Inspectorate (PINS) on 16 November 2022
Potentially PINS could request(s) further information prior to Acceptance (using possibly Reg 5, The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009)	Potential for additional comment on additional information	Not required by PINS, but PINS issued Section 51 letter on 'minor errors and omissions' dated 28 November 2022
PINS decision on AoC	N/A	28 November 2022
PINS Rule 4 Letter (Appointment of Panel)	The 4-Member Panel appointment is: Lead Member – Rynd Smith Members – Dominic Young, Ken Taylor and Ken Pratt. Possibility of 5 th Member subject to understanding issues further	2 December 2022
Early Procedural Decisions from Examining Authority (ExA)	Required updated Documents to address 'Minor Errors and omissions'; Primary Areas of Disagreement (PADS) and	19 December 2022

	SoCGs procedures, Non-disclosure Agreements (NDAs); PPAs; and Other Matters. Examination Library published	
Additional Submissions from NH	Responses to S51 Advice (updated documents); Errata Report; Place Name Gazetteer; and, Letters from Department for Transport (DfT) and Department for Business, Energy and Industrial Strategy (BEIS)	22 December 2023
Relevant Representation (RR) Period – submission of Council and public RRs and interaction with Members and the Public	Completed	From Monday, 9 January 2023 until Friday, 24 February 2023 Thurrock Council provided submission – 4 May 2023
Prepare PADS Summary Statement and Tracker	Completed	To be completed (with NH) by Friday, 10 March 2023 Thurrock Council provided submission – 4 May 2023
NH to submit further details of current and prospective PPAs to ExA	NH submission to ExA – Thurrock Council has responded to ExA PPA questions	To be completed (with NH) by Friday, 10 March 2023 - completed
Interaction with Members and the Public	Council governance processes and accounting for any contributions from the public in preparing the LIR, as a representative of the public	During the following 3 months, i.e. during the period March 2023 – June 2023
Review of DCO documentation and Preparation of Local Impact Report (LIR) and updated PADs, SoCG and any Written Reps, which are key documents (and similar in nature, but not content)	Substantial inputs on specific technical issues to assess how previous comments on the technical documents dealt with (previous technical comments to be used to assess the DCO submission)	Underway during the period mid-April – July 2023

PINS Rule 6 Letter, Programming Meeting and Preliminary Meeting (Stage 1), which begins the formal timetable	Completed	25 April 2023
Procedural Deadline A (PDA) and Programming Meeting	Thurrock Council Submission – 4 May 2023	5 May and 16 May 2023 – Thurrock Council attended
Procedural Deadline B (PDB) and Preliminary Meeting Part 1	Thurrock Council Submission – 26 May 2023 (including signed Joint Position Statement on PPA Variation)	26 May and 6 June 2023 – Thurrock Council attended.
Procedural Deadline C (PDC) and Preliminary Meeting Part 2 – currently programmed	Thurrock Council Submission to be prepared	Submission for Procedural Deadline C made week commencing 13 June 2023.
The ExA will determine if Thurrock Council's request for deferring the start of the Examination, Deadline 1 and the end of Examination has been accepted and the ExA decision will be set out in their Rule 8 Letter		
Subsequent Period – Undetermined and awaiting ExA Decisions and Advice		
PINS Rule 8 Letter (Examination Timetable) – this will be a detailed and final programme	Limited input, it sets out the exact timetable and Council's likely involvement	Either before or immediately after the final Preliminary Meeting (after Stage 2), i.e. summer 2023
ExA potential request(s) for further information (Rule 17 - Infrastructure Planning (Examination Procedure) Rules 2010)	Unknown, but largely likely from LTC, but we would then need to review and include comments in the LIR and Written Reps	Unknown
Interaction with Members and the Public	Council governance processes, preparing public for Examination input, attendance	Usually post-Rule 8 for several weeks
Deadline 1 - Submission of the Local Impact Report (LIR) and any Written Representation (WR) (key documents) + other submissions and comments on other reps	Major submissions	18 July 2023 (currently programmed)
Procedural Deadline D (PDD) – requests by		18 July 2023

interested parties to be heard at Open Floor Hearings or Affected Persons at CPO Hearings – for members of the public and Thurrock Council		
PINS Written Questions	Likely significant technical input, dependant on the questions	Very significant technical involvement in whatever questions are assigned to Thurrock, usually needing a final collective response to all questions within 21 days from receipt.
Finalise SoCG (after several iterations)	Checking/confirming status of issues	Likely by late Autumn 2023
Attendance at Hearings (Issue-Specific (ISH), Open Floor (OFH) or CPO)	Some direct witness involvement, mostly back-office support during the Examination	Unknown yet, although OFH and ISH are set for 20, 21, 22, 23 and 28 June and 5 July 2023, the majority will be held probably from early Summer – Autumn 2023