

meeting COUNTY COUNCIL

date 27 January 2011

agenda item number **10**

## **JOINT REPORT OF THE CABINET MEMBER FOR TRANSPORT AND HIGHWAYS AND THE CABINET MEMBER FOR FINANCE AND PROPERTY**

### **NOTTINGHAM EXPRESS TRANSIT**

#### **Purpose of the Report**

1. To report to Council on the outcome of negotiations between Council officers and the City Council following the decision of Full Council on 24<sup>th</sup> September 2009 to withdraw from the promotion of NET Phase Two and explore a withdrawal from NET Line one.
2. As a consequence of the negotiations noted in 1 above, to seek the approval of Council to enter into a settlement deed with the City Council which enables the Council to withdraw from NET Line One and settling the withdrawal from the promotion of NET Phase Two (the Settlement Deed).
3. To approve and enter into such ancillary documents as may be necessary to give effect to the obligations which are set out in the Settlement Deed.
4. To advise the Council on proposed measures and procedures to protect the County Council's highway interests if NET Phase Two proceeds.

#### **Background**

1. As was reported to Full Council in September 2009, the previous County Council administration approved the submission of an application for a Transport and Works Act Order (the Order) in early 2007. Following a public inquiry, the Secretary of State for Transport approved the Order on 30th March 2009. The Order gave both councils the powers (whether acting alone or together) to construct and operate NET Phase Two as well as to continue to operate the existing NET Line One. Accordingly, the City Council has always had the power to pursue the scheme on its own.

2. As part of its agreement with the City Council regarding the running of NET Line One and the promotion of NET Phase Two, the Council had entered into two joint agreements. The first regulated, amongst other things, the ongoing relationship for the ownership and management of NET Line One (“1<sup>st</sup> Joint Agreement”). The second joint agreement regulated, amongst other things, the promotion of NET Phase Two (“2<sup>nd</sup> Joint Agreement”).
3. In line with its manifesto commitment the new administration took a report to Council recommending withdrawal from the promotion of NET Phase Two. Such recommendation was approved and the Council issued notice to terminate the 2<sup>nd</sup> Joint Agreement. This gave three months’ notice to the City Council of the County’s intention to terminate the relationship. This expired on 24<sup>th</sup> December 2009.
4. Notwithstanding the termination of the 2<sup>nd</sup> Joint Agreement the Council was contractually obliged to cooperate with the City Council to bring about a timely transfer of any necessary matters in order to allow the City Council to proceed with the promotion of Phase Two on its own account. Since serving the termination notice, officers of the Council have been negotiating with City Council officers in relation to both the winding up of the relationship on the promotion of Phase Two and withdrawal from NET Line One. During the course of the negotiations the relevant cabinet members have been regularly updated.
5. Officer meetings between the two Councils have taken place supported by external legal advice. A core meeting has been held on a six-weekly basis while themed groups including highway/technical issues and property issues have met separately to address detailed matters.
6. The City Council has progressed with the procurement of a new concessionaire for the expanded network on its own as sole promoter. It issued its advertisement in the Official Journal of the European Union on 24<sup>th</sup> September 2009. Following a pre-qualification process 2 bidders were invited to bid and they returned their initial bids in May 2010. Following completion of its evaluation it is envisaged by the City that a preferred bidder will be selected in the early part of 2011. Final negotiations will then begin with the preferred bidder and the current expectation is that a contract will be awarded in the autumn of 2011.

## **Information and Advice**

### **7. General Settlement Terms**

- 7.1 As is noted above, there were two joint agreements between the two councils, one for the relationship regarding Line One and another in relation to the promotion and procurement of Phase Two. In accordance with the mandate given by County Council on 24<sup>th</sup> September 2009, the settlement arrangements deal with both the winding up of the relationship under the 2<sup>nd</sup> Joint Agreement and the termination of the 1<sup>st</sup> Joint Agreement. The termination of the 1<sup>st</sup> Joint Agreement will consequently see the County Council withdrawing from its involvement in Line One.

- 7.2 It should be noted that the relationship between the City Council and the County Council with regard to Line One will only terminate upon the termination of the first concession agreement (which the Council is a party to) and the award of the new concession agreement for the enlarged network (which only the City Council will be a party to). Accordingly, up until that point, the two councils will continue in their relationship (so far as Line one is concerned) largely as before.
- 7.3 Council officers have, as far as it is practicable, sought to achieve a clean break for the County Council in its withdrawal from NET. This is with a view to shielding the Council from ongoing liabilities as a promoter in relation to Phase Two. In addition there has been an effort by both Councils to draw a line under liabilities for Line One. In certain limited circumstances outlined below it has not been possible to obtain a completely clean break and the consequences of these exceptions are outlined.
- 7.4 As part of the settlement the Council will have no liability for any local monetary contribution that may need to be made as a result of a shortfall between the level of government support and the actual costs of the new Concession.
- 7.5 As part of the settlement arrangements, the County Council has agreed to transfer its rights in the PFI credits which are designed to support the payment of charges due under the existing concession agreement. Officers will be seeking consent from the Department for Transport for the transfer of these PFI credits to the City Council.
- 7.6 As was reported to County Council in September 2009, the procurement route chosen requires a termination of the existing Line One Concession Agreement. There will be a termination payment to be made to the outgoing concessionaire and the City will bear the cost of this payment although it is expected that such payment will be financed by the Line One PFI Credits.
- 7.7 The Council will be assigning its right and legal title to the 20% of the existing Line One network which it currently owns. Further details are provided in the Finance section below
- 7.8 The City Council have agreed to bear all liability for Land Compensation Act Claims which may arise out of the construction of Phase Two. The County Council has agreed to retain its 20 % share of the liability for Land Compensation Act claims which may still arise as a result of the construction of Line One. It is not expected that this liability will be significant and will be paid for out of existing budgets.
- 7.9 The settlement agreement will signify the withdrawal by the County Council from the promotion of the NET Phase Two. This will mean that all future dealings with the promoters of NET, the Concessionaire and the Contractor will be as defined in the Transport and Works Act Order and as specified in legislation detailing the duties of a Highway Authority. In view of the scale of the NET extension proposal and the

associated risks in delivering this project, the County Council has obtained additional assurances from the City Council regarding programming of works, remedial action and recovery of costs. These form part of the settlement agreement and are set out in more detail in section 8 below.

- 7.10 The County Council has agreed to the following arrangements in relation to concessionary fares. Under the existing Line One concessionary fare arrangement, the County Council is contractually obliged to pay concessionary fares (whilst the same are available on the bus network) for Line One until the end of the Concession Agreement. This concession agreement was due to terminate in 2030. The County Council has agreed with the City Council that the Council will meet its obligations under the existing concession agreement up until the operational date of any new expanded tram network. From that first operational date, the County Council will then pay for concessionary fares on Lines One, Two and Three (the entire expanded network) for a period of five years. At that point, the Council will have an opportunity to review whether to cease or continue with concessionary fares on the network. The obligation will only continue for so long as concessionary fares are available on the bus network and/or the city continue with their concessionary fare scheme.
- 7.11 Whilst the works are progressing, the City Council will make certain financial provision for the County Council's costs in securing additional bus services to cover disruption to current routes. The exact mechanisms for accessing the funding are currently being discussed. There is no provision for responding to any tendering needs which might arise in the longer term when NET is operational and travel habits evolve.
- 7.12 Following the decision of the County Council to withdraw from the promotion of NET Phase Two, land required for the project between Cator Lane and Bramcote Lane remains in the ownership of this Council. This land, together with land owned by Broxtowe Borough Council, is deemed open space land and as such is subject to special procedures to ensure that equal value land is made available to the community if the land is compulsorily purchased. The City Council has made an application to the Secretary of State for Transport for an amendment to the existing Order so as to authorise the compulsory purchase of the 'open space' land. In addition the City Council has also applied to the Secretary of State for Communities and Local Government to certify that the proposed replacement open space land, adjacent to Field Lane, is equally advantageous to the local community.

The amendment to the Order is currently being considered by the Secretary of State for Transport who may deem it necessary for a Public Inquiry to be held. If the Order is confirmed, the whole of the exchange land will become the property of the County Council, as the majority land owner of the 'open space' land. This is in addition to the value of the open space land which will also be payable to the County

Council. The procedures and arrangements to secure this open space land do not form part of the settlement agreement

- 7.13 At the County Council meeting on 24th September 2009, it was agreed that the Council would no longer meet the costs of the Chilwell Financial Assistance Package. However it is acknowledged that the construction of the tram through Chilwell Road and High Road, Chilwell would cause significant disruption to traders and businesses along the route. Members will recall that the County Council supported the establishment of a Financial Assistance Package to help traders and businesses during the construction period, and this package of help was fully detailed in the County Council Report of the 22nd February 2007. Evidence submitted by local residents and traders to the subsequent public inquiry in November 2007 was influenced by the prospects of such a package.
- 7.14 Although the County Council no longer supports the NET Extension proposals, the Council does recognise the severe disruption these proposals will have on Chilwell Road and the High Road and potential impact on local businesses during construction. Consequently the County Council has insisted that the Promoter (City Council) make an equal contribution to the financial assistance package. The County Council has therefore agreed to fund 50% of the actual cost (including administration) of this assistance in the Settlement Deed. This acknowledges the support the County Council wishes to ensure for local businesses in this area in the event of Phase Two being constructed.

## **8. Highways Issues**

- 8.1 If the NET Phase Two proposals proceed to the build stage, the County Council, as Highway Authority for part of the route, will be obliged to approve plans, drawings, specifications and particulars for proposals within its highway boundary. The settlement includes for the 'reasonable' repayment of costs, to the Council, associated with the necessary approvals and monitoring of works on the County Council's highway network. A provisional estimate of the cost of this approval works is £710,000, although provision has been made for additional cost recovery if reasonable. The exact extent of this work will not become fully evident until a Contractor has been appointed and the detailed construction proposals become known.
- 8.2 The NET Phase Two proposals include for the complete reconstruction of the highway (carriageway and footways) along the route of the tram. This 'betterment' to the highway offsets the additional costs to the County Council for routine maintenance e.g. gully emptying and street light replacements, associated with having to work around the fixed route and schedule of the tram.
- 8.3 It is normal practice to design the thickness of new road construction to last for twenty years before major maintenance / reconstruction is required. In this case a twenty year design life would conflict with the intended thirty year tram concession, resulting in potentially very high

costs associated with complex and restricted maintenance works around a live tram route. To overcome this issue, a forty year design life for the carriageway construction has been agreed and the City Council will ensure that the new concession agreement will have this contractual requirement.

- 8.4 One of the main obligations of the County Council as the Highway Authority is to ensure that the proposed NET Phase Two works are properly controlled and co-ordinated to minimise disruption to the highway network. The Nottingham Express Transit System Order 2009 made pursuant to the Transport and Works Act 1992 ("TWAO") gives the Promoter of the NET Phase Two the power to implement the necessary works. The County Council is empowered under the TWAO and under its wider powers as the Highway Authority, to approve the plans, specification and programme. This is an important power for the Council and as with all such powers they must be used appropriately and reasonably and the approval of applications cannot be unreasonably withheld.
- 8.5 The construction of the NET Extension works is a complex civil engineering project requiring the close working of sub-contractors, suppliers, statutory undertakers, financial backers and others. The scale of the project is very large and the potential for disputes and problems on site is high.
- 8.6 One of the key risks that the Council Officers have been keen to mitigate is the effects of contractual issues or disputes between the Promoter or the Concessionaire or the Contractor. If a significant problem were to arise then there could be a disruption to the programme of works leaving sites in a dangerous condition, or with work areas open and significant temporary traffic management measures in place but no progress being made. The County Council has therefore agreed in the settlement deed powers to 'step-in' to make safe and/or restore normal highway operations and that costs of these reasonable works are recoverable from the Promoter.
- 8.7 The settlement deed will also include a licence for works to be done by the City/Concessionaire under section 278 of the Highways Act 1980. These works will comprise the realignment, widening and improvement of Toton Lane and the footway adjacent to Toton Lane but fall outside the limits of the works authorised by the TWAO. Standard protections will be included in the Deed to protect the interests of the Council as Highway Authority.
- 8.8 A Highways Interface Document has also been agreed which provides a framework for how the highways would be managed by Nottinghamshire County Council as highways authority and how an operational tram track would integrate with other traffic and highways maintenance provision.

## **9. Local Transport Plan**

- 9.1 As Members will be aware, there are currently two Local Transport Plans (“LTP2”) which cover the county area. The first covers the north Nottinghamshire area. The second covers the south of the county and the City area.
- 9.2 The two existing LTP2s which explain the County Council’s transport strategy, are due to expire on 31 March 2011. The Council is obliged to ensure that these plans are replaced by a third round of Local Transport Plans (“LTP3”). LTP3 has to be developed and submitted to the Department for Transport by 31 March 2011 and work is continuing on LTP3 both within the Council and with colleagues at partner organisations. There is a separate report to this meeting of the County Council seeking approval for the LTP3 transport strategy.
- 9.3 The replacement LTP3 is a statutory document and must include a strategy and an implementation plan, and these two elements can be replaced and reviewed at a timescale to be determined by the highway authority. The new LTP3 will be a single countywide plan. Strategic transport relationships with adjacent Highway Authorities have been protected by separate agreements.
- 9.4 The County Council does not support the extension to the tram along the route as approved by the Secretary of State in accordance with the Order. Particular concerns were outlined in the report to County Council on 24 September 2009 including those relating to cost and the impact on local communities. The Council however, does recognise that the development of sustainable travel alternatives, the reduction of greenhouse gases and easy access to employment, training and services is a vital part of its local transport strategy. The Council considers that these priorities can be supported by other affordable transport measures rather than the proposed tram routes and consequently such measures will be supported in LTP3. The Council has been mindful therefore in considering the impact of the tram (both the current and future routes) on the capacity of the transport network to ensure that its transport strategy to support all forms of transport is not prejudiced.

## **10. Land Issues**

As part of the settlement the two Councils have agreed to treat the transfer of land in a number of ways as follows:

- 10.1 On land or Properties which the Council has purchased for the purposes of NET Phase Two (the ‘County Blighted Land’ as referred to in the current draft of the Settlement Deed) the Council will receive the amount paid by the Council for these properties (plus its costs incurred) less any payments already made to the Council for such properties.
- 10.2 On Garden land owned by the Council for the purposes of possible dualing of Line one in the future the Council will continue to hold such land but grant an option of up to 20 years to the City to purchase

should plans for dualing ever come to fruition. In the event that the option is exercised, a nominal price will be payable by the City Council on the basis that the land can be used only for the scheme.

- 10.3 On the Hucknall Park and Ride site, a small area adjacent to it and the Butlers Hill Tram Stop, the Council will receive its sunk costs which are some £106,730. The City is also entering into a clawback arrangement which will see a return of 50% of any profits should the land ever be sold or redeveloped.
- 10.4 There is one small sliver of land to the south east of Leen Valley Way, Hucknall which has little or no market value and will be transferred to the City Council for nominal value.
- 10.5 If two further parcels of land (known as land to the east of Leen Valley Way, Hucknall and land to the north east of Forge Mill Grove, Hucknall) are acquired by the Council using its existing compulsory purchase powers then this land will be transferred to the City Council and the Council will receive in return the amount of any compensation to the relevant third party payable plus the Council's costs.
- 10.6 The Council has, when making any disposal of land, to be aware of its obligations to obtain best value. The negotiating team has been mindful of this obligation and considered its legal obligations in this regard. In particular
  - a) The disposal of the County Council's land interests purchased for Phase Two, will result in the County Council obtaining its proportion of costs incurred when it originally purchased the land. The original acquisition costs are considered to exceed the current market value.
  - b) In relation to the County Council's interest in land which it owns pursuant to the Line One arrangement, the County Council is largely being repaid the costs it incurred in acquiring the land. In particular land held by the County Council for the Hucknall Park and Ride, land adjacent and Butlers Hill Tram Stop, due to the current encumbrances on the land (namely that it is subject to the provisions of a concession agreement which requires it to be used as a Park and Ride site) the market value of the land would be significantly depressed. In consideration of this point, the County Council has sought and has agreed with the City Council, overage provisions which would require a repayment of a proportion of the profit due should the site be utilised for development at some point in the future.

Accordingly, it is not felt that land transferred pursuant to the settlement arrangements would be transferred at an undervalue.



## **11. Legal Issues**

- 11.1 It will be noted from the above that, pursuant to the terms of the Settlement Deed, the County Council will transfer to the City Council all rights, interests and obligations (which may include statutory functions) which the County Council holds in the Nottingham Express Transit system in respect of both Line One and the promotion of Phase Two. Advice has been sought by the County Council as to whether, pursuant to Article 55 of the Nottingham Express Transit System Order 2009 or Section 71 of the Greater Nottingham Light Rapid Transit Act 1994, the County Council is required to seek Secretary of State consent to such a transfer. Pursuant to both sections the advice received is that the Council may need formal consent. Accordingly, the execution of the Settlement Deed will be subject to receiving Secretary of State Consent if required.
- 11.2 In relation to the County Council's general power to enter into and perfect the obligations set out in the Settlement Deed and ancillary documents, and once the County Council has the consent of the Secretary of State if required (as outlined in paragraph 11.1)) the County Council is able to rely on some or all of the following statutory powers. As follows:
- 11.2.1 Section 111 of the Local Government Act 1972, which provides that the County Council may do anything which is calculated to facilitate the exercise of the powers set out in the Nottingham Express Transit System Order 2009 and the Greater Nottingham Light Rapid Transit Act 1994;
- 11.2.2 The "wellbeing powers" set out in Section 2(1) of the Local Government Act 2000. Those powers allow the County Council to do anything which it considers is likely to improve the economic, social or environmental wellbeing of its area or of the people within its area. It is also a requirement that the Council has regard to the matters set out in Nottinghamshire's Sustainable Community Strategy (NSCS). It is considered that the proposals should fall within the objectives of the wellbeing power and the NSCS (as outlined in paragraph 11.3).
- 11.2.3 Section 123 of the Local Government Act 1972, which provides for the disposal of land by the County Council in any manner it wishes, provided that the land is not being transferred at an undervalue (or, if it is, the disposal has the consent of the Secretary of State).
- 11.3 As was noted above, the City Council were empowered under the TWAO to promote NET Phase Two without the County Council's involvement. In circumstances where the City Council could progress without the County Council, the Settlement Deed provides significant additional protections to County Council residents particularly in relation to controls over highways matters, financial assistance, bus services and concessionary fares. These additional benefits may not have been provided if the settlement arrangements had not been

agreed and will thus provide for social, environmental and economic well being benefits for the County Council's area and its residents.

## **12. Costs**

- 12.1 As part of its negotiations with the City Council, the County Council has engaged two sets of external advisers. Financial advice has been obtained from Deloitte LLP and legal advice has been obtained from Wragge and Co LLP. The costs paid to 14<sup>th</sup> January 2011 are £262,176.40
- 12.2 It is expected that further costs will be incurred in order to complete all legal agreements.

## **13. Financial Issues**

- 13.1 The Council will be assigning its right and legal title to the 20% of the existing Line One network which it currently owns. As part of the necessary financial due diligence prior to this transfer, the County Council commissioned Deloitte to review the 'value' of Line 1. Deloitte had been involved in another light rail scheme and had recent and relevant experience of carrying out this type of evaluation. The outcome of their work considered a number of possible scenarios for Line 1, all in the absence of Phase 2. Of necessity the work required many assumptions, together with attempting to assess values at a considerable time in the future. Overall their view was that although Line 1 has a future value, it also has future liabilities. The negotiated settlement with the City Council effectively proposes offsetting these, and hence transferring Line 1 without consideration.
- 13.3 It was reported to Full Council on 24<sup>th</sup> September 2009 that the Council were to be repaid £0.9 million representing an over contribution of development costs. As at the 24<sup>th</sup> December 2009 the County Council had contributed an excess of £1.147m towards NET Phase 2 development. Of this £642,000 relates to overpayments in 2008/09 and will be repaid upon execution of the settlement deed. The balance relates to costs now funded by Central Government contributions and will be repaid on the earlier of financial close for Phase Two or August 2012.
- 13.4 The County Council's share of Central Government funding for NET Line One, which is currently held in a specific reserve account to fund future NET Line 1 operational costs, will subject to obtaining Secretary of State approval be transferred to the City Council. As at 31<sup>st</sup> March 2010 the reserve balance was £3.9m.
- 13.5 The Full Council report on 24<sup>th</sup> September 2009 identified likely reductions in future expenditure of £18.5m, consisting of land acquisition costs (£6.5m), availability payments (£10.0m) and financial assistance costs (£2.5m). As noted in 7.13 and 7.14 it is proposed that the NCC will now fund 50% of the financial assistance costs and as such likely reductions will reduce to £17.25m.

13.6 The County Council initially set aside circa £7m to fund NET Phase 2 development costs. The balance on this account currently stands at £1.496m, and on conclusion of this settlement the balance will be available to fund other priorities.

#### **14. Statutory and Policy Implications**

This report has been compiled after consideration of implications in respect of finance, equal opportunities, personnel, crime and disorder and those using the service and where such implications are material they have been described in the text of the report.

#### **15. RECOMMENDATION**

**It is RECOMMENDED that:**

15.1 The principal terms of the Settlement outlined in this Report be approved; and

15.2 The Corporate Director for Resources and the Environment in consultation with the Assistant Chief Executive and the Cabinet member for Transport and Highways be authorised to:

15.2.1 finalise the negotiations and approve the detailed terms of the Settlement Deed and any ancillary documents which are required to be entered into to perfect the requirements of the Settlement Deed in line with the principles set out in this Report; and

15.2.2 subject to receiving Secretary of State Consent (where needed) to enter into the final form of the Settlement Deed and any ancillary documents which are required to be entered into to perfect the requirements of the Settlement Deed on behalf of the County Council.

#### **COUNCILLOR RICHARD JACKSON**

Cabinet Member for Transport and Highways

#### **COUNCILLOR REG ADAIR**

Cabinet Member for Finance and Property

#### **Comments of the Service Director – Finance**

The financial implications are as stated in the report. (MA 17.01.11)

#### **Legal Services Comments**

The recommendations set out in the report are matters which may be approved by Full Council (SSR.18.1.11)

## **Background Papers Available for Inspection**

### **Electoral Division(s) and Member(s) Affected**

**Rushcliffe**

**Broxtowe**