

SURREY COUNTY COUNCIL**CABINET****DATE: 26 JANUARY 2021****REPORT OF: MRS NATALIE BRAMHALL, CABINET MEMBER FOR ENVIRONMENT AND CLIMATE CHANGE****LEAD OFFICER: KATIE STEWART, EXECUTIVE DIRECTOR FOR ENVIRONMENT, TRANSPORT & INFRASTRUCTURE****SUBJECT: SURREY FLOOD ALLEVIATION PROGRAMME – JOINT APPLICANT FOR THE RIVER THAMES SCHEME DEVELOPMENT CONSENT ORDER****ORGANISATION STRATEGY PRIORITY AREA: GROWING A SUSTAINABLE ECONOMY SO EVERYONE CAN BENEFIT/ ENABLING A GREENER FUTURE****SUMMARY OF ISSUE:**

In October 2020, Surrey County Council Cabinet approved investing £270M in delivering the objectives of Surrey's Local Flood Risk Management Strategy. This investment includes a financial contribution of £237M to the River Thames Scheme which is being developed and delivered in partnership with the Environment Agency.

The Outline Business Case for the River Thames Scheme is currently awaiting approval from HM Treasury after which the project will move into technical design and obtaining the necessary planning consents. The Environment Agency has recently made a request to the Secretary of State to give a direction for the River Thames Scheme to be designated a Nationally Significant Infrastructure Project (NSIP) and therefore treated as development for which development consent is required under the Planning Act 2008. This request was approved by the Secretary of State on 24 December 2020.

Surrey County Council is investing a significant amount of funding into the scheme and therefore must ensure that it can maximise its influence on the scheme's design and future legacy. Cabinet is therefore asked to take a decision for the Council to be a Joint Applicant with the Environment Agency in obtaining the Development Consent Order for the River Thames Scheme, thereby strengthening its role in delivering the scheme in partnership with the Environment Agency.

RECOMMENDATIONS:

It is recommended that Cabinet:

1. Approves Surrey County Council becoming Joint Applicant with the Environment Agency in obtaining the Development Consent Order for the River Thames Scheme under the Planning Act 2008 subject to a legal agreement setting out the governance and financial arrangements.

2. Approves Surrey County Council entering into negotiations for a legal agreement with the Environment Agency to include the governance and financial arrangements, how risk will be managed and how disputes will be resolved.
3. Delegates the approval of the separation of responsibilities for SCC's role as both applicant and host authority to the Executive Director for Environment, Transport and Infrastructure in consultation with the Planning Group Manager.
4. Delegates the approval of a Service Level Agreement setting out the requirements and expected levels of service between SCC as Host Authority to the Planning Group Manager.

REASON FOR RECOMMENDATIONS:

It is recommended that Cabinet approves Surrey County Council becoming Joint Applicant for the River Thames Scheme alongside the Environment Agency, to enable influence over the programme, process, design, assurance and delivery, to ensure it represents the best interests of the County.

As Joint Applicant, Surrey County Council would be legally responsible for ensuring the process set out in the Planning Act 2008 is followed from pre-application through to the completion of the project and that works are carried out in accordance with the Development Consent Order.

Officers are confident that being Joint Applicant would be at no extra cost to Surrey County Council as the project funding, including the approved £237 million contribution, will cover costs including resourcing. A Service Level Agreement is also being developed that would cover any additional costs incurred by Surrey County Council acting as Host Authority.

Surrey County Council is in a strong position to take on the role of Joint Applicant on this strategically important project which aligns with the Councils desire to take more of a leadership role in delivering infrastructure. There are several risks in this approach and would need to be kept entirely separate from SCC's role as a host authority. However, there is already a positive and collaborative relationship with the Environment Agency, and we are ready to mobilise the required resources to drive the River Thames Scheme forward. It will also send a strong message to residents and Government that the scheme is being delivered through a true partnership between the two organisations.

DETAILS:

BACKGROUND

1. In October 2019, Cabinet approved investment of £270m to deliver the objectives of Surrey's Local Flood Risk Management Strategy. This includes a financial contribution of £237M to the River Thames Scheme (RTS).
2. The remaining £33M is to invest in flood risk management activities across the County. Since then, officers have been working closely with other "Risk Management Authorities", including the Boroughs and Districts, to identify the priority areas and opportunities for investment. For example, in October 2020, Cabinet approved a flood alleviation scheme in Caterham on the Hill which aims to fit Property Flood Resilience Measures to 205 properties and paves the way for additional measures throughout the catchment to reduce the impact of surface water flooding. Surrey County Council (SCC) is also working with the Environment Agency (EA) on other schemes to reduce flood risk including in Byfleet and Guildford.

3. The Council has also been working closely with the EA over the last year to further develop the River Thames Scheme and the governance arrangements for its delivery. The River Thames Scheme is a major infrastructure project that will reduce the risk of flooding from the Thames for communities in Runnymede and Spelthorne. It will achieve this through the construction of two new channel sections to divert water away from the Thames and additional capacity improvements to Sunbury, Molesey and Teddington weirs.
4. The EA submitted the Outline Business Case to the Department for Environment, Food and Rural Affairs (Defra) for approval earlier in 2020 and it has now been passed on to HM Treasury for final approval which should be forthcoming in early 2021.
5. Once the Outline Business Case has been approved the project can move into the next phase which includes technical design, obtaining the necessary planning consents, preparing for construction including procurement of the main contract and ultimately getting Final Business Case Approval.
6. The River Thames Scheme is eligible for £284m of Government Grant in Aid (GiA). Within the November 2020 Spending Review, £5.1bn of GiA was been committed to flood defence investment in the period 2021-2027. This £5.1bn includes the GiA that the scheme requires during this period. By 2027 the scheme will be in construction with the Final Business Case approved, which would guarantee the availability of the eligible GiA after 2027.
7. The project Sponsor Group, co-chaired by the EA and SCC, have agreed that the most appropriate planning route for an infrastructure scheme of this scale is an application for a Development Consent Order under the Planning Act 2008. The Development Consent Order Process streamlines the decision making process for infrastructure projects of this scale with more certainty around timescales than with the traditional planning route.
8. To that end the EA requested that the Secretary of State consider the RTS as a Nationally Significant Infrastructure Project (NSIP) under S.35 of the Planning Act 2008 and direct that the scheme follow the associated process for obtaining development consent. That direction was secured with the Secretary of States approval on the 24 December 2020.
9. As the majority of the scheme is in Surrey, SCC will act as a “Host Authority” in our role as Upper Tier Planning Authority. However, given the scale of our investment it would also be advisable for the Council to be a Joint Applicant alongside the EA to be able to directly influence how the funding is spent and what the legacy of the scheme will be. The design of the flood defence assets that the EA will be responsible for is quite mature, whilst the landscape design – which is of key interest to SCC can still evolve further. This provides the opportunity for SCC to incorporate wider corporate objectives relating to active travel and access to green space into the scheme. It will also give a powerful message to residents and the Government that the scheme is being delivered by a true partnership.
10. An alternative to being Joint Applicant would be to ensure that a legal agreement setting out the arrangements for SCC’s financial contributions to the scheme include robust provisions for how the governance arrangements would enable the Council to influence any decisions regarding the design and delivery. However, the EA would retain overall decision making responsibilities for the scheme and control of the final design.

DEVELOPMENT CONSENT OVERVIEW

11. The development consent regime was introduced through the Planning Act 2008 to streamline the decision-making process for Nationally Significant Infrastructure Projects (NSIPs) in order to make it fairer and faster for communities and applicants. An overview of the process can be found on the Planning Inspectorate website: [The process | National Infrastructure Planning \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/process/national-infrastructure-planning/).
12. Development consent applications are submitted to the Planning Inspectorate for Examination on behalf of the Secretary of State. The Development Consent Order (DCO) is the Statutory Instrument and includes required consents including planning, listed building, deemed consents, licences and compulsory purchase powers.
13. One aim of the development consent regime is to 'front load' the pre-application phase, meaning that the design has been developed and informed through meaningful pre-application public consultation and stakeholder engagement with negotiations have already commenced with regards to acquiring land by agreement. The documents and information submitted to the Planning Inspectorate are prescribed in statute and should form an acceptable application which can be robustly examined with outstanding issues having already been reviewed and ideally resolved. This is different to the traditional planning application process whereby separate consents would be required from individual planning authorities such as planning permission, listed building consent and compulsory purchase orders.
14. There are statutory processes to follow as prescribed in the Act but there is no prescribed time for the pre-application phase, although they usually take somewhere in the realm of 18 – 24 months. Once submitted to the Planning Inspectorate the timescales are largely fixed and the process takes approximately 16 months to the final decision.
15. DCO's can authorise the compulsory acquisition of land, or of an interest or right over land where attempts to acquire land, interests or rights by agreement have failed. Such compulsory purchase will be subject to compensation.
16. The DCO also includes requirements (similar to planning conditions) which may be linked to certain activities and will need to be complied with or discharged before certain works take place to ensure compliance with the DCO. There will be some other consents which need to be obtained outside of the DCO such as some environmental and highways consents.

HOST AUTHORITY IMPLICATIONS

17. As the main part of the scheme falls within SCC's administrative boundaries, SCC is regarded as a "Host Authority" and is therefore a statutory consultee under sections 42 and 43 of the Planning Act 2008.
18. The role of local authorities is set out in the Planning Inspectorate's Advice Note Two ([Advice notes | National Infrastructure Planning \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/advice-notes/national-infrastructure-planning/)) which provides guidance on each of the stages.
19. SCC will be responsible for ensuring we have followed the processes associated with the role of the local planning authorities, which includes liaison with the developer/applicant, providing comments on the Statement of Community Consultation, responding to pre application consultation within given time frames and preparing the Local Impact Report.

20. SCC will also need to fulfil its statutory regulatory and consenting duties including as upper tier planning authority, local highway authority and lead local flood authority
21. As host authority, SCC will need to ensure compliance with the DCO obligations and requirements and any agreements, including enforcement action if necessary. The role and responsibilities as host authority last the lifetime of the project, from pre-application through to completion.

JOINT APPLICANT IMPLICATIONS

22. In addition to being a host authority, the Council has an option in this project of being Joint Applicant for the DCO. SCC is in a strong position to be Joint Applicant alongside the EA, having already committed £237 million in capital funding - approximately half of the cost of the project – to deliver the RTS. In addition, there are already years of project knowledge and experience within the Council that has developed since the project was originally conceived in 2009.
23. As Joint Applicant, SCC would take joint accountability for delivering the RTS and be jointly legally responsible for ensuring the pre-application process is followed correctly and the requirements of the Planning Act 2008 are met. If the project does not follow the correct procedure, the application may not be accepted by the Planning Inspectorate and this would cause delay, additional expense and reputational damage.
24. Once the application is accepted, SCC would share the responsibility with the EA for liaison with the Planning Inspectorate and in preparing for, resourcing and coordinating the Examination, and to respond to any further queries during the decision making phase.
25. Once a decision is made by the Secretary of State, the role and responsibilities as Joint Applicant would continue through the delivery phase until completion (and beyond should there be continuing responsibilities for land and environmental management) to ensure all the necessary consents are in place and that the River Thames Scheme is built in compliance with the DCO. It is a criminal offence to breach the conditions of the DCO and the legal duty to ensure that does not happen will lie jointly with SCC and the EA. If SCC was not to be Joint Applicant, the liability would rest with the EA as sole applicant.
26. There would be specific legal implications for SCC as Joint Applicant, as it is a criminal offence to undertake development without development consent where it is required, or to breach the terms of a DCO. This would be a joint risk, as if one applicant did not comply with any aspect of the DCO, the other could be open to challenge and therefore exposure to risks and liabilities is greater as a Joint Applicant.
27. If the Council became a Joint Applicant, a legal agreement will be developed between SCC and the EA setting out the governance and funding arrangements, how certain provisions and therefore liabilities would be apportioned between the two parties, how financial risk would be shared and how disputes between the two parties would be resolved.

INFLUENCE

28. As Joint Applicant, SCC would have greater influence over the pre-application programme and the speed of delivery of the scheme, which is of utmost importance to the Council and residents, who wish to reduce the risk of further flooding as soon as possible.

29. SCC would also be able to influence the design of the scheme and associated development such as public rights of way, which would happen as the scheme progresses rather than through updates following public consultation and stakeholder engagement.
30. SCC will be able to represent residents more effectively as a Joint Applicant and a driving force rather than simply providing the funds to the EA to deliver the scheme. Members will have a direct link in to the project team for to better support their residents.
31. An alternative to becoming a Joint Applicant would be to ensure the legal agreement includes robust governance arrangements that enable SCC to influence the scope, design and delivery of the scheme and linked to our financial contribution (North Somerset District Council, as sole applicant for its MetroWest scheme, has a similar arrangement with its funding partners). SCC would also have influence through the pre application consultation process. However, for the RTS the EA would be responsible for all aspects of the scheme and would have sole control of its design and delivery. Furthermore, the Council would have less influence regarding any changes that occurred during DCO Examination.

RESOURCE IMPLICATIONS

32. The resource implications for SCC as a Joint Applicant or host authority are significant and there is a need to ensure there are sufficient in-house resources to enable SCC to perform both roles and functions. However, the cost of the additional resources will be paid for through the project funding and approved financial contribution including that required for SCC to participate in the DCO process as host authority.
33. The Council is well equipped to mobilise the required resource and is currently recruiting for roles within a Project Management Office (PMO) that has been developed in the Environment, Transport and Infrastructure directorate for the scheme. Officers are in the process of identifying where there may be skills gaps and whether these roles would best be filled in house, externally, or potentially filled using the SCC Framework with suppliers.
34. Specialist DCO legal advice is paramount and will be needed for the preparation of the Legal Agreement, the preparation of the DCO process, preparation of the DCO, any Section 106 or other agreements, appearance at Examinations (which may require a QC) and any land transactions. The EA have sourced a specialist DCO legal team from Pinsent Masons for the project. SCC will be paying towards this from the Councils committed investment and would benefit from their advice as Joint Applicant. However, it is highly likely that SCC will require independent advice to ensure that the Councils requirements are being met. Legal resource currently being brought into SCC's new PMO will be able to provide independent advice or seek external support when required. Any costs would be covered by the scheme.
35. External suppliers will be required to deliver many of the required services such as the Environmental Impact Assessment, land assembly, engineering and planning deliverables. SCC's financial contribution will be partly funding the supplier through the project whether Joint Applicant or not so this is not an additional cost.
36. Should the Cabinet agree to the Council being a Joint Applicant a paper will be brought to Cabinet over the coming months detailing the proposed governance arrangements for the scheme and to seek approval for the legal agreement between SCC and the EA.

SERVICE LEVEL AGREEMENT

37. For SCC's role as "Host Authority", a Service Level Agreement (SLA) is being drafted to detail the requirements and the expected level of service between the relevant Local Planning Authorities (SCC, Elmbridge Borough Council, Spelthorne Borough Council and Runnymede Borough Council) and the River Thames Scheme. Runnymede Borough Council are leading on this and will act as coordinating authority throughout the consultation.
38. The objective of the SLA will be to enable Local Planning Authorities to target their resources appropriately, identify what additional resources or specialist expertise might be needed and set a framework for how the applicant will both financially and through agreed ways of working, support the Local Planning Authorities in delivering their role in the DCO process.

SEPARATION OF RESPONSIBILITIES

39. If SCC is to become a Joint Applicant, it will be essential to create a clear division of responsibilities between those in the authority who are advising on the River Thames Scheme as Joint Applicant and those who will be carrying out the regulatory duties of SCC as a host authority. In respect of the latter it would need to include responsibilities such as responding to public consultation, engaging with the applicant, preparing the Local Impact Report, making a submission on the Adequacy of Consultation and taking part in the Examination as well as post decision responsibilities.
40. SCC will be required to clearly demonstrate how roles and responsibilities have been separated. This would include services such as Planning, Environment, Heritage, Highways, Legal, Property, Finance and the Lead Local Flood Authority.

CONSULTATION:

41. In considering the merits and risks of being Joint Applicant for the River Thames Scheme Development Consent Order we have held two meetings with the Planning Inspectorate to better understand the process and what the requirement would be.
42. Officers have drawn upon learning from SCC involvement in responding to DCOs including the M25 Junction 10 application and additionally we have met with North Somerset District Council to learn from their experience in being applicant for the MetroWest DCO.
43. Officers have engaged with the Boroughs and Districts through both the River Thames Scheme Programme Board and Planning Group. Discussions have also taken place with the Environment Agency project team and Project Sponsor and they would fully support any potential decision on becoming Joint Applicant for the River Thames DCO.

RISK MANAGEMENT AND IMPLICATIONS:

44. In becoming a Joint Applicant, SCC would be exposed to some legal and reputational risks. As detailed above, SCC would be legally jointly responsible under the Planning Act 2008 to ensure the DCO process was adhered to and that it is not breached in the delivery of the scheme, as to do so would constitute a criminal offence.
45. There would also be reputational risks if the application was not accepted by the Planning Inspectorate or if there were further delays to its submission.

46. These will be mitigated through the Legal Agreement due to be considered by Cabinet in the spring that will set out robust governance arrangements between SCC and the EA as well as how financial risk will be managed.

FINANCIAL AND VALUE FOR MONEY IMPLICATIONS

47. The cost of being Joint Applicant for the River Thames Scheme would be funded by the project including from the approved financial contribution. The financial arrangements will be set out in a legal agreement between SCC and the EA however we will be able to draw down from the Capital Budget for the scheme already programmed on the approved Medium Term Financial Plan.
48. Additional resources required for SCC to carry out its role as Host Authority will be dealt with through the Service Level Agreement which will set out how the scheme will support the Local Planning Authorities in delivering their role in the DCO process.

SECTION 151 OFFICER COMMENTARY

49. Although significant progress has been made over the last twelve months to improve the Council's financial position, the medium term financial outlook beyond 2021/22 remains uncertain. The public health crisis has resulted in increased costs which may not be fully funded. With uncertainty about the ongoing impact of this and no clarity on the extent to which both central and local funding sources might be affected in the medium term, our working assumption is that financial resources will continue to be constrained, as they have been for the majority of the past decade. This places an onus on the Council to continue to consider issues of financial sustainability as a priority in order to ensure stable provision of services in the medium term.
50. The Council becoming a Joint Applicant is not expected to increase either the overall scheme cost, or the Council's financial contribution, which is included within the approved capital programme. However, it will give the Council increased influence over the scheme, including how funds are utilised. As such, the Section 151 Officer supports the recommendations.

LEGAL IMPLICATIONS – MONITORING OFFICER

51. There is currently no precedent on the NSIP website for a local authority as Joint Applicant for an order for development consent. It does not, however, appear to be precluded by any of the relevant statutory provisions which has been confirmed by legal counsel in conference. There are precedents for joint applications between private promoters such as the Daventry Rail freight Interchange DCO.
52. As a host authority, SCC will be expected to participate in the Planning Act 2008 process following submission of an application, providing local perspective at pre-application stage and becoming responsible for discharging requirements and monitoring and enforcing certain order provisions and requirements should an order for development consent be granted. This role must be kept entirely separate from any Joint Applicant role.
53. An offence is committed if development is carried out or is caused to be carried out which requires development consent, without such consent. Additionally, it is an offence to carry out, or cause to be carried out, development in breach of the terms of an order granting development consent or to fail to comply with an order granting development consent. As a Joint Applicant, there is risk to the Council if either of these offences are committed including reputational and financial if a fine is imposed.

54. DCOs can authorise the compulsory acquisition of land, or of an interest or right over land where attempts to acquire land, interests or rights by agreement have failed. Such compulsory purchase will be subject to compensation.
55. Decisions such as the grant of development consent are open to legal challenge by way of judicial review. Applicants will be interested parties and would usually participate in such proceedings. Any such challenge would therefore be a risk to SCC as a Joint Applicant.

EQUALITIES AND DIVERSITY

56. As this paper is specifically seeking a decision as to whether SCC should be Joint Applicant for the River Thames Scheme DCO, the decision does not directly affect the scope of implications of the scheme, and as such an Equalities Impact assessment has not been completed.
57. An Equalities and Diversity Impact Assessment will be produced for the scheme itself in accordance with the Equalities Act 2010 as part of the pre-application process.
58. Further, it is worth noting that during the pre-application phase the applicants will be required to undertake full and thorough consultation with stakeholders and the community. The applicant will be required to submit a Statement of Community Consultation as part of the application and the host authority will need to prepare an Adequacy of Consultation statement. This will ensure that the widest possible cross-section of Surrey residents will have the opportunity to engage with the plans as they develop.

OTHER IMPLICATIONS:

59. The potential implications for the following council priorities and policy areas have been considered. Where the impact is potentially significant a summary of the issues is set out in detail below.

Area assessed:	Direct Implications:
Corporate Parenting/Looked After Children	No significant implications arising from this report
Safeguarding responsibilities for vulnerable children and adults	No significant implications arising from this report
Environmental sustainability	By being Joint Applicant, we will have greater influence on how the Scheme can help deliver our environmental aspirations for Surrey.
Public Health	No significant implications arising from this report

ENVIRONMENTAL SUSTAINABILITY IMPLICATIONS

60. An Environment Sustainability Assessment has not yet been carried out. However, one will be undertaken as part of the scheme development. The potential for environmental opportunities with the scheme is significant and by being Joint Applicant we can ensure these are maximised.

WHAT HAPPENS NEXT:

61. If the Cabinet approves the Council being a Joint Applicant for the River Thames Scheme DCO, then the next steps are as follows:

- a. Approval of the Legal Agreement with the Environment Agency – Spring 2021
- b. Agreeing Separation of Responsibilities document – February 2021
- c. Signing Service Level Agreement – February 2021

Contact Officer:

Doug Hill, Strategic Network Resilience Manager, Tel: 020 8213 2711

Consulted:

Caroline Smith – SCC Planning Group Manager

David Stempfer – SCC Major Transport Projects Manager

Boroughs and District RTS Leads and Programme Board Representatives

North Somerset District Council – Relating to their experience applying for the Development Consent Order for the MetroWest scheme.

Planning Inspectorate

Sources/background papers:

- [National Infrastructure Planning \(planninginspectorate.gov.uk\)](http://planninginspectorate.gov.uk)
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