



meeting **COUNTY COUNCIL**

date **24 September 2009**

agenda item number **8**

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

NOTTINGHAM EXPRESS TRANSIT

Purpose of Report

1. To seek the approval of Council to change Council policy to withdraw its support for the NET Phase Two major transport scheme and to authorise the service of three months' notice to terminate the Joint Agreement for NET Phase Two on the other Co-Promoter, Nottingham City Council forthwith in accordance with its terms and to further authorise the Corporate Director of Communities in consultation with the Service Director, Legal & Democratic Services to agree appropriate termination arrangements (relating to such matters as third party contracts and land) to give effect to the termination.
2. As a consequence of 1 above, to seek the approval of Council to explore a negotiated settlement with Nottingham City Council to enable the Council, if appropriate, to withdrawal from the NET Line One arrangements on reasonable terms to be agreed with Nottingham City Council and to authorise the Corporate Director of Communities to commence discussions (subject to Council approval of the final agreed terms).
3. To incur such reasonable internal officer and external adviser costs as are necessary as a result of entering into such negotiations referred in paragraphs 1 and 2.

Background and Current Policy Position

4. The previous County Council approved the submission of an application for a Transport and Works Act Order (the Order) in early 2007 and this led to a Public Inquiry during November and December 2007. Individual members from the Conservative Group (including the now Cabinet Member for Transport and Highways) were objectors to the Order and voiced these objections as part of the Inquiry process. The Inspector submitted his report to the Department for Transport (DfT) during 2008 and the Secretary of State for Transport approved the Order on 30 March 2009. The Order gave both Councils the powers (whether acting alone or together) to construct and operate NET Phase Two as well as continue to operate the existing NET Line One.
5. The confirmation of the Order was reported to Cabinet on 13 May 2009 and approval was given to commence the procurement programme subject to DfT Conditional Approval of the NET Phase Two extension and written confirmation from the Leader of the Council to proceed. As the County Council is reviewing its involvement in NET Phase Two no written confirmation from the County Council has been given.
6. Through discussion with officers at the City Council, County Council officers are aware that the City Council maintains its intention to proceed with the procurement programme even if the County Council resolves to withdraw from promotion of NET Phase 2. This was also confirmed by a resolution of the City Council on 13th July 2009 which resolved to carry on with the promotion of NET Phase 2 without the County Council. Officers from the City Council met with HM Treasury Project Review Group on 21st July 2009 (minutes are a background paper) who approved its support for NET Phase 2 even if the County Council were to withdraw. It is important to note that HM Treasury set out a number of conditions in the minutes of that meeting which are to be met before the City Council may advertise the project in the Official Journal of the European Union to formally begin the procurement. In order to proceed with NET Phase 2, the City Council will need, amongst other things, to demonstrate to the Department of Transport:

(a) Provision by the project of an acceptable assessment of the risks to the project arising from the withdrawal of Nottingham County Council from the project and proposals for the management and mitigation of those risks. (b) Confirmation from DfT that it is content with the projects assessment and proposals.

It will be necessary, in view of the County Council's co-operation obligations referred to below, to ensure an ongoing dialogue with the City Council and the issues connected with the County Council's withdrawal from NET Phase 2 are explored in paragraphs 24 to 29 below.

7. On 31 July 2009 the DfT announced its Conditional Approval to the project proceeding and at the same time approved the City Council's application to introduce a Workplace Parking Levy (WPL) with both subject to certain conditions and constraints. A letter setting out the conditions which must be satisfied following Conditional Approval was sent by the Department for Transport (DfT) to the City Council on 12 August 2009. This sets a maximum level of PFI credits of £530.7 million pounds which is up from the amount reported to Council in May 2009 of £471 million. It also advises that Ministers reserve the right to reconsider their decision on funding if there are any significant changes to the scheme and/or if a Full Business Case (FBC) has not been submitted by 1 September 2012.

The Local Transport Plan and withdrawal from NET Phase 2 Promotion

8. The NET Phase Two scheme has been a significant component of the longer term transport strategy for Greater Nottingham as set out in the first and second Joint Greater Nottingham Local Transport Plans and identified as a sub-regional transport priority in successive Regional Spatial Strategies.
9. The East Midlands Regional Plan, published in March 2009, supports the development of new light rail opportunities such as NET Line One and the proposed Phase Two and acknowledges that they offer the opportunity to move large numbers of people into and within major urban areas in a sustainable and cost effective manner. The Three Cities Sub-Regional Transport Priorities in the Regional Plan state that Regional partners have identified that the proposed NET Phase Two will bring significant sub-regional benefits.
10. The Greater Nottingham Local Transport Plan (GNLTP) 2006/07 to 2010/11 is produced jointly by the County Council and Nottingham City Council. The NET Phase Two scheme is identified in the GNLTP as one of a number of measures which could deliver policy objectives such as reduced congestion, improved accessibility and regeneration. However, even at the time of publication in March 2006, it was recognised that the scheme would not be completed within the timescales of the Plan and thus not be able to contribute to the achievement of its

objectives within the Plan period. No LTP funding was sought for the scheme as procurement was to be subject to Private Finance Initiative (PFI) scheme negotiations. A proposed methodology for the development of the third round of LTPs was approved by Cabinet last week (16 September). The guidance encourages local authorities to take a fresh look at the policies and implementation proposals. The GNLTP also recognises the City Council's proposed Workplace Parking Levy (WPL) as a component of the Greater Nottingham transport strategy.

11. In reaching its decision about withdrawal from NET Phase 2 members should be mindful of the LTP. However, in light of the high level nature of the relevant objectives (which relate to NET Phase 2) set out therein and the City Council's intention to proceed with NET Phase Two on its own, the County Council's decision to withdraw as a promoter of NET Phase 2 would not be inconsistent with current LTP policy objectives. This is discussed in greater detail in paragraphs 12 to 14 below. In any event the County Council's position will also be reflected in the drafting of future Local Transport Plans. The development work on LTP3 referred to above will define a refreshed transport strategy which is likely to emphasise the importance of high quality, sustainable but affordable public transport options. The outcome of this development work will be reported to Cabinet and County Council in due course.

Proposed Council Policy Change

12. The County Council elections on 4 June 2009 led to a change in administration. The Conservative Group in the County Council has consistently opposed the proposals that comprise NET Phase Two. Their concerns have been raised at several County Council and Cabinet meetings since 2002 and evidence was presented by County Councillors Jackson (now the Cabinet Portfolio Holder for Transport and Highways) and Pettengell and former County Councillor Brandon-Bravo as objectors at the NET Phase Two Public Inquiry held in November and December 2007. These concerns can be summarised as follows:

- (a) The proposals for each route have an unacceptably high level of environmental impact on many local residents. In addition to noise and visual intrusion, there is loss of valuable open space and significant impact on Green Belt land.
- (b) The local communities affected by the proposals are already very well served by public transport. The new lines will result in additional road safety concerns and

there is still uncertainty about traffic management arrangements, particularly in Beeston Town Centre and the surrounding area.

- (c) The scheme is very expensive and the rising costs were a cause for concern. It results in an unfair distribution of County Council transport expenditure in a relatively small sector of the conurbation in the extreme south-west of the County.
- (d) The assurances given for compensation or financial assistance for damage to the local environment and local businesses are insufficient and unconvincing.
- (e) The conclusions drawn from many of the early “consultation” exercises are, at best, questionable and seemed to exaggerate support for the scheme.

The Inspector's report and subsequent decisions of the Secretary of State concluded that the scheme would inevitably have some negative impacts on those living and working in the areas affected by it. However, they considered that the comprehensive range of mitigation measures proposed by the promoters would reduce those impacts to an acceptable minimum. This view is not shared by the new administration of the County Council.

13. As part of the campaign which led to their election as controlling majority of the County Council, the new administration gave clear manifesto commitments regarding the County Council's involvement in NET Phase Two. In accordance with this political mandate the County Council has therefore indicated to the City Council its intention to review its continued involvement in the NET Phase Two project and to bring a report at the earliest opportunity to the Council with the aim of seeking authority to change council policy and to withdraw from NET Phase Two. The proposed County Council policy change does not signal a change in the Council's overall vision for public transportation or undermine the LTP objectives of reducing congestion, improving accessibility, road safety and air quality, supporting regeneration, enhancing quality of life and seeking more efficient and effective maintenance of the transport network. Options to achieve these objectives could, in the future, include support for other light rail systems and other extensions to NET Line One provided they have a robust business case and less direct environmental and other negative impacts on local communities.

14. The proposed County Council policy change is to no longer promote NET Phase Two because of the concerns set out in paragraph 12 above and the firm belief that

further expenditure by the County Council on the project would be insufficiently beneficial to be worth the financial cost to the County Council. The financial savings for the County Council are more particularly outlined in paragraph 20. However as is noted above the City Council intends to provide the additional local funding required for the project if the County Council withdraws its financial contribution. Accordingly, the expectation is that NET Phase Two will proceed for the time being without the County Council's support.

15. The previous administration of the County Council maintained a neutral policy position in relation to the City Council's Workplace Parking Levy (WPL) proposal. The City Council proposes to use the proceeds of the WPL to fund its contribution to NET Phase 2. At its meeting on 19 September 2007, Cabinet approved a response to the City Council's consultation on its WPL proposals. In summary it noted that the County Council accepted WPL as a potential policy tool amongst a package of transport measures to deliver the LTP policy objectives but one which was not considered appropriate for the County area. It noted that many employers could pass the charge on to their employees thus placing an extra financial burden on many County residents who work in the City. It could also lead to some on-street parking in residential areas in the County located close to workplaces in the City, but close to the County boundary. In conclusion, whilst recognising WPL as a potentially effective policy tool, it could have a negative impact on some County residents.
16. Whilst recognising that this is ultimately a decision for the City Council the new administration is strongly opposed to the implementation of this "tax on business". It believes that the previous Council position severely underplays the impact that WPL will have on the local business community and view it as having an extremely negative impact on the County's residents and future business prospects, both for well established major multinational companies and smaller independent enterprises. These views support the position of the Derbyshire and Nottinghamshire Chamber of Commerce which considers the levy an ill-conceived policy that would damage the competitiveness of businesses, reduce investment in the City and cost jobs. Meanwhile, the House of Commons Transport Select Committee concluded that evidence suggested the consultation with businesses on the WPL was "deeply flawed". The proposal therefore is to have a Council policy position of opposition to the WPL.

Financial Implications of withdrawal from the Promotion of NET Phase Two

17. Project costs are always expressed in Net Present Value (NPV) terms to take account of the timing of payments and express the values in current day amounts. From Programme Entry to OBC approval, the NPV scheme costs have decreased slightly from £482m to £471m due to changes in interest rates and the timing of payments. However the cost of financing the project has increased due to recent problems in global financial markets and consequently there has been a considerable increase in government grant funding. The maximum amount of PFI credit over this period has increased from £437m to £517.2m. Confirmation of these amounts is contained in the letter of approval from government. The latter amount has been further increased by £13.5m, taking the credit to £530.7m, to take account of the loss of Workplace Parking Levy (WPL) in the first two years of operation. The above figures represent the most up to date position and the maximum government grant. Clearly there remains uncertainty and risk that amounts could change up to the time the project gets to financial close with any increased costs above the maximum government grant falling on the Promoter(s).
18. The total County Council expenditure to date for NET Phase 2 is £8.2 million. This represents the County Council's proportion of development costs for the project as required by the 2008 Joint Agreement (see paragraph 29). Costs incurred during the 3 month termination period referred to in paragraph 25 will be funded from other sources referred to in paragraph 19.
19. The County Council are due to receive a repayment of £0.9m in development costs resulting from the DfT grant that is receivable upon conditional approval, leaving the estimated County Council's share of final development costs as £7.3m. Of the total estimated development costs of £38.8m, £9.1m remains to be spent in financial years 2009/10 and 2010/11, however this should be fully funded from other contributions.
20. The County Council's proposed withdrawal at this stage would reduce its future estimated expenditure on NET Phase Two by £18.5 million as set out below.

	NPV
	£m
Land acquisition	6.0
Availability payments (this is the local contribution to costs during the operational phase of the procured arrangements)	10.0
Financial Assistance	2.5 (see paragraph 30)
Total	18.5

Legal Framework

NET Line One

21. As members will be aware, the County Council is currently a joint promoter of NET Line One. The County Council's principal contractual involvement in NET Line One (although there are a considerable number of other agreements) is by way of a concession agreement which was completed on 31st March 2000 with an effective date of 11 May 2000. This concession agreement was entered into between the County Council, the City Council and Arrow Light Rail Limited (the "Concession Agreement").
22. The Concession Agreement established a framework for the design, construction, operation and maintenance of the system and for its financing partly as a PFI transaction and partly through the collection of fares from passengers.
23. The term of the Concession Agreement is 30 years and 6 months from 11 May 2000 although subject to extension on the occurrence of certain events. Members should note that the Concession Agreement can be terminated earlier in a number of circumstances including upon the award of a new contract for the enlargement of the tram network.
24. The two Councils recognised the need to deal with (as between themselves) various matters. To this end they entered into an inter-council agreement on 31st March 2000 (as amended on 11 May 2000). In particular this agreement confirms that the Concession Agreement cannot be terminated without the consent of both the County and the City Councils, and such consent has not been given by the County Council.

NET Phase Two

25. In order to formalise their positions in respect of the promotion of NET Phase Two, the County and City entered into a Joint Agreement in June 2008 setting out the basis on which they would work together as Promoters of the project. This covers issues such as:

- a. Project Governance;
- b. Promotion of the transport and works act order
- c. Funding and budget sharing arrangements,
- d. Publicity
- e. Co-operation,
- f. Land issues;
- g. Confidentiality provisions; and
- h. Various other matters.

This agreement also shapes the manner in which either council may terminate its involvement in the project for any reason and requires the terminating party to give 3 months notice to the other.

26. Acknowledging the complexity of the situation, the Joint Agreement also allowed for a period of up to 12 months following any termination to deal with any practical issues and other consequential actions necessary to sever the arrangements between the two Councils and allow the other council to proceed with NET Phase 2 on its own if it so wishes. In light of the proposed policy change it is therefore proposed that as the Council withdraws its support for NET Phase Two it gives three months' notice to its Co-Promoter, Nottingham City Council, of the intention to terminate the NET Phase Two Joint Agreement forthwith and further that the Council enters into discussions with Nottingham City Council to give effect to any necessary termination arrangements.

27. In addition to the Joint Agreement with the City, the Promoters have entered into a number of agreements with third parties dealing with issues relating to their land holdings due to the way in which they are affected by the route of NET Phase Two. These agreements will only come into effect when and if the powers under the TWAO are exercised. Should the County Council resolve to terminate its involvement with NET Phase Two it is anticipated that the County Council's maximum exposure to costs flowing from such arrangements would be £250,000, based on 35% (the County Council's usual contribution during the development

phase of the project) of the current budgetary provision of £710,000 allocated by the project for such costs in its financial model. However, ultimately the County Council's proportion of any liability remains subject to negotiation based on the provisions within the Joint Agreement. As part of the withdrawal process, it may be necessary for the County Council to continue holding such arrangements for the benefit of the City until such time as they can be properly transferred to the City with the relevant third parties' consent.

Legal Effect of Withdrawal from NET Phase Two

28. If the Council withdraws from NET Phase Two as a joint Promoter it will no longer be able to participate in the procurement of the tram system extending the existing NET Line One. It will be required to co-operate to transfer relevant assets, documents and know-how to the City Council so that it may continue with the project if it chooses to do so. The Joint Agreement makes provision in relation to the disposal of any interest in land held or acquired by it for the Project and where such land is to be transferred allows for reasonable terms to be agreed between the parties. In light of this, current market value for any land held will be sought wherever possible subject always to any legal or contractual constraints. Additionally, if the County Council holds any open space required for the Project, the County Council will be required to follow a statutory process before being able to transfer it.
29. During the 3 month termination notice period, the County would be required to continue in co-operation with the City as a joint Promoter of NET Phase Two. This may involve attendance at relevant meetings, continued payment of budgets (in the Normal Contributions of 65% City Council and 35% County Council as more particularly set out in the Finance Section of this report paragraphs 17 to 20). It will also require the County Council to work with the NET Project Team to arrange the orderly withdrawal of the County from the NET Phase Two Project in compliance with the Joint Agreement. After service of the 3 months notice required to terminate the Joint Agreement, the County will no longer be under a contractual requirement to co-operate in the promotion of NET Phase Two or to make budgetary payments towards the Project. The obvious possible residual risk will be any liabilities under the third party agreements. The County will also have its continuing obligations in connection with NET Line One.
30. As was reported to the County Council at its meeting of 22 February 2007, the construction phase of the Chilwell via Beeston and Queens Medical Centre route

would have an impact on Chilwell High Road/ Chilwell Road. In that meeting the County Council, in its position at that time as one of the two Promoters of NET Phase Two, approved a Financial Assistance package for the Chilwell High Road traders of £850,000 per annum for up to 3 years.

31. If the recommendation to withdraw from the promotion of NET Phase Two is approved the County Council will also cease to be a Promoter of NET Phase Two. In those circumstances, it is considered appropriate that those responsible for pursuing the NET Phase 2 project should be responsible for all of the costs associated with that decision. Therefore it is proposed that the County Council will not provide a financial assistance package, on the basis that the issue is one for the City Council to address as part of the range of matters necessary for them to reconsider if they resolve to continue as sole Promoter of the NET Phase Two tram system.

NET Line One

32. As was reported to the meeting of the County Council's cabinet on 13th May 2009, the proposed NET Phase Two procurement strategy is based on the award of a new NET PFI concession agreement to finance, design and build NET Phase Two and operate and maintain NET Line One and NET Phase Two as an integrated tram network. This strategy pre-supposes that the existing NET Line One concession agreement will be terminated. This proposed strategy was submitted to the DfT as part of the Outline Business Case approved by the DfT on 31 July 2009 and referred to in paragraph 7 above.

33. If the County Council decides to withdraw from NET Phase 2, it is necessary and appropriate for Members to consider the basis upon which the Council's involvement in NET Line One can continue while the City Council seek to procure the NET Phase 2 alone. Accordingly, it is proposed that the County Council enter into exploratory negotiations with the City Council about the County Council's continued involvement in NET Line One. Although the results of any negotiations would need to be taken back to full Council for approval it is felt that the negotiations would need to cover such matters as the following in order to provide Council with a full picture of the consequences of withdrawal:

- a. Agreements with third parties and liabilities resultant from those;
- b. Land issues;
- c. Concession Agreement Termination Costs;

- d. Highway planning and associated issues
- e. Liabilities generally;
- f. The County Council's rights and obligations as effected land owner;
- g. Staffing implications; and
- h. Other ancillary and associated matters.

34. As members will appreciate until such exploratory negotiations have been advanced the full implications of such a potential withdrawal from Line One will not be available. However, no agreement will be reached without further approval from Council below and this approval will be sought as soon as it is practicable to do so. As part of these negotiations it will be necessary to incur external adviser costs and internal officer costs and time. These costs will be kept under review and reported to the Cabinet Member for Transport and Highways at regular intervals and also reported in the further Council report.

35. The County Council as a continuing co-promoter in respect of NET Line One will continue its membership of the GNLRT Advisory Committee as required. The allocation of the 5 places on this Committee will be 3 Conservative Group Members, 1 Labour Group Member and 1 Independent Group Member, which reflects the overall political balance on the Council.

36. Key Decision

This report leads to a Key Decision as saving or expenditure of more than £1 million are involved and there would be a significant effect on communities in two or more electoral divisions in the County Council area. The decision was published on the Council's Forward Plan on 27 August 2009.

37. 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. Where such implications are material, they have been described in the text of the report.

RECOMMENDATIONS

38. It is RECOMMENDED that:

- a. Council's policy is changed to cease to be a Promoter of NET Phase Two.
- b. the Service Director for Legal and Democratic Services is authorised to serve notice to terminate the NET Phase Two Joint Agreement with the City Council forthwith;
- c. The Corporate Director of Communities is authorised in consultation with the Service Director, Legal and Democratic Services to enter into novation agreements of the Third Party Agreements and conclude such land and other transactions as may be necessary to give effect to the termination provisions within the 2008 Joint Agreement;
- d. In view of the County Council ceasing to be a Promoter of NET Phase 2 on expiry of the 3 month notice period, it will no longer meet the costs of the Chilwell Financial assistance package referred to paragraph 30;
- e. The Corporate Director of Communities in consultation with the Service Director, Legal and Democratic Services is given authority to explore with the City Council costs, risks and benefits of a potential withdrawal from NET Line One and report back to Council ;
- f. The Council may incur such reasonable internal and external costs as are necessary to effect recommendations above; and
- g. The Council's policy should be one of opposition to the City Councils proposed introduction of the Work Place Parking Levy due to its adverse affect on businesses in the County; and
- h. that the County Council continue its membership of the GNLRT Advisory Committee and that 3 Conservative Group Members, 1 Labour Group Member, and 1 Independent Group Member be appointed.

COUNCILLOR RICHARD JACKSON
Cabinet Member for TRANSPORT AND HIGHWAYS

COUNCILLOR REG ADAIR
Cabinet Member for FINANCE AND PROPERTY

Legal Services' Comments

Council is authorised to take the decisions set out in the report. As the decisions affect the Council's budget and policy framework these are matters reserved to Council to determine. Members should be aware that in early exchanges, the City Council raised the question of whether the County Council would be entitled to give notice of its intention to terminate the 2008 Joint Agreement and whether, if it did so, there would remain a continuing obligation on the County Council to fund the NET Phase Two project. In addition, the potential for legal action to be taken against the County Council was raised by the City Council. The main focus was an alleged breach by the County Council of its obligations under the Joint Agreements. Leading Counsel's opinion has been sought regarding these issues and the advice received confirms that the County Council has not acted in breach of contract, that it is entitled to give notice of its intention to terminate the 2008 Joint Agreement, and that by so doing it will not remain liable for the ongoing funding commitment relating to NET Phase Two beyond the end of the 3 month notice period. The City Council's principal concern at the time of those exchanges was that withdrawal by the County Council would cause the loss of government support for NET Phase Two, which has not in fact occurred. In the light of more recent constructive exchanges with the City Council, it is hoped that outstanding matters will be resolved by agreement. The other legal implications are outlined in the body of the report. [HD – 16/9/09]

Comments of the Service Director – Finance

The financial implications of the recommendations are set out in the report. Reasonable costs incurred in investigating withdrawal from NET Line One will be charged to the existing Line 1 reserve, which currently stands at £3.6m.

Background Papers Available for Inspection

DfT Conditional Approval letter dated 12 August 2009

HM Treasury PRG Meeting Minutes 21st July 2009

Cabinet Report dated 13 May 2009

Council reports dated 22 February and 17 May 2007

Electoral Division(s) and Member(s) Affected

ALL