

Notice of Non-key Executive Decision

Subject Heading:	Reprioritisation of Highways work due to the outbreak of Covid-19 in March 2020
Cabinet Member:	Councillor Osman Dervish, Cabinet Member for Environment
SLT Lead:	Barry Francis Director of Neighbourhoods
Report Author and contact details:	Spencer Gray, Highways Manager Spencer.gray@havering.gov.uk
Policy context:	Highways and Parking Strategy December 2018, LIP 2019/20
Financial summary:	Delay in the delivery of capital spend and safety critical schemes. Risk of requirements for payment to contractor in advance of works as per Cabinet Office Procurement Policy Note (March 2020).
Relevant OSC:	Environment
Is this decision exempt from being called-in?	The decision is exempt as these are guidelines highlighting delays and the reprioritisation of work load to be agreed by the Director of Neighbourhoods due to Covid 19

The subject matter of this report deals with the following Council Objectives

Communities making Havering	<input type="checkbox"/>
Places making Havering	<input type="checkbox"/>
Opportunities making Havering	<input type="checkbox"/>
Connections making Havering	<input checked="" type="checkbox"/>

Part A – Report seeking decision

DETAIL OF THE DECISION REQUESTED AND RECOMMENDED ACTION

It is recommended to the Cabinet Member for Environment to agree;

1. That all Highways works are reprioritised as follows:

High Priority	Road and pedestrian safety including access for emergency and council vehicles
	Disabled access
	Strategic Priority
	Works with high residential support
Low Priority	Works where resident or political support is low

2. That works are progressed depending on priority.
3. That the Highways Capital investment programme continues as programmed, based on the risk ratings applied within the document.
4. That the Covid 19 Policy is adopted by the organisation during the current emergency period.

Note that highways schemes may be subject to a delay in consultation and implementation due to the Covid 19 outbreak.

AUTHORITY UNDER WHICH DECISION IS MADE

3.3 Powers of Members of the Senior Leadership Team

General powers

- (a) To take any steps necessary for proper management and administration of allocated portfolios.

Financial responsibilities

- (b) To oversee the delivery of programmes agreed by the Council and Cabinet.

STATEMENT OF THE REASONS FOR THE DECISION

Due to the recent pandemic outbreak of Covid-19 across the world, measures have been taken by the Government which are being actioned by the London Borough of Havering to protect the Council's workforce and residents. These measures have meant that officers cannot work in

their normal operating conditions. These include restricted access to office buildings, restricted contact with other officers and members of the public as a result of social distancing, restricted access to materials and equipment, and restrictions on non-essential travel.

The Council does not wish it's directly employed or contracted employees to make unnecessary trips or undertake non-essential works during these times. Therefore it is proposed that the approach to programmed works is based on the introduction of a Covid 19 policy ensuring high priority works are undertaken. Main arterial routes and trunk roads will be prioritised over smaller residential roads to ensure that free movement of traffic can take place as the country returns to normal traffic habits.

It is also an opportunity to carry out works on busier routes whilst the roads are quieter as motorists follow government guidance to stay at home. However, where a safety risk is present or resident accessibility is currently compromised, smaller schemes will continue to be carried out for reasons discussed below.

These changes mean that officers have to re-prioritise highways, traffic and parking schemes ensuring that key high priority schemes are still being delivered. One such change is to pause non-emergency works until such time that non-essential travel may continue. It is proposed that if this is not sooner than the end of June 2020 a review takes place by 30th June 2020.

The Government has been clear on what is regarded as essential works and services which include the Transport network and Infrastructure, including Utilities and telecommunications. The Government has made it clear in a joint statement along with HAUC England and HAUC UK, that our roads remain open and they expect works, including emergency and essential street and road works to maintain utility and highway services to continue, ensuring that life-saving medicine, equipment, supplies and healthcare staff can travel across the country to where they are needed most. The Government has also made clear that highway improvement schemes that are already in place, and schemes where external funding could be lost if not delivered on time are also seen as essential works.

The Cabinet Office published a Procurement Policy Note in March 2020 (PPN 02/2020) relating to payments to public sector contractors until 30th June 2020. In order to ensure the survival of businesses during this period the PPN outlines circumstances where a payment would continue to be made to contractors in cases where works were paused or suspended. It should be noted in taking a decision to suspend the Highways Investment Programme for a specific period that payments will be required to be made to the contractor (Marlborough Highways Ltd) and will be held to cover the costs of the work post-suspension. This is in line with the guidance set out in the PPN 02/2020, attached at Appendix B. However, post-suspension, Marlborough may not have the resources to complete this work and there is a risk that the weather in the latter end of the year will affect works and the programme for this year may not be completed. It is proposed that this is mitigated by outlining to Marlborough Highways Ltd that any payments are for works to be completed and that the onus is on them to ensure works are carried out and materials paid for are used within the borough's program. Additionally a change control note is recommended to be drafted to ensure at the start of the next financial year the initial three invoices, or up to, may be withheld should works not be satisfactorily completed.

There is reputational risk that roads committed for work will not be completed. The highway network serves all aspects of the community including businesses and the emergency services

and continued investment should be a priority.

Roads and footway schemes are considered to be safety critical projects to ensure that the network is available to emergency services and is reliable for freight journeys, particularly essential journeys such as medicine deliveries and other essential goods such as deliveries to supermarkets.

The Environment Service area provides various services which falls within the Covid Government guidelines and the Council's essential public services. For example, maintenance and upkeep of the public highway, including all infrastructure within it (Street Lighting, Drainage, footpaths, carriageways etc.) and as such Havering needs to continue to maintain them.

It is expected that post-Covid 19, when the UK returns to business as usual, the highway network will see an unprecedented increase in requests for permits to continue with pre-planned & new works on the highways. This would potentially lead to increased traffic flows and congestion, increased travel time for residents/commuters, TfL buses & emergency services with the knock-on effect that the Council would receive an increased level of complaints about this and additional resources would be required to co-ordinate such. The London Borough of Havering, like all other Local Authorities has a duty to co-ordinate under the Network Management Duty and Traffic Management Act, something of which will be a massive strain & impact on the section to comply with if works are postponed due to Covid.

Thus if works have not been carried out during Covid 19, we could see issues of over demand on our road network, resulting in congestion, higher pollution outputs and the overall network not performing.

Further information provided by TFL has stated that the previous list of highways works supplied for review and pausing during COVID-19 was for information purposes only and to assist with the management the road network rather than to inform officers to cease all highway works therefore direction has been given by TFL to continue with all approved schemes.

With regards to the traffic and parking schemes which have been prioritised in the programme due to Covid; the Council have prioritised the disabled bays due to the needs of the vulnerable and disabled during Covid and also single and double yellow lines, as these have been requested by the waste service where their vehicles cannot get through due to parked vehicles. It is very likely that if a waste vehicle cannot get through nor could an emergency vehicle such as an ambulance or fire engines and therefore these have been classed as a priority. Low priority roads will be considered in August 2020 and an assessment of the emergency situation will be made.

OTHER OPTIONS CONSIDERED AND REJECTED

Suspend the Highways Investment Programme for financial year 2020/2021.
(Failure of the Council to perform its statutory duty to maintain the network and protect the health and safety of the public)
Suspend all highway works for an agreed period
(Failure of the Council to perform its statutory duty to maintain the network and protect the health and safety of the public)

PRE-DECISION CONSULTATION

NA

NAME AND JOB TITLE OF STAFF MEMBER ADVISING THE DECISION-MAKER

Name: Spencer Thatcher-Gray

Designation: Highways Service Unit Manager

Signature: Date: 06/04/2020

Part B - Assessment of implications and risks

LEGAL IMPLICATIONS AND RISKS

1. Article 107(3)(b) permits the approval by the European Commission of additional national support measures taken by a member state to remedy a serious disturbance to the economy of such member state provided that such disturbance affects the whole or an important part of the economy of the concerned member state and not one of its regions or parts of its territory.
2. The COVID-19 pandemic affects all of the EU's member states and the containment measures taken by member states affects the normal operation of undertakings in said member states. State aid is therefore justified in these circumstances and in keeping with the provision of Article 107(3)(b) as long as such measures are for a limited period, aimed at remedying the liquidity shortage faced by undertakings and ensures that the disruptions caused by COVID-19 do not undermine the viability of the undertakings, (particularly those undertakings that are SMEs).
3. Pursuant to Article 107(3)(b) TFEU, the Commission adopted a Temporary Framework permitting 5 types of state aid, one category of which permits member states to make direct grants, selective tax advantages and advance payments. The UK Government guidance provided in PPN 02/20 (the guidance) seeks to provide guidance on advance payments and encourages contracting authorities to support 'at risk' suppliers during the COVID-19 pandemic by keeping up and/or expediting their payments even if service delivery is disrupted or temporarily suspended. The proposed payments in this report are therefore exempt from qualifying as unlawful state aid.
4. Whereas this guidance is not binding on the Council being a sovereign body, it prescribes methods by which the Council as a contracting authority may take advantage of the flexibilities within the Public Contract Regulations (PCR) in the current crisis.
5. In accordance with this guidance, Cabinet approved the Covid -19 Supplier Support Offer (the Offer) permitting the Council to pay some key and "at risk" suppliers and providers in advance to support likely instances of significant service disruption and possible revisions to the payment profile of their contracts so as to support their cash flow positions. Also in keeping with the guidance, such arrangements are to last till the end of June 2020, in the first instance.
6. The Offer requires each individual service area within the Council to establish to their satisfaction and on a case-by-case basis that the works the contractor (in this case, Marlborough) is meant to deliver are essential and their supply chain would be put at risk if the Council does not continue its payments as agreed.
7. From documentation provided to Legal, the Council concedes that Marlborough are an "at risk" Contractor and under the terms of the Highways Investment Programme (HIP) contract, payment is made upon assessment of work carried out by Marlborough (i.e., "payment on result") for which the guidance prescribes that payment should be based on the calculation of the average of their last 3 months' invoices for similar works.

8. While it is conceded that the current social distancing measures may make it difficult for Marlborough to carry out the works as agreed, the preferred option from a legal perspective would be for payments to continue to be made to Marlborough on account while the requirement for assessment of the works is suspended until the end of June 2020 in the first instance and pending further review of the current containment policy by the UK Government.
9. Such payment would be on the basis of the average of their last 3 months' invoices as prescribed in the guidance and may be expedited where necessary. The guidance also prescribes that the contractor should indicate on their invoice that such payments are attributable to COVID-19 and also that staff deployed to the delivery of the works for the London Borough of Havering specifically are not furloughed during this period.
10. The suspension of the requirement of assessment of works carried out before payment as well as the prescribed obligation for Marlborough to act on an open book basis for the duration of the COVID-19 period should be evidenced by a variation to the current Term Service Contract between the Council and Marlborough. Said variation should also include the requirement that staff working on the project during this period must not be furloughed.
11. From a Procurement Law perspective, the proposed variations would be permitted under the exception provided by Reg. 72(1)(c) of the PCR, on the basis that the COVID-19 outbreak is an unforeseeable circumstance which is responsible for the proposed variations; the overall nature of the contract will not change and any increase in the contract value shall not exceed 50% of the original value of the contract. The Council would also have to publish an OJEU Notice notifying the Commission of this variation.
12. The guidance also charges contracting authorities to take necessary steps to mitigate risks occasioned by its decision to adopt Supplier relief. The Council proposes to mitigate the risk of non-completion of the works by Marlborough by way of a further amendment to the contract to the effect that the Council may withhold payment of the 3 initial invoices submitted by Marlborough in the 2020/21 financial year. In the absence of sighting the actual NEC3 Term Service Contract terms, this proposal would be subject to agreement by Marlborough and the Council is also not precluded from taking advantage of all the other contractual remedies available to it under the HIP Contract.

FINANCIAL IMPLICATIONS AND RISKS

Financial risk to the highways capital programme.

Procurement Policy note PPN 02/20 (appendix B) refers to supplier relief during the COVID-19 pandemic for which the Highways Investment Programme is estimated at £745k-£930k per month if suspended. Should the Programme become live at a later date these funds will be utilised for the highways investment programme and seen as a credit with no further cost, it is a "nil cost" to the authority should the programme continue as planned.

The contractor is heavily committed to delivering the capital works programme which has been a key operational, financial and political priority in the Borough for the past 12 months. To date this programme has been continuous and uninterrupted, leading to the potential for efficiency and cost savings to be made. If Marlborough were to be instructed by LBH to come off site, there may be additional costs as a result of the cancellation of the agreed programme, such as demobilisation, remobilisation and the material price changes. It may also be challenging to pause some schemes for safety reasons.

Should the Highways Investment Programme be stopped or delayed significant additional revenue spend will be likely in the winter months of 2020/21 and beyond as the highway network will continue to deteriorate. Revenue budget for 2019/2020 decreased by £100k and the AD had reduced spend by a further £200k. The risk to the authority is an increase in revenue spend of c£300k plus per annum which will increase as the networks deteriorates. Furthermore, there is the potential risk in increase of personal claims against the authority may be seen as statutory duty to maintain the highway will not have been fulfilled. The total outstanding personal claim amount for 2019/2020 is £390,929.79 and it is highly likely without the continued works a similar or increased amount can be expected for 2020/21.

The Highways Investment Programme generates c£200k in revenue from vehicle crossing installations within roads where footways are renewed which frees up the network and improves safety by removing more vehicles from the public highway. A quarter of this could be lost should the Highways Programme be suspended for three months.

A number of traffic schemes are 2019/20 LIP Funded projects that are either currently being delivered or are set to be completed in April. If these projects were to be paused the authority would have to seek agreement with TfL that its 2019/20 LIP budget could still be utilised to fund these schemes. Because it is unclear at this stage whether such schemes could be funded from the 2019/20 budget if they were to be paused for a few months, they are considered essential schemes to be delivered in order to avoid loss of external funding.

Any delay in the Highways Investment Programme would not incur additional costs regarding interest rates and borrowing costs and any saving as a result of the slippage to the expenditure would be minimal and reported corporately through the Council's treasury budgets.

In summary, the financial implications are in the region of

- Continued payments to Marlborough £2.5m
- Loss of income from Crossing Instalments £0.050m
- Increase in personal claims –unknown at this stage

HUMAN RESOURCES IMPLICATIONS AND RISKS (AND ACCOMMODATION IMPLICATIONS WHERE RELEVANT)

There will be the need to redeploy existing staff to other areas should the normal day to day work reduce.

EQUALITIES AND SOCIAL INCLUSION IMPLICATIONS AND RISKS

Those members of the public with disabilities will have schemes delivered based on the above priority.

Failing to maintain the Highway may reduce social inclusion as persons with disabilities may not be so easily able to move around the borough.

An EQIA has not been carried out as these changes will affect all members of the public other than disabled persons whose schemes will still continue as normal

BACKGROUND PAPERS

NA

Other Items

Appendix A – Highways, Traffic and Parking schemes priorities list under Covid 19

Appendix B – PPN 02/20

Part C – Record of decision

I have made this executive decision in accordance with authority delegated to me by the Leader of the Council and in compliance with the requirements of the Constitution.

Decision

Proposal agreed

Proposal NOT agreed because

Details of decision maker

Signed

Name: Barry Francis, Director of Neighbourhoods

Date:

Lodging this notice

The signed decision notice must be delivered to the proper officer, Debra Marlow, Principal Democratic Services Officer in Democratic Services, in the Town Hall.

For use by Committee Administration

This notice was lodged with me on _____

Signed _____