

## CAOL AND LOCHYSIDE FLOOD PROTECTION SCHEME

DPEA REF: FPS-270-1

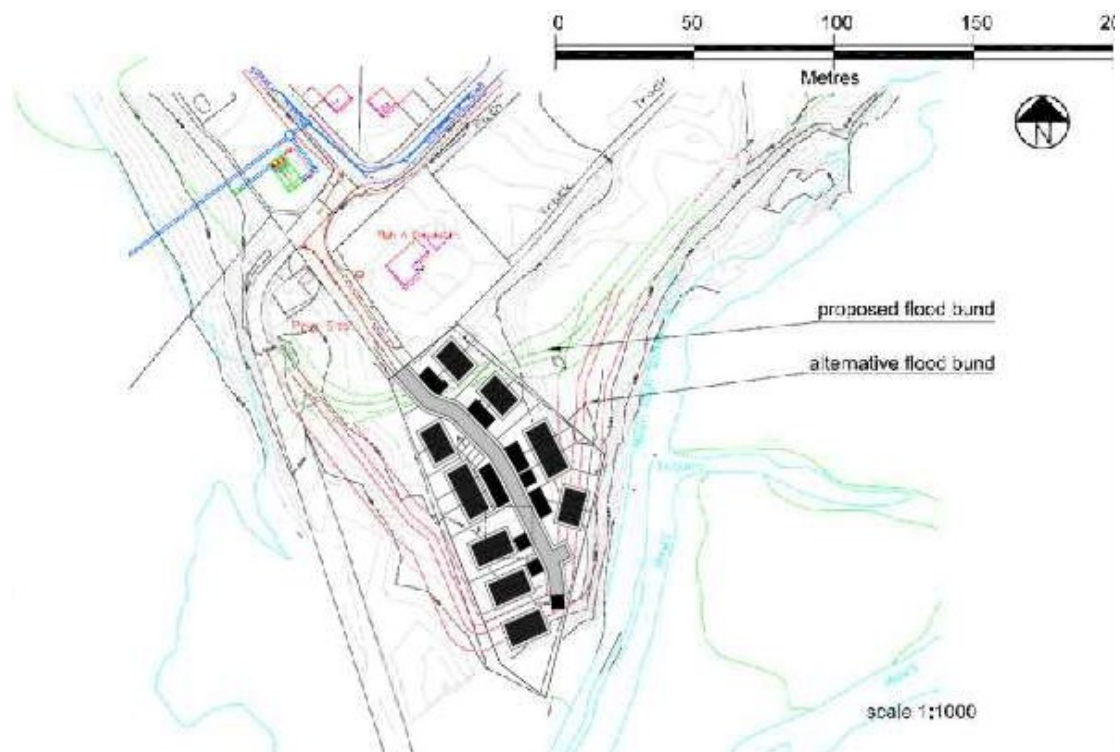
### RESPONSE TO STATEMENT OF CASE LODGED ON BEHALF OF MR & MRS D MICHIE

For ease of reference the Council has included the text contained in Mr & Mrs Michie's Statement of Case and the Council's responses are contained in text boxes delineated in red.

#### 1 Introduction

- 1.1 We are fully supportive of the plan to put a Flood Prevention/Protection Scheme in place. As owners of land with a potentially high development value, we have been deprived of the use of that land by the Council proposing to build the flood bund across the entrance to our site, and through part of the area we propose to build low-cost housing on, and failing to erect a protective bund round, rather than across our land. No provision has been made in the design of the scheme for granting us access to our land other than a restricted access road which is not capable of being upgraded to adoptable standard, which will be necessary for the proposed housing development.

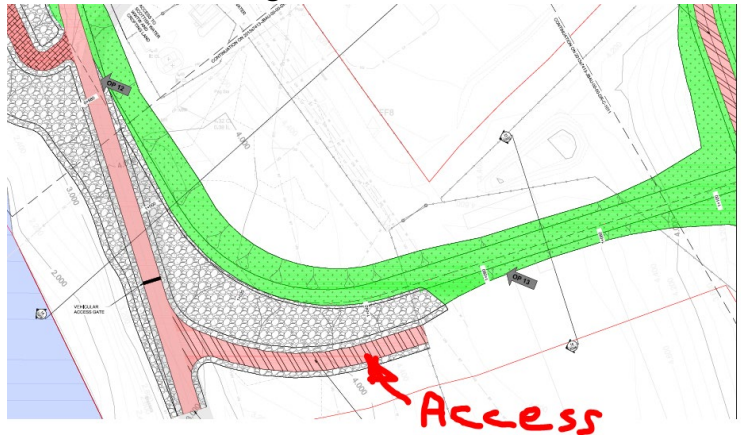
The land we own (with the potential 17 housing units included) is shown in shown below:



The Objectors' description of their property is not shared by the Council. The property comprises a disused structure and associated land. As such it does not merit protection by a flood protection scheme. Flood protection schemes are designed and funded to protect existing buildings and their occupants or users, particularly where the economic cost of damage to those existing properties (usually collectively) is high. The Objectors' landholding has little existing use value and therefore it would not be reasonable or cost effective to divert the alignment of the Scheme around it to protect the landholding. The "potentially high development value" has not been evidenced by the Objectors as having any foundation in local planning policy, the planning history of the site, in legislation or in

case law. The Council is not required to protect land with future development potential (particularly where that potential has not been endorsed by the local planning authority through its development plan or through granting of a planning permission).

A 3m wide access is provided to the Objector's site within the Flood Protection Scheme drawings, this was developed through the consultation process for the Scheme to maintain access to the Objector's property to a similar standard to the existing access. The Council has no responsibility to create access for potential or future development as part of the Flood Protection legislation.



## Grounds of objection to the Flood Protection Scheme

### 2 Grounds of objection to the Flood Protection Scheme

- 2.1 Our principal grounds for objection are set out in our letter to Garry Smith, Principal Engineer with Highland Council, dated 26<sup>th</sup> May 2018.
- 2.2 In addition to the grounds set out in that letter, we have concerns that we have been denied the opportunity to make effective representations to the local Council Member who sits on Highland Council's Environment, Development and Infrastructure Committee, as set out in documents which will be lodged.

The ward within which the Scheme is located is represented by 3 elected members: Cllrs Henderson, Rixson and Thompson. Cllr Henderson is Chair of the EDI Committee and Cllr Rixson is a member of the EDI Committee. Mr Michie made representation to Cllrs Rixson and Thompson regarding the Scheme in the period leading up to the EDI Committee on 16<sup>th</sup> August 2018. Cllr Henderson did not meet Mr Michie in the lead up to the August Committee however he passed on Mr Michie's details to Cllr Rixson who listened to Mr Michie's Objection. Cllr Rixson spent several hours with Mr Michie a few days prior to the Committee date. Mr Rixson voted to approve the proposed Scheme without modifications in the full knowledge of the Objection. Cllr Thompson attended the EDI meeting and spoke in favour of the Scheme but did not vote as he is not a member of the Committee. The Objectors' assertion that they "have been denied the opportunity to make effective representations to the local Council Member" is refuted.

### **3 The Council's position**

3.1 The Council are refusing to address our concerns because:

- a) They estimate that the additional cost of putting a protective bund round our land will be £450,000. (this cost is disputed by us) and that this cost is excessive.

No figure has been quoted for the cost of the defence of the Objector's land. The cost of the defence works within Scheme will ultimately be tested when tenders are let for the construction. The basis of cost quoted by the Objector is described in Point 6 in Council's Statement of case.

- b) They Council have stated, "that the purpose of the scheme is to protect 300 properties in the community of Caol and Lochyside and that the scheme, as it was presented in the public meeting in May (2015), illustrates an alignment which seeks to reduce the risk of flooding to existing houses and commercial properties.". Accordingly, the Council maintain, they are not obliged to provide protection to our land.

This is correct. The Council's Statement of case Point 4 (iii) provides guidance by SEPA regarding the role of a Flood Protection Scheme within the development framework. This is consistent with the Council's approach to the Objector's land.

- c) The Council continue to ignore/ misunderstand the medium to long-term development potential of the site for housing, which is complicated by the significant question mark over the future of the long-standing proposal for the Caol Link Relief Road.

Please refer to the following points in the Council's Statement of case: Point 2, Point 3, Point 5 and Point 9.

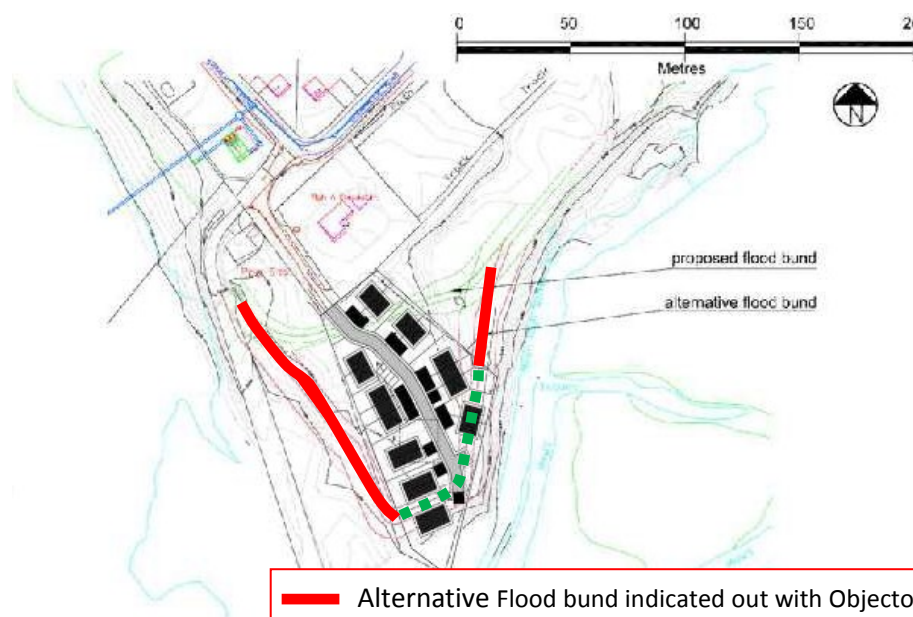
### **4 Response to the Council's position**

4.1 We dispute the Council's projected additional cost of £450,000. We have prepared preliminary costings of extending the bund round our site. We estimate that the cost of our alternative bund will be considerably less than the amount estimated by the Council. The exact amount will depend on options the Council may have on where they route the protective bund. We would like our property to be protected in full, but there could be scope for the proposed bund encroaching on our land to a slight extent in the marginal and estuarial areas, if this option ameliorates any design difficulties. From these costs will have to be deducted the cost of the length of bund which will no longer be required (that stretch which crosses our land) and the amount of compensation which the Council will be obliged to pay us (which will also be less as the limitation on development potential would be substantially reduced). We would also highlight the powers afforded to the Council under the Flood Risk Management (Scotland) Act 2009 to enter into agreements with landowners to carry out flood protection works – we would be open to discussion with the Council about the most efficient way to construct the bund around, or marginally through, our land.

A significant proportion of the Objector's proposed bund to protect the Objector's land would be constructed on estate land / croft land in third party ownership. See the Objector's marked up plan below, for clarity the red line indicates the Objector's

alternative flood bund on land which belongs to others and the dashed green line indicates the Objector's alternative flood bund within the Objector's land.

Section 56 gives general powers to the Council to manage flood risk including emergency measures. S56(2) allows the Council to implement a Flood Protection Scheme granted under Section 60. It also allows the Local Authority to enter into agreements with landowners to manage flood risk. This would typically be an arrangement to allow an area to flood which would reduce flooding elsewhere or to make improvements to a watercourse to delay and hold up flood water within a catchment to reduce flooding elsewhere. S56 is not intended for use where complex works are required to be carried out over areas of multiple land ownership. For that reason Section 60 is included for promotion of a Flood Protection Scheme. This reasoning is explained on page 3 of the document 'Local Authority Functions Under Part 4 Guidance' issued by the Scottish Government.



4.2 We dispute that the Council is only obliged to protect "existing houses and commercial properties" and maintain that our land ought to be protected. We have presented a viable alternative that could be incorporated into the scheme as a modification so as to preserve the development potential of our land and deliver equivalent flood protection to those existing houses and commercial properties.

The Council's Statement of case at Point 4 (iii) provides guidance by SEPA regarding the role of a Flood Protection Scheme within the development framework. This is consistent with the Council's approach to the Objector's land.

4.3 No test is established under the Flood Risk Management (Scotland) Act 2009 or the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010 for assessing and, ultimately, determining to what extent any objection to the Flood Protection Scheme

and/or proposed modifications should be taken into account in the final confirmed scheme.

This is tested by the Council Committee of elected Members and through the hearing process lead by the Reporter. The Council has followed the procedures laid out in the Act for the promotion of a Flood Protection Scheme.

4.4 The Scottish Government guidance on Flood Risk Management (Scotland) Act 2009 – Local Authority Functions under Part 4 indicates that it is for the local authority to consider the **most appropriate arrangement** for carrying out any flood protection works (emphasis added). While the local authority is clearly afforded a degree of discretion, it is implicit that there is a requirement to consider and account for why alternative arrangements for flood protection works have been discounted. We are not aware of such comparative analysis having been undertaken in respect of our land, notwithstanding the submission of our objection.

The 2007 feasibility report by Scott Wilson reviewed alternative arrangements for the flood protection of Caol and Lochyside [THC 20]. This concluded that an area wide direct defence was the most practical and economical. Protecting land for potential future development is not the intention of the Act. The Act is intended to reduce flood risk through sustainable flood risk management. Any scheme must provide a summary of the benefits of the operations (schedule 2). Given that there are no benefits to be gained by spending public resources on protecting undeveloped land the Scheme has been developed to maximise the benefits (number of properties protected by the scheme) whilst minimising the length of the scheme and therefore cost of construction. Although modifications to the Scheme have been agreed by the Council (see responses to Section 5 below) no modification of the Scheme was considered necessary in respect of the Objectors' land for the reasons given above and in the Council's Statement of Case at Section 5. The Council considers that the Scheme, without further modification, is the most appropriate arrangement for carrying out the flood protection works at Caol and Lochyside, in accordance with the Scottish Government's guidance abovementioned.

4.5 In the absence of a specific test within the Flood Risk Management legislation and guidance, we consider that it is also relevant to look at the tests for a compulsory purchase order on account of the comparable interference with the rights of land owners. On account of the potential impacts of the proposed Flood Protection Scheme, our rights under Article 1 Protocol 1 and Article 8 of the European Convention on Human Rights are engaged.

The Act provides procedures for the publication and implementation of a Flood Protection Scheme. The Council has followed the procedures in the Act and the Regulations. No compulsory purchase is proposed for the Caol and Lochyside Flood Protection Scheme, the Act provides powers to enter and construct a Scheme with compensation paid to those with an interest in the land affected.

4.6 The CPO framework emphasises the need for proportionality and that the means used by local authorities have to be **reasonably necessary** for the interference with private land rights to be considered as being in the public interest.

The Council believes it has acted proportionately, in accordance with the Act and in a financially prudent manner.

4.7 The Council has not demonstrated that it is reasonably necessary for the Flood Protection Scheme to go directly through our land rather than around its perimeter, particularly if the development potential of our land is increasingly less likely to be inhibited by the proposed Caol Link Road.

Please refer to the following points in the Council's Statement of case: Point 2, Point 3, Point 5 and Point 9

## 5 Hearing

5.1 At the hearing due to take place on 28 March 2019, we believe it would assist discussions between the parties if the undernoted points were addressed by the Council.

5.2 We would respectfully ask the Reporter to request a response from the Council in relation to the following points:

5.2.1 Provide evidence to demonstrate that our objection and the proposed modification have been taken into account in relation to the proposed Flood Protection Scheme;

The evidence that demonstrates that the Council has taken into account the Objectors' objection and proposed modification is as follows:

- Table 1 contained in the Council's Statement of Case details engagement between the Council and the Objector over the period June 2015-October 2018;
- Section 3.2 of the Council's report to its EDI Committee [THC 04] summarised the objection and the Council's response;
- Section 4 of the Council's Statement of Case responds in detail to each point contained in the objection;
- The proposed modification was first received in plan form from the Objectors as part of their Statement of Case (i.e. post-dating the Scheme being reported to Committee and referred to the Reporter) therefore this is the Council's first opportunity to take this into account. The Council's comments on the plan are contained in the response to Section 4.1.

As regards the Objectors' land, the Council has reviewed the planning history and local development in order to inform its response to the Objection as regards the planning status and potential use.

5.2.2 Explain why to date the Council has not incorporated our modification into the proposed Flood Protection Scheme;

The increase in length of the Scheme to protect the Objector's land would be close to 200m , this equates to around 10% of the length of the whole Scheme which is designed to protect 300 properties in Caol and Lochyside . As the Objector's land is undeveloped, any alternative alignment of the Flood Protection Scheme to protect the land would provide no additional benefit and would reduce the economic viability of the Scheme.

5.2.3 Provide details of any other modifications that have been incorporated into the proposed Flood Protection Scheme;

Modification to change the alignment through the croft land of ///////////////. The alignment changed the length of the Scheme by 8m i.e. 0.4% of the overall Scheme length and constitutes a reasonable variation. The Scheme design has developed over the last

three years through the consultation process. This can be demonstrated through the alterations to the documents and drawings over a period of time.

- 5.2.4 Provide any comparative analysis (including financial appraisals) carried out by the Council in relation to the proposed Flood Protection Scheme as compared with any alternative options for works on our land and/ or the modification outlined in our letter of objection; and

No development potential has been established for the Objector's land and therefore the test set out in 5.2.2 above provides the comparative analysis of the modification outlined by the Objector.

- 5.2.5 Provide details of any arrangements made with other land owners to take account of the impacts of the works under the proposed Flood Protection Scheme.

Agreement with one other landowner has been concluded. This involved the purchase of a section of river bank from the Property Innisfree on Kilmallie Road. The plot of 207 m<sup>2</sup> was purchased for £2000. No other land agreements have been completed. The other landowners, who did not object to the Scheme, are still in discussion with the Council and are proceeding with the compensation route outlined in the Act.

## **6 List of Hearing Documents**

- 6.1 See Appendix 1 to this Statement of Case.