

## CAOL AND LOCHYSIDE FLOOD PROTECTION SCHEME

DPEA REF: FPS-270-1

### RESPONSE TO THE HIGHLAND COUNCIL'S STATEMENT OF CASE

#### 1 Introduction

1.1 In response to the Council's Statement of Case dated 12 February 2019, it is not disputed that:

1.1.1 The Council has a duty when exercising its functions under the Flood Risk Management (Scotland) Act 2009 ("the 2009 Act") to reduce overall flood risk.

1.1.2 There is a need for flood protection measures at Caol and Lochyside, on account of historic flooding in the area.

1.1.3 The site owned by Mr and Mrs Michie ("the Objectors") is not currently allocated in the local development plan, nor does it benefit from planning permission for new development (housing or otherwise).

1.1.4 Any owner of land impacted by a Flood Protection Scheme has a right to compensation under s82(2) of the 2009 Act.

1.1.5 Any amount of compensation due to the Objectors would require to be assessed by the Lands Tribunal for Scotland in the event that agreement cannot be reached with the Council.

1.1.6 It is not the purpose of the hearing into the Flood Protection Scheme to have a detailed discussion on compensation or any likely sum that might be payable to the Objectors as a result of the Scheme.

#### 2 Response to the Council

2.1 The foregoing paragraphs respond to key issues raised by the Council in Section 4.3 of its Statement of Case responding to Mr and Michie's objection letter, dated 26 May 2018.

2.2 This response considers the principal points of dispute between the parties, with a view to allowing a focused discussion at the hearing on 28 March 2019. Silence on any particular point should not be treated as acceptance of it or otherwise.

2.3 ***'The presence of the Scheme itself would not prevent the remainder of the Objector's land from being developed in the future. Therefore the claim that the Scheme sterilises the land from future development is not considered to be correct'.***

2.4 The Objectors understand that it remains the Council's intention to route the Flood Protection Scheme through their land as indicated on THC 19 ref 1001-1010-2006.

- 2.5 While it may remain physically possible to site development on either side of the proposed embankment, the combined effects of:
- 2.5.1 the Council proposing to route the Flood Protection Scheme across the most readily developable area of the Site (readily developable in terms of the area being closest to existing services including the public road and also because the topography of that area of the Site is such that less infill would be required); and
  - 2.5.2 no allowance in the Scheme for constructing a vehicular access across the embankment; an alternative route, while it may be physically possible to install, is likely to be prohibitively expensive when its extended length is considered relative to the reduced scale of development possible on the remaining Site. The proposed 3 metre wide unsurfaced access road will be insufficient to enable an access to be constructed to adoptable standard. The grantor of a right of servitude over the proposed access may not permit increasing the width to the standard required. Also, upgrading the proposed access will involve partial demolition of the coastal protection work proposed under the Scheme. This will involve substantial cost.
- 2.6 would mean that a much smaller scale of development, which might not be financially viable, particularly because of the high cost of providing flood protection measures, is all that the remaining Site could accommodate. If development is not financially viable, the effect in practice is one of sterilisation.
- 2.7 The Council has not identified a clear need to route the Flood Protection Scheme through the Site rather than routing it around the perimeter. To the extent the Council has cited the additional costs of the works as a reason, this point is responded to directly at para 25 below.
- 2.8 *'Planning permission for 10 houses (10 less than claimed in the Objection) on the site was refused in 2009 (application ref 08/00285/OUTLO). The reasons for refusal included the Caol Link Road, flood risk at the site, and incompatibility of the development with adjacent development patterns.'***
- 2.9 The Objectors consider that their site has capacity for upwards of 10 houses. Planning application 08/00825/OUTLO sought permission for 10 units on the basis that part of their land required to be safeguarded for the Caol Link Road. In the future if the Caol Link Road is no longer safeguarded in the LDP, the site would have capacity for potentially up to 20 units. Following on from the Scottish Government's representations calling for removal of the road safeguarded in the LDP in 2017, the likelihood of the Caol Link Road going ahead continues to decrease. There is potential for flood risk at the site to be addressed through works constructed as part of the Flood Protection Scheme, depending on the final, confirmed Scheme. The Objectors are also aware of grants of planning permission since 2009 for housing development lying between their site and the main Caol settlement, including 11/04288/FULL for erection of two dwelling houses and 15/02479/FULL erection of one dwelling house. Accordingly, the adjacent development patterns have altered since the Objectors' planning application and planning appeal in 2009 and 2010 respectively. The site has been previously built on and is now a brownfield site, eminently suitable for development.

**2.10** *'Aside from the acceptability or otherwise of the development in terms of Development Plan Policy, there appears to be several issues with the housing development site layout plan submitted with the objection'.*

2.11 As part of their objection to the Flood Protection Scheme, Mr and Mrs Michie are not required to address all potential planning issues arising from future development of their site. These are matters to be resolved as part of any subsequent planning application.

2.12 Notwithstanding, the "issues" with the housing development site identified by the Council at 4.3 (iii) a – d are all issues that could likely be overcome through the siting, layout and design of a housing scheme.

2.13 The Objectors' view that the Caol Link Road is increasingly unlikely to come to fruition (the route having been safeguarded in consecutive development plans for c. 38 years and an alternative option to address traffic issues in Fort William – "the Kennels option" - is now included in the emerging local plan) so that it is a further issue that could be overcome has already been set out at para 2.9 above. In addition, the Objectors have identified the following features of the proposed Flood Protection Scheme – such as the access from Erracht Drive to the beach, which is approximately 40m long by 3m wide, and likely to be lost if the road did in fact go ahead – and consider that the construction of such works do not readily allow for the installation of the Caol Link Road along its safeguarded route so as to highlight the incompatibility of the two schemes. In respect of the area relating to their own site, the Objectors have prepared drawings to highlight the incompatibility of the schemes. It will be seen from the drawings that, to comply with the criteria set out in Para 3.21 of document R12 - The West Highlands and Islands Local Development Plan – Main Issues, the embankment of Caol Link Road will be 35 metres wide at its base. This is incompatible with the Scheme (much of the Scheme as it traverses the Objector's land will be buried beneath Caol Link Road) and existing properties. The Objectors have requested a plan showing how the Flood Protection Scheme and Caol Link Road sit together. They have not been given one. The drawing which the Objectors have prepared is document D16 – Plan of CLR, FPS & New Houses.

**2.14** *'Re-aligning the Scheme around the objector land would unfairly favour the objector land over neighbouring land that is already affected. Re-aligning the Scheme would incur additional construction cost for the Council, without providing any additional benefit in terms of increasing the number of properties protected.'*

2.15 Section 56 of the 2009 Act makes quite clear that the Council can do anything that it considers will contribute to the implementation of measures in a local flood risk management plan, without any reference to ensuring fairness between any landowners affected by flood protection works.

2.16 In the circumstances, Mr and Michie are the only objectors to the Scheme and the Council are obliged to consider the terms of their objection under Para. 5 of Schedule 2 to the 2009 Act; the Council are not under a similar obligation to consider the views of landowners who have not objected to the Scheme.

2.17 The Objectors accept that any modifications to the Scheme cannot lead to additional construction costs that are disproportionate to the benefits offered by such modifications. They dispute, however, that

modifications need to lead to an increase in the number of properties protected by flood risk before they can be accepted by the Council. The Council confirmed to the Objectors by emailed dated 12 February 2019 that the route of the Flood Protection Scheme has previously been subject to modification. In 2015 the Scheme passed diagonally through croft land but in 2016 the alignment of the route was altered to follow the field margin to be more sympathetic to the existing land use for crofting. It does not appear that any additional properties were safeguarded as a result of this modification. The incorporation of a cycle track and part of the Great Glen Way across sections of the embankments forming the Flood Protection Scheme, as proposed to the Council, also add to the cost of the works without necessarily protecting any additional homes from flooding.

**2.18** *'The primary purpose of a Flood Protection Scheme is to protect existing development from flood risk rather than to facilitate new development'.*

2.19 The Objectors are not seeking the Flood Protection Scheme works to be installed in a manner that facilitates any future development of their site. Their modification is instead looking for the works necessary to protect existing development from flood risk to be implemented in a manner that preserves the developable area of their site as far possible.

**2.20** *'Re-aligning the Scheme would be hampered by physical constraints that are much greater than the Objector acknowledges'.*

2.21 The Council's reference to 'physical constraints' is vague and unhelpful. The Council has not identified any definitive, technical reason why the Flood Protection Scheme could not be routed around the Objectors' site in some shape or form. Indeed, it has provided at least one design option as to how this may be achieved in THC 09. The Objectors accept that a route around their Site this may require incursion into the estuarial, marginal areas of their Site but overall this would better preserve its viability and potential. On the basis of the modifications previously made to better accommodate existing crofting activities, there does not require to be a net gain in the number of properties protected by the Flood Protection Scheme in order to permit a modification to be made. The issue of additional costs of carrying out greater or longer works is considered at para 25 below.

**2.22** *'The Objectors claim that the additional cost of constructing the Scheme on an alternative alignment around the land affected would be less than the cost of compensating the Objectors for loss of development potential...Furthermore the Council does not consider it the purpose of the hearing for which this statement is prepared to determine the amount of any compensation as it is not a matter for the Reporter either to determine or to take into consideration.'*

2.23 The Objectors agree that it is not the purpose of the hearing to debate the specific compensation sum that might be due in respect of their site. The Objectors' position is, however, that the broader issue of compensation is relevant to the extent that the total compensation due to landowners affected by the Flood Protection Scheme is one component of the overall costs of the Scheme.

- 2.24 The Objectors consider the comparative costs of their proposed modification (both the cost of carrying out the Flood Protection Scheme works and the corresponding compensation liability) to be a critical issue for discussion at the hearing.
- 2.25 The Objectors' position on costs and compensation is as follows:
- 2.25.1 Information from the Council on projected costs has been limited to an overall Scheme cost of £9.650M and an average cost of £4,684 per metre.
- 2.25.2 There are discrepancies in the lengths of works envisaged by the Council. Currently they are indicating 40m to go across the site v. 233m to around it in their Statement of Case. Previously these figures have been 90m v. 180m respectively. The Objectors' projections are detailed in Section 3 below.
- 2.25.3 The Objectors estimate, however, that a cost of £87,000 is reasonable for crossing their land on the route currently proposed. This option, however, will result in the Council incurring considerable additional costs by way of compensation. They estimate that putting a full width embankment, incorporating a cycleway and the Great Glen Way, on the route shown on the Council's drawing THC-09 will cost around £254,000. The Objectors are keen not to delay the Scheme, and will be willing to accommodate a layout which results in a protective bund going around their land, but encroaching on to it, as referred to in Paras 2.25.9 and 3.3.3. They estimate that constructing this alternative bund (including the cost of constructing a cycleway across the top of their site, near the entrance) will cost £152,000. To achieve this cost-saving (by reducing the volume of the required embankment) the Objectors would be willing to consider having the cycle track routed cross the northern part of their site. Schedules of approximate quantities have been professionally prepared and costed out, and are included as documents R8 – Cost of Diverting Bund round site.
- 2.25.4 Regardless of the basis for calculating costs, the level of compensation due to the Objectors forms part of the overall costs of implementing the works.
- 2.25.5 Compensation due to the Objectors would require to take account of the development potential of the site in a 'no scheme world' (i.e. without the Flood Protection Scheme).
- 2.25.6 The Objectors consider that the Site has potential for around 10 units if land continues to be safeguarded for the Caol Link Road, up to 20 units in the absence of the scheme for the link road.
- 2.25.7 The starting point for assessing compensation liability would be development potential for between 10 – 20 housing units on the Site.

2.25.8 Compensation liability could vary significantly depending on the final route of the Flood Protection Scheme and, in turn, have a considerable impact on the overall costs of carrying out the section of flood protection works relevant to the Objectors' land.

2.25.9 The Objectors consider that when compensation liability is considered alongside construction costs an accurate figure for the overall cost of implementing the Flood Protection Scheme will be given. Considered in this manner, the Objectors consider that routing the Flood Protection Scheme around their Site (with some marginal encroachment) may be considered a cost-effective option when reduced compensation liability is taken into account.

### **3 Iterations of the Flood Protection Scheme**

3.1 The Council has proposed a route for the Flood Protection Scheme that appears to fully protect the Objectors' land. It is shown on the Council's drawing THC 09 – SK\_2 Former Sewage Works Site – embankment.

3.2 The Objectors suggest that this proposal has not been fully thought through. Contrary to what is shown on THC 09, the embankment will be much wider and will encroach a considerable distance on to the foreshore, possibly to the extent that it may exacerbate flooding. THC 09 shows only one side (the seaward side) of an embankment, yet the Scheme Document (THC 01) indicates that the embankment is to comprise a 3m wide shared cycle way with 1m and 0.5m verges giving an overall embankment of 4.5m. Accordingly, an area of land much greater than that shown on THC 09 would be required in order for the embankment to be routed around the Objectors' Site.

3.3 The Objectors consider that there are four options for routing the Flood Protection Scheme around, rather than across, their Site:

3.3.1 The embankment around the edge of the Objectors' site as indicated on THC 09 (at a projected cost of £253,834.44); or

3.3.2 Construction of a sea wall, as the Council is proposing elsewhere within the Scheme, on the line of the embankment as shown on THC 09 (not costed by Objectors); or

3.3.3 An embankment routed generally around the Objectors' Site but allowing for encroachment on marginal, estuarial parts of their land so as to mitigate costs and technical difficulties (at a projected cost of £151,791.47); or

3.3.4 The scheme presently proposed by the Council (at a projected cost of £87,528.51)

3.4 The third option would be the Objectors' preference. They also consider that this option is more cost effective and efficient in terms of land use than the alternative suggested by the Council in THC 09. As demonstrated when comparison is made between the indicative costings prepared by the Objectors for the three route options (the Objectors have not attempted to estimate the cost of the sea wall option at 3.3.2) above – refer to Document R/8 – Cost of bund options.

- 3.5 THC 09 shows a bund running in a north-west/south-east alignment at the east end of the 40m throat. The Objectors suggest that this section of the bund be re-aligned so that it runs in a general north-east/south-west direction to join the proposed bund at a point approximately 60 metres east of the junction as shown. The Objectors have prepared an indicative plan to show this potential re-alignment. It is submitted as document D14 – Bund Location Options. This alignment would involve greater encroachment on to adjacent land than the proposal set out in the Council’s drawing THC-09. The Objectors estimate that the length of this alternative route, allowing for nominal encroachment, would be 220m in contrast to going across the site which would extend to a length of 120m.
- 3.6 The Objectors consider that the third option (as outlined on D14 – Bund Location Options) is one which the Council ought to have considered. By incorporating both a cycle track and the Great Glen Way, any embankment is going to be large and require a substantial land-take, both of which will be reflected in the overall costs of a Scheme. The Objectors would be willing to enter into discussions with the Council about routeing the cycle track across the top end of the Site. This would greatly reduce the requirement for such a large embankment and substantial earthworks.

#### **4 Correspondence**

- 4.1 The Objectors note that a number of letters, generally from the Objectors to the Council, have been omitted from the Council’s submission to the Reporter. This correspondence is now included in the Objectors’ submission.
- 4.2 On the matter of negotiations between the parties to date, the Objectors considered it without purpose to negotiate with the Council’s Estates’ Department until:
- 4.2.1 Issues regarding the final route of the Scheme were resolved;
  - 4.2.2 the STAG had been published and the likely fate of Caol Link Road had been clarified. It should be noted that the Objectors previously wrote to the Council asking for postponement of the hearing until after the STAG Report had been published with a view to facilitating discussions between the parties.