

Agenda Item	<b>16</b>
Report No	<b>EDI 51/19</b>

## HIGHLAND COUNCIL

**Committee:** Environment, Development and Infrastructure

**Date:** 15 August 2019

**Report Title:** Caol and Lochyside Flood Protection Scheme 2018

**Report By:** Director of Development and Infrastructure

### 1. Purpose/Executive Summary

- 1.1 The Scheme comprises a 2.1 km (1.3 mile) long, direct flood defence, consisting of 1,200 metres of embankment along the shore of Loch Linnhe and 900 meters of flood wall along the bank of the River Lochy. The Scheme seeks to protect 300 properties at risk from the predicted 1:200 year storm event.
- 1.2 Approval to publish the draft Scheme documents was granted by Planning, Development and Infrastructure (PDI) Committee on the 4 November 2015 (PDI 73/15). In addition to this, in August 2016 the PDI committee was advised on the progress of the above Scheme and informed regarding the formal notification process (PDI 52/16)
- 1.3 Following publication of the Caol and Lochyside Flood Protection Scheme in April 2018, the Scheme received five comments and one objection during the notification period. No late representations were made.
- 1.4 Following the preliminary decision by the Environment, Development and Infrastructure (EDI) Committee on the 16 August 2018 (EDI/51/18) to confirm the scheme without modification, the objector and the Scottish Ministers were notified of the preliminary decision. The Ministers chose not call in the Scheme and instead instructed the Council to hold a hearing for the objection.
- 1.5 An independent reporter was appointed through the Scottish Government's Planning and Environmental Appeals Division to hear the objection and a local hearing was held in Caol on the 28 March 2019. The reporter published the final report on 16 July 2019. The reporter recommended that the Caol and Lochyside Flood Protection Scheme be confirmed without modification. A copy of the report is included in **Appendix 1**.

## 2. Recommendations

### 2.1 Members are asked to:

- i. confirm the Caol and Lochyside Flood Protection Scheme 2018 without modification; and
- ii. approve the draft planning conditions in **Appendix 2**.

## 3. Implications

### 3.1 Resource

The Scottish Government confirmed on 18 July 2016 that 80% funding was available for the Scheme within the programme of spending 2016 – 2022. The Scheme is included in the Highland Council's Capital Programme, approved by Council on 7 March 2018. The grant calculation is based on tender cost and will be confirmed with the Scottish Government following the contract tender procedure.

### 3.2 Legal

3.2.1 Confirmation of the Flood Protection Scheme for Caol and Lochyside establishes powers to construct the proposed operations on third party land with the compensation mechanism in accordance with the procedures in the Act.

3.2.2 A Licence has been granted by Marine Scotland to allow construction within a marine environment.

3.2.3 The works involve construction on the Caledonian Canal which is a scheduled ancient monument. Consent to carry out the works has been granted.

3.3 Community (Equality, Poverty and Rural)  
There are no known implications.

### 3.4 Climate Change / Carbon Clever

The Scheme was originally proposed to include climate change and predicted change in sea level. Through the public consultation process it was agreed with the local Community to provide a progressive design solution. The standard of protection to be provided accommodates a 1:200 year event taking into account combined coastal and river flooding effects. This will greatly increase the protection to the 300 properties at risk of flooding in Caol and Lochyside. The design footprint of the scheme has been developed to enable future enhancements to increase the standard of protection should it be required due to the impact of climate change.

### 3.5 Risk

Failure to proceed with the proposed scheme may impact on the availability of Scottish Government grant funding for the project, and may require re-payment of funding provided to date.

### 3.6 Gaelic

There are no known implications at this time.

## 4. Scheme Details

- 4.1 A full description of the Operations, as included in the Caol and Lochyside Flood Protection Scheme Documents, and Drawings can be viewed on the Council's web-site [https://www.highland.gov.uk/info/1226/emergencies/80/flood\\_alleviation\\_schemes/5](https://www.highland.gov.uk/info/1226/emergencies/80/flood_alleviation_schemes/5)

These include:

- Flood Protection Scheme (FPS) Notice
- FPS Description Document
- FPS Drawings, Plans and Sections
- FPS Design Justification Report
- Flooding Background
- Flood risk
- Hydraulic Modelling
- Scheme Development
- Environmental Assessment
- Public Consultation
- Scheme fly through animation (provided for information only)

## 5. Procedure

- 5.1 The Flood Risk Management (Scotland) Act (2009) establishes powers within Part 4 of the Act for Local Authorities to confirm formal Flood Protection Schemes, thereby removing the need for Scottish Ministerial approval. In addition, if a Flood Protection Scheme was confirmed by the Local Authority, the Act allows Scottish Ministers to deem it to have Planning Permission.
- 5.2 The draft planning conditions for the Scheme are included in Appendix 2, these will be issued in draft to the Scottish Ministers for consideration for conditions on confirmation of deemed planning consent.

Designation: Director of Development and Infrastructure

Date: 19 July 2019

Author: Colin Howell, Head of Infrastructure  
Garry Smith, Principal Engineer

Background Papers: PDI 52/16 and 73/15, EDI 51/18



## Report to the Highland Council

# FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009 CAOL AND LOCHYSIDE FLOOD PROTECTION SCHEME

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Report by Martin H Seddon

- Case reference: FPS-270-1
- Site Address: Land at Caol and Lochyside,
- Promoting Authority: Highland Council
- Flood Protection Scheme under section 60 of the Act
- Objectors: Mr and Mrs D Michie
- Date of Hearing: 28 March 2019

Date of this report and recommendation: 8 July 2019

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The Highland Council

8 July 2019

Councillors

### **Caol and Lochyside Flood Protection Scheme**

In accordance with my letter of appointment dated 10 January 2017, I conducted a public Hearing in connection with an objection to the Caol and Lochyside Flood Protection Scheme on 28 March 2019 at the Kilmallie and Ardnamurchan Free Church, Glenpane Street, Caol. Those taking part in the Hearing were as follows:

Representing the Council: Karen Lyons, Principal Solicitor, Gary Smith, Principal Engineer (flood scheme), Alan Fraser, Principal Engineer (Local flood management plan), David Mudie, Planner, Genny Tonberg, Technical Assistant.

Objectors: Mr and Mrs D Michie. Mr Michie attended, represented by Victoria Lane, Brodies LLP.

Five members of the public and Cllr B Thompson attended the Hearing .

The report sets out a summary of evidence, taking account of the written submissions by the objectors and the Council, and the discussions at the Hearing. The report then ends with my conclusions and recommendation.

I recommend that the Caol and Lochyside Flood Protection Scheme be confirmed without modification.

Yours faithfully,

*Martin H Seddon*

Martin H Seddon BSc DipTP MPhil MRTPI

REPORTER

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## **CAOL AND LOCHYSIDE FLOOD PROTECTION SCHEME**

### **SUMMARY OF EVIDENCE**

#### **Background**

1.1 The Caol and Lochyside area, north of Fort William, has a history of flooding with flood records from 1957. The cause is variable including high river flows; surface water flooding and high tides. The last tidal surge event to occur was in 2005 when around 20 homes were flooded, and the sea level reached 4.44 m AOD. The flood risk analysis commissioned by the council and carried out by JBA Consulting has identified that 296 properties are at risk from a 1 in 200 year flood event with a current potential cost of damage at around £12.2m. The cost estimate for the proposed Caol and Lochyside Flood Protection Scheme (the Scheme) is approximately £9.7m, providing a good cost /benefit ratio of 1.26.

1.2 The council's preferred Scheme was developed in conjunction with stakeholders and in consultation with residents. It consists of 3 main elements. There will be an embankment with rock armour along the foreshore to protect from coastal flooding, a wall along the River Lochy to protect from fluvial flooding and pumping stations to protect the area from surface water flooding.

1.3 The Scheme will provide a 1 in 200 year standard of protection against fluvial, tidal and wave flooding. Where possible, structural elements of the scheme have been designed to a higher standard than 1 in 200 years and include possible effects of climate change up to 20% greater in magnitude, in line with UK climate predictions. The scheme has been designed to enable future enhancements to increase the standard of protection should it be required due to the impact of climate change.

1.4 The proposed Scheme was confirmed by the council's Environment, Development and Infrastructure Committee, without modification, on 16 August 2018 and the draft planning conditions were approved. I note that the Committee highlighted the significant urgency to proceed to protect the number of properties at risk of flooding in Caol and Lochyside.

1.5 On 15 September 2018 the council notified Scottish Ministers of its decision to confirm the scheme with one objection in place, that of Mr and Mrs Michie. On 27 September 2018 Scottish Ministers advised the council that they did not wish to call in the scheme for further consideration and that an independent reporter should be appointed by the council to hold a Hearing regarding the objection to the proposed scheme.

1.6 The Hearing was initially arranged for 11 February 2019. Mr and Mrs Michie were advised of the date on 26 November 2018. On 31 December Mr and Mrs Michie wrote to the council requesting that the Hearing be adjourned in order to allow

them time to prepare their case because they did not know who would be representing the council. In the circumstances, and in the interest of natural justice, a new date was arranged for the Hearing of 28 March 2019.

1.7 On 27 March I carried out an unaccompanied visit to the area to become acquainted with its location and the characteristics of the surrounding area. The Hearing was arranged and undertaken in accordance with the procedure set out in *Appendix G (Code of Practice for Hearings) of the Flood Risk Management (Scotland) Act 2009: Local Authority Functions under Part 4 Guidance*.

1.8 The council received an objection letter from a resident just prior to the Hearing. However, to be valid, an objection must comply with the requirements of the *Flood Risk Management (Scotland) Act 2009 under Part 3(2) of Schedule 2 of the Act, requirements a-c*. The objection was not made before the expiry of 28 days beginning with the date that notice of the Scheme was first published, and therefore could not be considered as a late objection. Mr and Mrs Michie claim to have been denied the opportunity to make effective representations to a local council Member about the scheme. However, I am informed that Mr Michie had the opportunity to speak to a council Member prior to the Committee Meeting on 16 August 2018.

### **The case for the objectors**

1.9 Mr and Mrs Michie state that they fully support of the plan to put a Flood Protection Scheme in place. They are owners of land comprising a former sewage treatment works located south of the junction of Erracht Terrace and Glenmallie Road. They consider that the land has a potentially high development value. They believe that they have been deprived of the use of that land by the council proposing to build the flood bund across the entrance to their site and through part of the area that they propose to build 17 low cost houses on, and failing to erect a protective bund around, rather than across, their land.

1.10 They state that no provision has been made in the design of the Scheme for granting access to their land, other than a restricted access road which is not capable of being upgraded to adoptable standard, and which would be necessary for the proposed housing development. Mr Michie confirmed that this was an accurate brief summary of their case at the Hearing.

### **The case for the Highland Council**

1.11 The council states that the only claim that the objectors make against the Scheme itself is that the Scheme would sterilise their site from future development. However, the council believes that the presence of the Scheme would not of itself prevent the site from being developed. The council advised that the objectors' land has been determined as unsuitable for development because of flood risk, the desirability of safeguarding a suitable corridor of land for construction of a future Caol Link Road, and in its view, the poor physical relationship of a housing scheme



to the pattern of existing development at Caol. The council confirmed that was an accurate brief summary of its case at the Hearing.

### **Points of common ground between the council and the objectors**

1.12 In their written response to the council's statement of case Mr and Mrs Michie listed six matters that are not disputed as follows:

1. The council has a duty to exercise its functions under the Flood Risk Management (Scotland) Act 2009 to reduce overall flood risk;
2. There is a need for flood protection measures at Caol and Lochyside, on account of historic flooding in the area;
3. The site owned by Mr and Mrs Michie is not currently allocated in the local development plan, nor does it benefit from planning permission for new development (housing or otherwise);
4. Any owner of land impacted by a Flood Protection Scheme has a right to compensation under s82(2) of the 2009 Act;
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, and
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.

1.13 Mr Michie and the council agreed these points of common ground at the Hearing.

### **Site ownership**

1.14 Mr Michie confirmed their land ownership at the Hearing. The former sewage works is overgrown with scrub vegetation and can be accessed via a track from Erracht Terrace which is adjacent to the new dwelling of Tigh A Chladaich. Mr Michie confirmed that they have a servitude right of access to their land from the north. Within the site there is a square fenced off enclosure which contains the remains of a small former Ministry of Defence listening post. This enclosed land is owned by Scottish Water. Mr Michie advised that the land was surplus to the requirements of Scottish Water. The ownership of this land was considered to be a constraint by the council. Mr Michie advised that he had been in contact with the company, as evidenced by the submitted correspondence. I see no reason to believe that the ownership of the land would be a significant development constraint for any development, although this was suggested in the council's Statement of Case.

## Points of dispute

1.15 In their response to the council's statement of case, Mr and Mrs Michie had set out a number of points of dispute. The Hearing proceeded through examination of these points and associated relevant evidence.

### *Potential sterilisation of Mr and Mrs Michie's land*

1.16 Plan reference number SK1 (document THC08) illustrates the section of flood protection works that would affect Mr and Mrs Michie's land, comprising a flood embankment. Mr and Mrs Michie consider that the flood embankment would be routed over the most readily developable area of their land in terms of access to services, and because of the higher ground level, where, in their opinion, less infill material would be necessary for their proposed housing site. However, the route of the embankment would be the shortest option for the council, and being on higher land, would ensure that the flood embankment could be relatively low in height and still be effective. At the Hearing the council advised that the route was selected to protect existing properties in Caol, passing through croft land and crossing Mr and Mrs Michie's land, as the shortest route.

1.17 The council proposes a 3 metre wide unsurfaced road that would allow access to the western side of Mr and Mrs Michie's land on the seaward/river side of the flood embankment. Mr and Mrs Michie consider that it would not be possible to upgrade this new route to an adopted highway to serve their development proposal. Upgrading would, in their view, be prohibitively expensive in view of the road length, because widening could involve partial demolition of the flood defence works, and improvement might not be permitted by the grantor of the right of servitude over the land. They consider that a smaller housing development might also prove not to be viable on the lower area of land that would be served by the new access.

1.18 At the Hearing the council advised that it could also be possible to create an access from the north that went over the flood embankment, which would be relatively low in height at that point, at a minimum of around 1 m above the existing ground level. This is indicated on the scheme layout plan drawing No. 2013s7413-JBAU-00-00-DR-C-1010 Rev 2 and related cross sections (6 of 10) drawing No. 2013s7413-JBAU-00-00-DR-C-2006 Rev 1. The council also confirmed at the Hearing that, although not a current guideline, in general practice up to 4 dwellings can in principle be served by a private access road.

1.19 Having considered all the evidence I find that, undoubtably, the proposed flood embankment would take up a significant part of the northern-most section of Mr and Mrs Michie's land and would affect their current access. However, the land would not be totally sterilised in respect of its accessibility because of the alternative access that is proposed by the council. There is also the possibility of re-creating

access from the north over the proposed flood embankment at some time in the future. In view of the existing overgrown condition of the land, and the possibility of an alternative access from the north, I see no reason why the council's proposed access and its specification would not be appropriate as part of the Scheme.

1.20 Clearly the portion of Mr and Mrs Michie's land to the south of the proposed flood embankment would still be prone to flooding. At this point the risk would primarily be from tidal flooding rather than from the River Lochy. Mr and Mrs Michie's alternative proposal is to re-locate the flood embankment so that it would run around the majority of his land. At the Hearing I asked whether the creation of a promontory of protected land would involve an embankment which would be more vulnerable to the effect of the sea and tidal flooding. The council advised that rock armour protection would be required at the western side of any proposed embankment around Mr and Mrs Michie's land to counteract the effects of wave action.

#### *The planning situation*

1.21 Mr and Mrs Michie's land was not included as a housing allocation in either the adopted Lochaber Local Plan or the former Highland Structure Plan or in the proposed Highland and Islands Local Development Plan. In terms of planning history, an outline application for 10 affordable houses on the northern part of the site was refused in 2009 (ref: 08/00285/OUTLO). The layout was designed to allow space for the proposed Caol Link Road to be accommodated. An appeal against the decision was dismissed by the council's Planning Review Body in 2010. The reasons for dismissal were as follows:

1. *Located on land reserved for the Caol Link Road therefore contrary to HSP G2 Lochaber Local Plan 4.2.8, 4.3.17 and 4.5.44 and draft WHILP;*
2. *Location and indicative layout considered to represent an isolated development incompatible with adjacent development pattern and therefore contrary to HSP G2, LLP 3.2.3, 3.2.6 and 4.5.3(f) and draft WHILP policy 1 and 18;*
3. *Proposed density considered overdevelopment of the site, incompatible with adjacent settlement pattern therefore contrary to HSP G2, LLP 3.2.3, 3.2.6 and 4.5.3(f) and draft WHILP policy 1 and 18, and*
4. *Site within identified coastal flood risk area and application is not supported by a flood risk assessment which prevents proper assessment of the risk to the development from flooding or the risk created by the development to the neighbouring property. Contrary to SPP7, HSP G2, LLP 3.5.10 and 4.5.42 and draft WHILP policy 8.*

1.22 Since that decision Mr and Mrs Michie have commissioned a flood risk assessment and have had a significant amount of correspondence with the council to try and resolve the reasons for refusal. They consider that the land has potential for up to 20 houses. No planning application has been submitted since 2010, but Mr and Mrs Michie made representations to the examination of the proposed West Highland and the Islands Local Development Plan, seeking inclusion of their land as a housing allocation. At the Hearing Mr Michie made the point that the development pattern in the area had changed since 2010 through nearby permissions and development and the land could not now be considered to be isolated.

1.23 Mr and Mrs Michie also sought deletion of the proposed Caol Link Road in the proposed West Highland and Islands Local Development Plan. Mr and Mrs Michie's position is that the Caol Link Road is unlikely to be constructed in the future because of the technical complexities and high costs associated with the road project. Mr and Mrs Michie also consider that the proposed flood embankment that would cross their land would be incompatible with construction of the Caol Link Road. At the Hearing the council explained that it did not see any incompatibility between the Scheme and the levels that would be required for a Link Road. Mr and Mrs Michie explained in their written submissions and at the Hearing why they considered that the Caol Link Road was unlikely to come to fruition, having been safeguarded in successive development plans for around 38 years. However, the examination report for the Highland and Islands Local Development Plan was published on 10 May 2019 and the outcome regarding Mr and Mrs Michie's representations for their land and the Link Road are dealt with at paragraphs 1.41-1.50 below.

#### *Scheme re-alignment issues*

1.24 Mr and Mrs Michie have sought a solution whereby the flood embankment would be re-routed around their land rather than crossing it. The council's view is that re-aligning the embankment around the objector's land would unfairly favour the objector's land over neighbouring land that is already affected. In addition, the council considers that re-aligning the embankment would incur additional construction costs for the council without providing any additional benefit in terms of increasing the number of properties to be protected. Realignment could involve an extra 200 m of flood protection or around 10% of the length of the whole scheme.

1.25 Mr and Mrs Michie have advised that *Section 56 of the Flood Risk Management (Scotland) Act 2009* indicates that the council can do anything that it considers will contribute to the implementation of measures in a local flood risk management plan, without reference to ensuring fairness between any landowners affected by flood protection works. Mr and Mrs Michie are the only objectors to the scheme, and they believe that the council is obliged to consider the terms of their objection under paragraph 5 of Schedule 2 to the Act. Paragraph 5 sets out the procedure regarding objections to a scheme. Mr and Mrs Michie advised in their written submissions that the council are not under a similar obligation to consider the views of landowners who have not objected.

1.26 Mr Michie advised at the Hearing that in 2016 the flood protection works had been re-aligned where crofting land was affected. However, the council confirmed that the crofting land was not potential development land and no changes had been made to include any proposed development land.

1.27 Mr Michie considered that the proposed incorporation of a cycle track and part of the Great Glen Way in the Scheme would add unduly to the overall cost. The council advised at the Hearing that funding for these aspects was being sought from Sustrans. However, it became apparent at the Hearing that Mr Michie was under the misapprehension that a footpath and cycleway would be routed on top of the proposed flood embankment where it crossed their land.

1.28 The proposed relevant embankment works are shown on drawing No. 2013s7413-JBAU-00-00-DR-C-1010 Rev 2, dated 17 October 2017. The drawings show operation locations OP12 and OP13. The descriptions of the proposed foreshore works are listed in paragraph 6.3.2 of the *Caol and Lochyside Flood Protection Scheme: Design Justification Final Report (THC7)* produced by JBA consulting in November 2017 (the JBA report). OP12 does mention a 3 m wide shared cycle path and footpath but that would only follow the foreshore and would terminate near the Erract Terrace/Glenmallie Road junction as shown on the Scheme Layout Drawing number 2013s7413-JBAU-00-00-DR-C-1001 Rev 2 dated 16 October 2017.

1.29 The description of the proposed works is included in paragraph 6.4.2 of the JBA report. Operation OP13 for the embankment crossing Mr and Mrs Michie's land states that "*The flood embankment will continue for a length of 210m or thereby. The outer and inner slopes shall be grassed and formed to a 1:2.5 side slope. The defence level shall be 5.06m Above Ordnance Datum and shall be constructed 1.0m above the existing ground level or thereby*". There is no mention of a shared cycle path and none shown on the relevant plan.

1.30 I find that re-aligning the flood embankment around Mr and Mrs Michie's land would increase the length of the proposed embankment, with increased height of the embankment to the south and with the need for some rock armour protection. The cost of the works would therefore increase, although Mr and Mrs Michie believe that these costs could be offset through reduced compensation from the council.

1.31 The Scheme has not been re-aligned to include any other potential development land in Caol and Lochyside and I am satisfied that there is no matter of precedent in respect of specifically protecting potential development land.

#### *Primary purpose of a flood protection scheme*

1.32 The Scottish Environment Protection Agency's *Planning Information Note 4: SEPA Position on development protected by a Flood Protection Scheme* advises

that: “*Flood protection schemes can reduce flood risk but cannot eliminate it entirely (Scottish Government Online Planning Advice on Flood Risk para 21). Their primary purpose is to protect existing development from flood risk rather than to facilitate new development*”. The Note also advises that “*the policy principle of avoidance should be promoted for any proposed development in areas protected by such schemes*” with reference to paragraph 255 of Scottish Planning Policy. Paragraph 255 concerns a precautionary approach and flood avoidance, including locating development away from functional flood plains, and flood reduction.

1.33 In terms of the proposed modification Mr and Mrs Michie submitted that they were “*not seeking the Flood Protection Scheme be installed in a manner that facilitates any future development of their site as far as possible*”. Their modification was 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 the site as far as possible*”. Despite this, I have no doubt that the modification to the flood protection scheme sought by Mr and Mrs Michie would ultimately be to facilitate the potential for new development and therefore in direct conflict with the Scottish Environment Protection Agency’s Note 4.

#### *Potential physical constraints of re-alignment*

1.34 Mr and Mrs Michie considered that the council’s reference to physical constraints for the modification was vague and unhelpful. It was apparent at the Hearing that the proposed flood embankment across Mr and Mrs Michie’s land would only be at a height of around 1m above ground level to give a crest level of 5.05 m AOD, as indicated on Cross Sections Drawing No.2013s7413-JBAU-00-00-DR-C-2006 Rev 1 dated 2 October 2017 (Section 15-15). The council had prepared a hypothetical scheme indicating a bund around Mr and Mrs Michie’s land including land raising ( Drawing No.SK2, THC09). An embankment around the site would have to be higher at its southern end at around 2-3 m in height because of the topography. Mr Michie envisaged that an embankment could exclude some of their estuarial marginal land, which could result in a lower embankment as shown on their indicative plan entitled “*Bund location options*”.

1.35 Mr and Mrs Michie’s land is a former sewage treatment site. No site investigation has been carried out, or contamination survey, although at the Hearing Mr Michie advised that contamination should not be a problem because of the time elapsed since the sewage works closed, and according to advice he had received from Scottish Water. The council advised that the land was considered as a brownfield site, but with no existing use. I find that there are no immediately apparent significant physical constraints that would prevent a modification to the line of the earthwork embankment to route it around Mr and Mrs Michie’s land, but further investigation would be necessary.

*Comparative costs of objectors' proposed modification.*

1.36 Mr and Mrs Michie's alternative proposal is that routeing the embankment around his site (with some marginal encroachment) may, in his view, be considered a cost-effective option when reduced compensation liability from the council is taken into account. At the Hearing, the council confirmed that the costs of the works in the Scheme affecting Mr and Mrs Michie's land would only be known when the proposed Scheme as a whole was put out to tender. The amount of compensation that may be involved was not a matter for my consideration in the Hearing, or in this report.

1.37 Mr and Mrs Michie had commissioned schedules of approximate quantities to be prepared and costed out to compare their proposals with the council's Scheme (R8). However, as mentioned at paragraph 1.27 above, these costs were based upon the inclusion of a shared cycleway and part of the Great Glen Way on the proposed flood embankment and its potential re-routing elsewhere on Mr and Mrs Michie's land, rather than being based upon the council's final drawings and proposals. It is apparent that the proposed height and width of the embankment that would cross Mr and Mrs Michie's land as part of the council's scheme, and hence the amount of material required, would probably have been over-estimated. This is because of the assumption that it would be supporting the shared cycleway/footpath and in the light of the council's confirmation that the embankment would be lower in height than Mr Michie anticipated. The costing also did not take into account a requirement for rock armour protection of Mr and Mrs Michie's proposed flood embankment.

*Iterations of the Flood Protection Scheme*

1.38 Mr and Mrs Michie had proposed four options for routeing the Scheme around, rather than across their land:

1. An embankment around the site as indicated by the council on drawing No.SK3 at Mr and Mrs Michie's estimated cost of around £253,834;
2. Construction of a sea wall around the site (not costed);
3. An embankment routed around the site, but allowing for encroachment on marginal, estuarial parts of the site at Mr and Mrs Michie's estimated cost of around £151,791, or
4. The council's scheme at Mr and Mrs Michie's projected cost of around £87,528.

1.39 Mr and Mrs Michie's preferred option from the above list was option 3. A figure of £450,000 as extra costs for re-routing the flood bank around Mr and Mrs Michie's land had also been referred to, but the council has explained that this was

an early broad pro-rata estimate for a flood scheme and therefore it cannot be relied upon. As mentioned above, unfortunately Mr and Mrs Michie's costings had been based upon the false premise that a shared cycleway/footpath would be an element of any option. Moreover, compensation figures have not been ascertained and the council's costs will not be finalised until the tender stage. Therefore, there is insufficient sound evidence on which to test Mr and Mrs Michie's submission that taking everything into account, their proposal would be considered a cost effective option when reduced compensation liability is taken into account. However, even if no significant additional cost for the council was proven, the proposed modification would still contravene the advice of the Scottish Environment Protection Agency that the primary purpose of flood protection schemes is to protect existing development from flood risk rather than to facilitate new development.

1.40 The Examination Report for the West Highland and Islands Local Development Plan was due to be issued shortly after the date of the Hearing. The council and Mr Michie agreed that they would provide further written representations once the examination report was received. The Hearing concluded with a visit to Mr and Mrs Michie's land at which I was accompanied by Mr Michie, his representative and a representative from the council.

### **The West Highland and Islands Local Development Plan**

1.41 The examination report was published on 10 May 2019. The main parties submitted further written representations on 17 May on the implications of that report. They had a further period of time to comment on each other's submissions but declined the offer. The examination report covered the future of the Caol Link Road proposal and Mr Michie's request that his land be allocated for development in the proposed plan. The examination reporter's findings and recommendations and the response from Mr and Mrs Michie and the council are set out below.

### **The proposed Caol Link Road**

1.42 The Examination reporter was not persuaded that modifying the proposed local development plan by deleting the safeguarded routes, including that for a Caol Link Road, would be of benefit to the future traffic planning process in Fort William. He believed that it would be a retrograde step for the sound planning for future road connections in the Fort William urban area and that no modification to the proposed local development plan was therefore necessary in that respect.

1.43 In their response, Mr and Mrs Michie emphasised that the key reason for retaining the Caol Link Road within the proposed local development plan focuses on procedure – a procedure that may well conclude that the proposed Link Road is not viable - rather than the merits of the proposal or its deliverability. For this reason, Mr and Mrs Michie submit that the outcome of the examination report does little, if anything, to increase the likelihood of the Caol Link Road actually being taken forward in the future.



1.44 Mr and Mrs Michie's position remains that the Caol Link Road is unlikely to be constructed in the future because of the technical complexities and high costs associated with the road project. They consider that this is supported by land having been safeguarded for the proposal in consecutive development plans for around 38 years without any further progress and, more recently, representations from the Scottish Government calling for removal of the safeguarded corridor for the Caol Link Road from the proposed local development plan. They believe that the continued safeguarding of land for the Caol Link Road should therefore not be treated as in any way reducing or undermining the need for Mr and Mrs Michie's proposed modification to the Flood Protection Scheme.

1.45 I accept that there is still uncertainty as to whether the Caol Link Road will, or will not, eventually be constructed. The facts are that the proposed local development plan covers a period for the next 20 years and that the examination report for the proposed local development plan retains the line of the potential link road. *Section 37(2) of the Town and Country Planning (Scotland Act) 1997* requires that in dealing with a planning application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. The inclusion of the Caol Link Road in the local development plan would therefore remain as a material consideration if an application for the development of Mr and Mrs Michie's land was submitted to the council at present.

### **Planning Status of Mr and Mrs Michie's land**

1.46 The examination reporter considered that Mr and Mrs Michie's representation showed a difference of opinion in professional views about the developability of their land. In addition to the question of the Caol Link Road corridor, another primary issue was the question of flooding, where opinions differed. The reporter recognised that, as the council had pointed out, it was not the aim of the Caol Flood Prevention Scheme to create development land and the council had confirmed that the site would be excluded from any such scheme.

1.47 The examination reporter noted that a planning application for Mr and Mrs Michie's site had twice been refused – by the council's officer and the council's local review body. Also, that the Scottish Environment Protection Agency had objected on flood risk grounds. Although there were claims that the site would add to the housing supply at a time when increasing houses are necessary in the light of industrial expansion, the reporter did not consider the potential approximately 10 houses to present a significant contribution when no firm evidence had been put forward of such need. The reporter noted that other houses appear to have been granted permission in the area, but he had no details of these and in any case, he advised that each proposal must be judged on its own merits. The reporter found no justification for modifying the plan to include Mr and Mrs Michie's land as a development allocation.

1.48 In responding to the council's further written submissions Mr and Mrs Michie raised an issue from the council's statement of case which stated that: "*The presence of the Scheme of 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*".

1.49 Mr and Mrs Michie disagree with this analysis and point out that it is inconsistent with the council's position as stated at the Hearing on 28 March with reference to document THC15: the Scottish Environment Protection Agency *Planning Information Note 4: SEPA Position on development protected by a Flood Protection Scheme*. This indicates that the most vulnerable land uses, including housing development, would not be considered acceptable behind a flood protection scheme unless it was protected by a planned formal flood protection scheme (one promoted by the Council in terms of the 2009 Act). Mr and Mrs Michie consider that it follows that they would not be able to develop their land independently if the flood protection scheme is confirmed as proposed. They add that this would be the case notwithstanding the position regarding the Caol Link Road.

1.50 They believe that the impact of the flood protection scheme, if confirmed, is one of actual sterilisation; in contrast the impact of the Caol Link Road is one of legal sterilisation while the land is safeguarded, an impact that would fly off if the Caol Link Road is dropped as a transport proposal in the future. Accordingly, Mr and Mrs Michie consider that it is the impact of the Flood Protection Scheme that is detrimental to the extent that their land will be, in effect, sterilised if it is confirmed without any modification.

1.51 However, *Planning Information Note 4: SEPA Position on development protected by a Flood Protection Scheme* makes it clear that the primary purpose of flood protection schemes is to protect existing development from flood risk rather than to facilitate new development. Modifying the flood protection scheme would be contrary to that principle.

## **CONCLUSIONS AND RECOMMENDATION**

### **Conclusions**

2.1 I find that the Caol and Lochside Flood Protection Scheme is needed to protect around 296 properties are at risk from a 1 in 200 year flood event. Mr and Mrs Michie made it clear in their submissions that they did not object to the principle of the flood protection scheme. Their objection focussed upon the effect of part of the Scheme on their land and a modification they have put forward to protect that land from flooding and to allow its future development for housing.

2.2 I consider that the council has provided a reasonable alternative access to Mr and Mrs Michie's land and that there would still be potential to provide access from

the north to the land over what will be only a low flood embankment. The land would not be protected by a planned flood protection scheme. However, *Planning Information Note 4: SEPA Position on development protected by a Flood Protection Scheme* makes it clear that the primary purpose of flood protection schemes is to protect existing development from flood risk rather than to facilitate new development.

2.3 Mr and Mrs Michie consider that the scheme could be modified as a cost-effective option when reduced compensation liability from the council is taken into account. However, accurate comparative costings are not available. I find that, even if no significant additional cost was proven, modifying the scheme to protect Mr and Mrs Michie's land from flooding would still contravene the advice of the Scottish Environment Protection Agency that the primary purpose of flood protection schemes is to protect existing development from flood risk rather than to facilitate new development.

2.4 Moreover, the northern part of Mr and Mrs Michie's land has been the subject of refusal of planning permission by the council and on appeal to its local review body. The land is potentially affected by the Caol Link Road scheme and is not allocated for residential development in the adopted local development plan or recommended for allocation as a development site in the emerging local development plan.

2.5 I consider that Mr and Mrs Michie have had full opportunity to make their representations regarding the Scheme and that the council has been reasonable in responding to their representations.

2.6 I have given careful consideration to Mr and Mrs Michie's objection and suggested modification to the flood protection scheme. However, having regard to all the evidence before me, including the written submissions and documentation, from the Hearing and from my site inspections, I conclude that the scheme should not be modified.

### **Recommendation**

2.7 I recommend that the Caol and Lochyside Flood Protection Scheme be confirmed without modification.

**RECOMMENDED CONDITIONS  
CAOL & LOCHYSIDE FLOOD PROTECTION SCHEME**

1.	No development, ground works or tree felling shall commence until pre-construction surveys for otter and bats have been undertaken and a written report of the findings submitted to and approved in writing by the Planning Authority. The Report of Survey shall include details of any recommended mitigation measures and the development shall thereafter be undertaken in accordance with any approved mitigation measures, including timing restrictions.
Reason:	<i>To ensure that the site and its environs are re-surveyed prior to the commencement of development to ensure there is no adverse impact on protected species or habitat; in accordance with Policies 28 and 58 of the Highland wide Local Development Plan.</i>
2.	At least three months prior to the proposed commencement of development a full site-specific Construction Environmental Management Plan shall be submitted to and approved in writing by the Planning Authority in consultation with SEPA. All agreed measures thereafter shall be implemented in full. The Plan shall incorporate detailed pollution avoidance and mitigation measures for all construction elements potentially capable of giving rise to pollution/environmental damage.
Reason:	<i>To protect the local environment and safeguard residential amenity.</i>
3.	No development shall commence until a Construction Method Statement has been submitted to and approved in writing by the Planning Authority. The Construction Method Statement shall provide details of how the site will be developed/phased and provide details of the location of work compounds and storage areas. Thereafter the development shall be undertaken in accordance with the approved Construction Method Statement.
Reason:	<i>In the interests of road and pedestrian safety and visual and residential amenity.</i>
4.	No development shall commence until a construction phase Traffic Management Plan has been submitted to and approved in writing by the Planning Authority in consultation with the Council's Transport Planning Team and Transport Scotland. Such details shall include a routing plan for construction vehicles, predicted construction vehicle trip generation and distribution, and provision for parking for construction workers. Thereafter the development shall be undertaken in accordance with the approved Traffic Management Plan.
Reason:	<i>In the interests of road and pedestrian safety.</i>
5.	No development, including site clearance, shall commence until a Tree Protection Plan, in accordance with BS5837:2012 (Trees in relation to design, demolition and construction) has been submitted to and approved in writing by the Planning Authority.
Reason:	<i>To ensure the protection of retained trees during construction.</i>

6.	No development shall commence until a detailed Tree Planting Plan, including a planting schedule and maintenance programme has been submitted to and approved in writing by the Planning Authority. Thereafter the approved Tree Planting Plan shall be implemented in full in accordance with the planting schedule.
Reason:	<i>In the interests of landscape and community amenity</i>
7.	No development shall commence until a scheme for hard and soft landscaping works has been submitted to and approved in writing by the Planning Authority. Such details shall include: <ul style="list-style-type: none"> <li>(a) Path works, including material and construction;</li> <li>(b) Fencing and walling, including sample panels of stone or concrete finishes where appropriate;</li> <li>(c) Identification of all existing vegetation to be removed/disturbed;</li> <li>(d) Reinstatement, planting and seeding works, including a schedule of plant species, sizes and planting density;</li> <li>(e) Reinstatement and landscaping schedule for implementation;</li> <li>(f) Proposals for future maintenance of the scheme.</li> </ul> Thereafter the agreed landscaping scheme shall be fully implemented in accordance with the approved reinstatement/landscaping schedule.
Reason:	<i>In the interests of landscape and community interest.</i>

## FOOTNOTE TO APPLICANT

### Initiation and Completion Notices

The Town and Country Planning (Scotland) Act 1997 (as amended) requires all developers to submit notices to the Planning Authority prior to, and upon completion of, development. These are in addition to any other similar requirements (such as Building Warrant completion notices) and failure to comply represents a breach of planning control and may result in formal enforcement action.

1. The developer must submit a Notice of Initiation of Development in accordance with Section 27A of the Act to the Planning Authority prior to work commencing on site.
2. On completion of the development, the developer must submit a Notice of Completion in accordance with Section 27B of the Act to the Planning Authority.

Copies of the notices referred to are attached to this decision notice for your convenience.

### Flood Risk

It is important to note that the granting of planning permission does not imply there is an unconditional absence of flood risk relating to (or emanating from) the application site. As per Scottish Planning Policy (paragraph 259), planning permission does not remove the liability position of developers or owners in relation to flood risk.

### Scottish Water

You are advised that connection to Scottish Water infrastructure is dependent on sufficient spare capacity at the time of the application for connection to Scottish Water. The granting of planning permission does not guarantee a connection. Any enquiries with regards to

connection to Scottish Water's infrastructure should be directed to Scottish Water on 0845 601 8855.

### **Local Roads Authority Consent**

In addition to planning permission, you may require one or more separate consents (such as road construction consent, dropped kerb consent, a road openings permit, occupation of the road permit etc.) from the Area Roads Team prior to work commencing. These consents may require additional work and/or introduce additional specifications and you are therefore advised to contact your local Area Roads office for further guidance at the earliest opportunity.

Failure to comply with access, parking and drainage infrastructure requirements may endanger road users, affect the safety and free-flow of traffic and is likely to result in enforcement action being taken against you under both the Town and Country Planning (Scotland) Act 1997 and the Roads (Scotland) Act 1984.

### **Mud & Debris on Road**

Please note that it is an offence under Section 95 of the Roads (Scotland) Act 1984 to allow mud or any other material to be deposited, and thereafter remain, on a public road from any vehicle or development site. You must, therefore, put in place a strategy for dealing with any material deposited on the public road network and maintain this until development is complete.

### **Construction Hours and Noise-Generating Activities**

You are advised that construction work associated with the approved development (incl. the loading/unloading of delivery vehicles, plant or other machinery), for which noise is audible at the boundary of the application site, should not normally take place outwith the hours of 08:00 and 19:00 Monday to Friday, 08:00 and 13:00 on Saturdays or at any time on a Sunday or Bank Holiday in Scotland, as prescribed in Schedule 1 of the Banking and Financial Dealings Act 1971 (as amended).

Work falling outwith these hours which gives rise to amenity concerns, or noise at any time which exceeds acceptable levels, may result in the service of a notice under Section 60 of the Control of Pollution Act 1974 (as amended). Breaching a Section 60 notice constitutes an offence and is likely to result in court action.

If you wish formal consent to work at specific times or on specific days, you may apply to the Council's Environmental Health Officer under Section 61 of the 1974 Act. Any such application should be submitted after you have obtained your Building Warrant, if required, and will be considered on its merits. Any decision taken will reflect the nature of the development, the site's location and the proximity of noise sensitive premises. Please contact [env.health@highland.gov.uk](mailto:env.health@highland.gov.uk) for more information.

### **Protected Species – Halting of Work**

You are advised that work on site must stop immediately, and Scottish Natural Heritage must be contacted, if evidence of any protected species or nesting/breeding sites, not previously detected during the course of the application and provided for in this permission, are found on site. For the avoidance of doubt, it is an offence to deliberately or recklessly kill, injure or disturb protected species or to damage or destroy the breeding site of a protected species. These sites are protected even if the animal is not there at the time of discovery. Further information regarding protected species and developer responsibilities is available from SNH: [www.snh.gov.uk/protecting-scotlands-nature/protected-species](http://www.snh.gov.uk/protecting-scotlands-nature/protected-species)