



Mr Steven Herriott
Head of Roads and Infrastructure
Dumfries and Galloway Council
Municipal Chamber
Buccleuch Street
Dumfries
DG1 2AB

Your ref: SP/78 AMS/MS
Our ref: FPS-170-1
17 March 2020

Dear Mr Herriott

THE WHITESANDS PROJECT (FLOOD PROTECTION SCHEME AND PUBLIC REALM IMPROVEMENTS) 2017

FLOOD RISK MANAGEMENT (SCOTLAND) ACT 2009

FLOOD RISK MANAGEMENT (FLOOD PROTECTION SCHEMES, POTENTIALLY VULNERABLE AREAS AND LOCAL PLAN DISTRICTS) (SCOTLAND) REGULATIONS 2010

I refer to the Whitesands Project (Flood Protection Scheme and Public Realm Improvements) 2017 (“the Scheme”) (as described in Annex 1) promoted by Dumfries and Galloway Council.

This letter contains the Scottish Ministers’ decision on whether to confirm the Scheme and grant deemed planning permission.

Preliminary Decision

On 27 June 2017, a full meeting of Dumfries and Galloway Council made a preliminary decision to confirm the Scheme without modifications.

On 4 August 2017, Dumfries and Galloway Council gave notice of its decision to Scottish Ministers under paragraph 5(5) of schedule 2 of the Flood Risk Management (Scotland) Act 2009 (“the Act”). On 28 September 2017 the Scottish Ministers advised Dumfries and Galloway Council that they would consider the Scheme under paragraph 7 of schedule 2 of the Act.



Public Local Inquiry

On 29 March 2018, the Scottish Ministers appointed Reporters to conduct an independent Public Local Inquiry (PLI) into the Scheme as required by paragraph 7(2) of schedule 2 of the Act because objections were made to the Scheme which were not withdrawn.

Further details on the PLI, including session dates and documentation may be found in Annex 2.

The Report to the Scottish Ministers

The Reporters' report and recommendation to Scottish Ministers was submitted on 13 September 2019.

The Reporters' Overall Conclusions and Recommendation

The Council has a statutory duty to reduce flood risk. The need for a flood protection scheme at Whitesands is recognised in SEPA's Flood Risk Management Strategies, and is identified within the Solway Flood Risk Management Plan.

The Scheme would significantly reduce flood risk to a large number of residential and business properties. The Reporters have had regard to social, environmental and economic impacts and accept that there would be some adverse impacts but find that the impacts of the Scheme are acceptable.

The Scheme is a technically complex project involving difficult trade-offs. Overall, taking account of technical, budgetary and other constraints, the Reporters consider that the Scheme represents a justifiable, technically feasible and cost effective solution to the risk of regular and potentially devastating effects of flooding at Whitesands while minimising the impact on the landscape and environment.

The Reporters have taken all the matters raised by the objectors into account, but none provide sufficient grounds for modifying or refusing to confirm the Scheme.

The Reporters recommend that Scottish Ministers confirm the Scheme subject to five considerations, which are set out below.

The Scottish Ministers' Considerations

The Scottish Ministers have reviewed the Reporters' conclusions and recommendations in detail including the five considerations set out in paragraph 9.57 of the report.

1. *Seeking legal advice to satisfy Ministers that the council's notification arrangements complied with the Flood Risk Management Act and associated regulations.*

The Scottish Ministers agree with the Reporters' conclusion that it was reasonable for the Council to make decisions on who to notify to fulfil the requirements of paragraph 1(d)(ii) of schedule 2 of the Act in reliance on their hydrological modelling, and accordingly Scottish Ministers are satisfied that the Council complied with the notification requirements.

2. *Being satisfied that they have addressed the matter of Appropriate Assessment under the 'Habitats Regulations' and, if so, in the formal decision, adopting our findings that the proposed scheme would not have a likely significant effect on the Solway Firth Special Area of Conservation (SAC) either alone or in combination with other projects.*

The Scottish Ministers adopt the Reporters' conclusion that the proposed Scheme would not have a likely significant effect on the Solway Firth SAC either alone or in combination with other projects and that an Appropriate Assessment under the Habitats Regulations is not required.

3. *Reviewing the council's cost benefit analysis to satisfy Ministers that the Scheme represents value for the use of public money.*

The Scottish Ministers consider that value for the use of public money is an important consideration when taking forward flood protection schemes. The Scottish Ministers have reviewed the Report and the more detailed evidence provided to the PLI and are satisfied that the economic appraisal to determine the cost benefit ratio was carried out in accordance with best practice. They also note it has been reviewed by an expert as part of the PLI. The Scottish Ministers acknowledge that scheme costs have not been independently verified as part of that review, but note that the costs have been calculated by an appropriately qualified quantity surveyor, that risk workshops have been held, and that a contingency allowance based on these risks has been included. The Scottish Ministers see no reason to doubt or challenge the expertise of the professionals contracted by the Council to undertake the economic appraisal and are therefore satisfied with its conclusions.

4. *Being satisfied on the basis of our findings or otherwise, that it would not be competent for the proposed changes to be treated as modifications by reason of them fundamentally altering the scheme.*

The Scottish Ministers accept the Reporters' findings that the modifications proposed would be fundamentally different in terms of the nature of the Scheme, its geographical location, spatial extent and potential impacts. They are satisfied that it would therefore not be competent for those changes to be treated as modifications.

5. *Including the planning conditions set out in Appendix 3 in the direction confirming the scheme.*

The Scottish Ministers accept the Reporter's recommendation that the planning permission should be deemed to be granted subject to the planning conditions set out in Annex 3.

The Scottish Ministers' Decision

Confirmation of Flood Protection Scheme

Having duly considered the Reporters' conclusions and recommendations and taken into account the environmental information referred to in regulation 10(3) of the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts (Scotland) Regulations 2010, the Scottish Ministers have decided under paragraph 7(4) of schedule 2 of the Act to **confirm the Scheme without modification**.

The Scottish Ministers agree with the Reporters' conclusions and adopt them for the purpose of their own decision. In relation to the five issues which the Reporters recommended Scottish Ministers give further consideration to, as set out in paragraph 9.57 of the report, Scottish Ministers' conclusions are set out above.

Planning Permission

Subject to the conditions set out Annex 3, Scottish Ministers direct under section 57(2B) of the Town and Country Planning (Scotland) Act 1997 that **planning permission be deemed to be granted** in respect of the development as set out in the Notice of the Scheme published by Dumfries and Galloway Council on 1 February 2017 (the “Notice”), and summarised in Annex 1.

Under section 58(1) of the Town and Country Planning (Scotland) Act 1997, this deemed planning permission will lapse if the development described in the Notice has not begun within a period of 3 years from the date of this letter.

Notice of final decision

Dumfries and Galloway Council must give notice of this final decision by the Scottish Ministers in accordance with paragraph 10(2) of schedule 2 of the Act.

Right of Appeal

This decision of the Scottish Ministers to confirm the Scheme may be appealed under paragraph 12 of schedule 2 of the Act by any person affected by the confirmed Scheme within a period of 6 weeks beginning with the day a notice is published under paragraph 10(2) (d) of schedule 2 of the Act by Dumfries and Galloway Council in a newspaper circulating in its area.

Yours sincerely

Keith Connal
Deputy Director, Natural Resources

Annex 1 – The development

The Whitesands Project (Flood Protection Scheme and Public Realm Improvements) 2017 will provide protection from flooding for up to and including the 1 in 75 year return period at Whitesands, Dumfries. The scheme will provide protection for around 107 non-residential and 59 residential properties over a design lifespan of 100 years.

The key features of the scheme are:

- A raised walkway set on top of a grassed bund,
- A series of flood walls topped with glass panels
- 460 metres of temporary demountable metal barriers designed to fix to the glass panels along Whitesands and other specific locations.
- 23 flood gates or flip up flood barriers.
- Alterations to the sewer system to mitigate flooding from the sewer and drainage network.
- Removal of the vegetated berm at the easternmost arch of Devorgilla Bridge.

The full details of the Scheme as set out in the Notice of the Scheme published on 1 February 2017 by Dumfries and Galloway Council may be found here:

<http://www.dpea.scotland.gov.uk/Document.aspx?id=506727>

Annex 2 – Public Local Inquiry

A pre-examination meeting on 1 August 2018 agreed that inquiry sessions would address background and context, technical matters, visual and heritage impacts, impact on the town centre, tourism and parking, and community engagement. In addition it was agreed that there would be hearing sessions on background and context and on other matters and conditions. Further written submissions were invited until 7 September 2018.

Inquiry sessions involving 26 witnesses were held between 6 - 9, 13, 14, 20 and 21 November 2018 and 4 and 5 December 2018. Hearing sessions took place on 6 November and 7 December 2018. Closing submissions were exchanged in writing, with the final closing submission (on behalf of the council) lodged on 28 January 2019.

Reporters conducted unaccompanied inspections of the site, its surroundings and other locations referred to in evidence on 21 and 22 July 2018, 6 October 2018, 13 April 2019 and 22 June 2019. Accompanied site inspections took place on 4, 5 and 6 December 2018.

All of the documents related to the Inquiry can be found here:

<http://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=118470&T=18>

Annex 3 - Planning Conditions

Phasing

1. There shall be no Commencement of Development on any phase of the scheme until a schedule setting out the phases of construction of the scheme have been submitted to and approved in writing by the Council. The phasing schedule shall include that alternative car parking provision is in place prior to the commencement of works within any phase which will result in the permanent loss of any car parking spaces. The approved schedule shall be implemented as approved.

Reason: To ensure that the works are programmed to minimise disruption to access, parking and servicing during construction of the scheme and to secure the provision of replacement parking.

Design approval

2. There shall be no Commencement of Development on any phase of the scheme until the following details in relation to that phase have been submitted to and approved in writing by the council.

- (a) The layout;
- (b) Scale;
- (c) Proposed finished ground levels;
- (d) External appearance
- (e) Hard surfacing materials;
- (f) Vehicular and pedestrian access, parking and circulation areas;
- (g) Minor structures, such as furniture, refuse or other storage units, signs and lighting;
- (h) Proposed and existing functional services above and below, ground, including drainage, power and communications cables and pipelines, manholes and supports; and
- (i) Implementation timetables for all landscaping works;

The details submitted must be in accordance with the limits of deviation set out in the Flood Protection Order. The works shall thereafter be carried out in accordance with the approved details and implementation timetables.

Reason: To ensure that the environmental impacts of these aspects of the scheme conform to the impacts assessed in the environmental statement and in the interests of the visual amenity of the area and in the interests of road safety.

Landscaping

3. There shall be no Commencement of Development on any phase of the scheme until for that phase a written Landscape Management Plan (including tree retention) and associated work programme has been submitted to and approved in writing by the council in consultation with Scottish Natural Heritage (SNH) and Historic Environment Scotland (HES). All landscape works shall be carried out in accordance with the approved landscape management plans and work programme and in accordance with the relevant recommendations of appropriate British Standards. Any tree or shrub planted as part of an approved landscape management plan that, within a period of five years after planting, is removed by the undertaker, dies or becomes, in the opinion of the relevant planning authority, seriously damaged or diseased must be replaced in the first available planting season with a specimen of the same species and size as that originally planted.

Reason: In the interests of visual amenity and effective landscape management and to ensure that adequate measures are put in place to protect the landscaping and planting in the longer term.

European Protected Species and ecological management

4. There shall be no Commencement of Development on any phase of the scheme until for that phase:
- (a) Final pre-construction survey work has been carried out to establish whether any European Protected Species are present on any of the areas affected, or likely to be affected, by that phase of the works or in any of the trees to be lopped or felled as part of that phase of the works;
 - (b) A written Ecological Management Plan, reflecting the survey results and ecological mitigation and enhancement measures included in the ES including an implementation schedule, has been submitted to and approved in writing by the council in consultation with SNH. The ecological management plan shall thereafter be carried out in accordance with the approved plan and implementation schedule; and
 - (c) Where a European Protected Species is shown to be present, works must not begin until a Species Protection Plan, including mitigation measures, has been submitted to and approved in writing by the council in consultation with SNH or a European Protected Species licence has been granted by SNH. Any scheme of protection and mitigation measures shall include a sensitive lighting regime to minimise the risk of disturbance to foraging bats. Thereafter works must be carried out in accordance with the approved scheme of mitigation. In this condition, “European Protected Species” has the same meaning as in regulation 38 of the Conservation (Natural Habitats & c.) Regulations 1994.

Reason: to ensure that; species protected by law are not harmed as a result of the Construction of the scheme.

Ecological Clerk of Works

5. There shall be no Commencement of Development on any phase of the scheme unless the council has appointed an independent Ecological Clerk of Works (ECoW) in consultation with SNH and SEPA. The terms of appointment shall:
- (a) Impose a duty to monitor compliance with the ecological and hydrological commitments provided in the ES and the ecological requirements of conditions 4, 6 and 9;
 - (b) Require the ECoW to report any incidences of non-compliance with the ECoW works at the earliest practical opportunity;
 - (c) Require the ECoW to submit a monthly report to the Council summarising works undertaken on site;
 - (d) Give the ECoW the power to stop any activities being undertaken within the Flood Protection Order land if a breach or potential breach of environmental legislation occurs to allow for a briefing of the concern to the nominated construction project manager; and
 - (e) Require the ECoW to report to the Council any incidences of non-compliance with the ECoW Works at the earliest practical opportunity.

The ECoW shall be appointed from Commencement of Development, throughout any period of construction activity and during any period of post construction restoration works approved

where the works carried out during that period are likely to result in significant adverse effects on protected species or habitats.

Reason: To enable the development to be suitably monitored to ensure compliance with the deemed permission issued and to secure delivery of the environmental mitigation and management measures associated with the development.

Construction and Environment Management Plan

6. There shall be no Commencement of Development on any phase of the scheme until a Construction and Environment Management Plan and a Construction Method Statement have been submitted to and approved in writing by the council in consultation with the Scottish Environment Protection Agency (SEPA), HES and SNH. These shall include:

- (a) Details of working hours;
- (b) Measures to reduce the impact of air and soil pollution and sediment run-off; and
- (c) An implementation schedule.

The Construction and Environment Management Plan and Construction Method Statement shall thereafter be implemented in accordance with the approved details and implementation schedules unless otherwise approved in advance in writing by the council in consultation with SNH and SEPA.

Reason: To protect the environment from the construction and operation of the scheme and secure final detailed information on the delivery of on-site mitigation works.

Construction Traffic Management Plan

7. There shall be no Commencement of Development on any phase of the scheme until for that phase written details of a Construction Traffic Management Plan has been submitted to and approved in writing by the council in consultation with SEPA. The construction traffic management plan shall contain details of:

- (a) Public road closures and restrictions;
- (b) Proposed vehicle routeing plans;
- (c) Any abnormal indivisible loads that may be delivered by road, or confirmation that no abnormal indivisible loads will be required for construction of the authorised development;
- (d) Condition surveys;
- (e) Any highway works proposed;
- (f) Wheel washing measures to ensure water and debris are prevented from discharging from the site onto the public road; and
- (g) Construction personnel travel.
- (h) An implementation schedule.

The Construction Traffic Management Plan shall thereafter be implemented in accordance with the approved details and implementation schedule unless otherwise approved in advance in writing by the council.

Reason: To ensure that the works are programmed to minimise disruption to access, parking and servicing during construction of the scheme, in the interests of road safety and to ensure that any abnormal loads are managed in a safe manner.

Archaeology

8. There shall be no Commencement of Development on any phase of the scheme until a scheme of archaeological investigation, including an implementation timetable, has been submitted to and approved in writing by the council in consultation with HES. Thereafter works must be carried out in accordance with the approved scheme of archaeological investigation and implementation timetable. Access shall be afforded at all reasonable times to any archaeologist nominated by the council to allow work to be observed in progress and the recording of any items of archaeological interest.

Reason: To ensure the protection or recording of archaeological features impacted by the scheme.

Implementation of sediment removal under Devorgilla Bridge

9. There shall be no Commencement of Development on any phase of the scheme until written details and an implementation timetable for the sediment removal at Devorgilla Bridge have been submitted to and approved in writing by the council in consultation with SEPA, HES and SNH. The removal of sediment at Devorgilla Bridge shall thereafter be completed in accordance with the approved details and implementation timetable.

Reason: To secure the delivery of the mitigation measures as set out within the Hydraulic Modelling Report (Mouchel 2017) and to minimise environmental impacts arising from the sediment removal.