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## **HAWICK FLOOD PROTECTION SCHEME REQUEST FOR DELEGATED AUTHORITY**

**Report by Service Director Assets & Infrastructure**  
**SCOTTISH BORDERS COUNCIL**

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**29 March 2018**

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### **1 PURPOSE AND SUMMARY**

- 1.1 **This report requests that the Council provides the Service Director Assets & Infrastructure the delegated authority to commence the land purchase negotiations and use the appropriate Compulsory Purchase Order powers where required; and provide the Chief Legal Officer the delegated authority to use the powers under the Flood Risk Management (Scotland) Act 2009 to allow entry to land for the construction of the Scheme.**
- 1.2 The reports that were submitted to Scottish Borders Council in 2017 did not provide the appropriate officers the delegated authority to use legislative powers to take entry to land or purchase land. This report requests this delegated permission.
- 1.3 Following a six week re-publication of the Scheme, following a Final decision to Confirm the Scheme by Scottish Borders Council on 21 December, there were no appeals registered with the Sheriff Court in Selkirk which means that the Scheme is now 'Operative' under the Flood Risk Management (Scotland) Act 2009. This is a key milestone in achieving the 80% Scottish Government funding for the Main Works.
- 1.4 The detailed design and advanced works are commencing well and the Project Team continue to proactively engage with the public in relation to both elements.
- 1.5 Now that Hawick Flood Protection Scheme 2017 is 'Operative' the project team will support the Planning Team to submit the package of information to Scottish Ministers to consider 'Deemed Planning' in accordance with Regulation 14 of Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010.

### **2 RECOMMENDATIONS**

#### **2.1 It is recommended that the Council:**

- (a) **provides the Service Director Assets & Infrastructure the delegated authority to commence the land purchase negotiations and use the appropriate Compulsory Purchase Order powers where required.**

- (b) provides the Chief Legal Officer the delegated authority to use the powers under the Flood Risk Management (Scotland) Act 2009 to allow entry to land for the construction of the Scheme.**
- (c) provides the Chief Legal Officer the delegated authority to use the powers under the Flood Risk Management (Scotland) Act 2009, if required, to request a Sheriff or justice of the peace to authorise entry to land if entry has been obstructed.**

### **3 CURRENT APPROVAL BY COUNCIL**

3.1 On 21 December 2017 Scottish Borders Council made a Final Decision to 'Confirm' the Hawick Flood Protection Scheme 2017. As part of that decision the Council also agreed the following recommendations:

- c) Provides the Scheme's Project Executive with the authority to: continue the Scheme's Detailed Design; commence the Advanced Works; and undertake the procurement of a Main Works Contractor; and**
- d) Authorises the Scheme's Project Executive, in consultation with the Chief Legal Officer to manage any appeal against the Scheme in the event that such an appeal is made to the Sheriff Court; and**
- e) Provides the Scheme's Project Executive with the authority to request that the Scottish Ministers direct that planning permission is deemed to be granted in accordance with Regulation 14 of the FRM's 2010 Regulations after the commencement of the Scheme.**

### **4 CURRENT STATUS OF PROJECT**

- 4.1 As detailed in the report of 21 December 2017 the Scheme was re-published (as per Paragraph 10 (2) of Schedule 2 of the Flood Risk Management (Scotland) Act 2009) on 19 January 2018. The notifications were undertaken as per the original publication of the Scheme on 28 April 2017, with circa 4000 letters to owners/occupiers/tenants of land affected; street notices and publications in the local press including the Edinburgh Gazette.
- 4.2 There were no actions raised with the Sheriff Court in Selkirk by the deadline of 2 March 2018, therefore the Scheme is now 'Operative' and has a legal standing in relation to the Flood Risk Management (Scotland) Act 2009, the Town & Country Planning (Scotland) Act 2006 and other associated Acts and it has obtained another Milestone in achieving 80% Scottish Government funding towards the Main Works Contract.
- 4.3 The detailed design and the advanced works are both progressing at pace and continue to require the communities involvement. The works to remove utilities from the footprint of the works will commence in April/May 2018 and continue for at least 12 months, with the likelihood of an overlap with the main works.
- 4.4 The detailed design will be complete by Summer 2018 to allow the commencement of the Main Works Contractor procurement to commence in Autumn 2018.
- 4.5 The Project Team are working with Sustrans at the moment to identify significant improvement opportunities to create a cycle route through the town to connect residential areas with business and recreational areas and promote sustainable transport. This potential scheme could attract significant funding from Sustrans if approved.

### **5 LAND PURCHASE**

5.1 The Scheme will be constructed over a period of approx. 36 months

and has a design life of 100 years. The Scheme's defences will change the landscape permanently within the town and it will be difficult to envisage a situation where the new flood defences are no longer required in 100 years. The Scheme must therefore consider land ownership for both the construction period (temporary) and thereafter (permanent for maintenance / repair / replacement).

5.2 The project team have identified four difference approaches through which the Scheme can gain access to land under the Flood Risk Management (Scotland) Act 2009:

- (1) Compulsory Land Purchase;
- (2) Negotiated Land Purchase;
- (3) Temporary Land Take; and
- (4) Permanent Land Take.

Two further approaches to land take have been identified and are proposed by the Scheme, however it is noted that in many ways these are simply bespoke tailoring of the four main approaches above:

- (5) Disposal of Land; and
- (6) Individual Agreements.

5.3 Compulsory Land Purchase:

The Flood Risk Management (Scotland) Act 2009 does not empower the Council to obtain land through compulsory purchase; it merely makes provision for empowering the Council to take entry to land. Compulsory Purchase of land not involving a new road or railway would require to be advanced under the provisions of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947.

5.4 Negotiated Land Purchase:

This approach advocates that the Scheme will purchase outright, through a negotiated agreement with the land owner, an area of land for the purposes of delivering the Scheme. In each specific instance where this is proposed a unique business case will be developed. It is not intended to purchase land simply to own the land but rather to purchase it where the advantages of ownership greatly outnumber the disadvantages. It is further noted that in each case the Scheme will consider if it can dispose of some or all of the land once the construction stage is complete.

5.5 Temporary Land Take:

In most instances the Scheme will not purchase land. Instead it will require temporary use of areas of land to undertake the construction work. This is defined as temporary land take. The Council is empowered by Section 79 (2) (e) of the Flood Risk Management (Scotland) Act 2009 to take entry to the land. The boundary of the temporary land take is generally within the Limit of Land Affected, but in some cases it will be necessary to take access to land out with the Limit of Land Affected (e.g. some of the proposed site compounds). Powers to gain access to this land will require to be carried out separately under agreement with the land owner. The duration of the use of the land will be defined by the construction plans and the construction programme however it is recognised that in some

instances the duration may be a season longer than the works e.g. where agricultural production is lost for a season / year. In these situations the land will remain in the ownership of the existing owner and the Scheme will hand back the land at the end of the period of use. During the period of usage it is assumed that no access will be available to the existing owner. As most of the land required by the Scheme is to be obtained through this approach it is not considered possible to provide the full detail of the locations where this is proposed in this report as in most cases the individual owners have not been contacted by the Project Team yet in relation to this topic.

5.6 Permanent Land Take:

This approach is similar to the temporary land take approach as defined in section 5.5. The difference here is that the areas in question are being considered from the end of the construction period and indefinitely thereafter. In most instances, these areas will be permanently removed from their current usage due to the presence of the new flood protection defences e.g. the area taken up by the new embankments/walls. The ownership of the land will remain with the existing owner. In almost every case the permanent area will be smaller than the comparable temporary area at that location, and will in every case be contained within the Limit of Land Affected. As most of the land required by the Scheme is to be obtained through this approach it is not considered possible to provide the full detail of the locations where this is proposed in this report as in most cases the individual owners have not been contacted by the Project Team yet in relation to this topic. .

5.7 Disposal of Land:

The Scheme will change the physical landscape due to the presence of new defences (e.g. flood walls, flood embankments and new culverted sections). In some instances this will result in small areas of land becoming isolated from the remaining part of an owners land and vice versa. It is proposed that for this reason, and also so that the Scheme can sell/transfer land that is not essential to remain in Council ownership, that the Scheme have an approach to disposing of land. Depending on how the land was acquired in the first place will determine the disposal route:

- a) Land obtained through Compulsory Purchase – this route requires any excess land to be offered back to the original owner (at market rates) prior to any sale on the open market.
- b) Land obtained through negotiation – this route provides the Council the flexibility to dispose of any excess land through the most appropriate means.

5.8 Individual Agreements:

The Project Team have only at this point negotiated one individual agreement to enter land in advance of the Scheme becoming 'Operative'. On the basis on this project status this option will no longer be required.

- 5.9 It is noted that the Council are a land owner and that in a number of locations the Council owns land on which the Scheme is to be built (e.g. Common Good Land, High School etc). In these instances the land can be treated through any / all of the Land Take approaches that are

appropriate. The relevant Council manager for the land will be engaged with in the same way as any other land owner so that the correct approach can be agreed on.

- 5.10 The Scheme recognises that the Council does not wish to own land simply to own it. The Scheme will therefore only progress with land purchases where it is most beneficial to the Scheme and will endeavour to return/dispose of as much land as possible on completion of the Scheme. In both instances it will strive to obtain greatest benefit to the Scheme and the Council within the context of the Scheme's Objectives.
- 5.11 A full database of landownership within the Limit of Land Affected is held by the project team and the consultation with owners will commence if the recommendations of this report are approved

## **6 TEMPORARY ACCESS TO LAND**

- 6.1 Sections 79, 80 & 81 in Part 6 of the Flood Risk Management (Scotland) Act 2009 provides the ability for the local authority to enter any land on which scheme operations are to be carried out, for the purposes of carrying out the operations or of executing any temporary works in relation to them.
- 6.2 This report has identified that the majority of the works will be carried out on land not owned by the authority at this point (this may change depending on the Land Purchase Strategy). Where areas of land remain in 3<sup>rd</sup> party ownership at the point of construction (Advanced Works or Main Works) the Authority will have to utilise the powers in Section 79, 80 & 81 in Part 6 of the Flood Risk Management (Scotland) Act 2009. Therefore this report requests that the delegated authority is provided to the Chief Legal Officer to use the appropriate powers within the Flood Risk Management (Scotland) Act 2009 when access to land is required.

## **7 PROGRESS UPDATE - DEEMED PLANNING CONSENT**

- 7.1 Where a Scheme is confirmed 'Operative' under the Flood Risk Management (Scotland) Act 2009, the Council must request that the Scottish Ministers direct that planning permission for any development described in the Scheme is deemed to be granted. This is detailed in Section 65 of the Flood Risk Management (Scotland) Act 2009 and Regulation 14 of the 2010 Regulations.
- 7.2 Regulation 14 (2) & (3) of the 2010 Regulations states that:
- (2) A request under paragraph (1) must be made to the Scottish Ministers in writing and must be accompanied by –
- a) A brief description of the nature and purpose of the confirmed scheme;
  - b) A copy of the confirmed scheme;
  - c) A summary of the scheme documents; and
  - d) A summary of the environmental statement (if any).
- (3) A request under paragraph (1) may be accompanied by any other material which the local authority considers relevant to the grant of deemed planning permission.
- 7.3 In order that the requirements of Regulation 14 of the 2010

Regulations are adequately addressed, the Project Team are currently assembling the information required by the Scottish Ministers. Scottish Borders Council Regulatory Services are also currently undertaking a full review of the Scheme from a planning perspective and will produce a report for submission to the Scottish Ministers to assist them in their consideration.

- 7.4 Now that the scheme has reached the milestone of being 'Operative' the Project Team will be in a position in April 2018 to request that the Scottish Ministers direct that planning permission is deemed to be granted in accordance with Regulation 14, and supported by the suite of documentation produced by the Project Team under Regulation 14 (2) and (3).

## **8 IMPLICATIONS**

### **8.1 Financial**

- (a) The District Valuer is currently undertaking a robust analysis of land and compensation cost associated with the proposed temporary and permanent land take for the works. This assessment will be fed into the total scheme costs and replace the current estimate and risk allowances that exist.
- (b) The Project Team and Sustrans are continuing to discuss the approval of funding towards a new cycleway network within Hawick.

### **8.2 Risk and Mitigations**

There is a Hawick Flood Protection Scheme project risk register that is regularly reviewed and updated. The key risks relating to this stage in the project process are as follows:

- (a) There is a risk that even with the use of Compulsory Purchase Order powers (to be used as a last resort) we will not have the land required vested in the Council at the point where we need to take entry to deliver the works. This risk is mitigated in Flood Risk Management (Scotland) Act 2009 by providing powers of entry for the authority to undertake the works and conclude any outstanding land purchase requirements in parallel or after the works are complete.
- (b) If an individual landowner obstructs the access to land to allow the authority to undertake any of the duties allowed under the Flood Risk Management (Scotland) Act 2009, then the Chief Legal Officer would have to raise an action with the Sheriff Court to warrant entry to the land. Unfortunately this process could take several months to complete and should only be used as a last resort. The project team will be mitigating this risk through proactive engagement with all landowners if the recommendations of this report are agreed.
- (c) The Final Outline Design contains a number of risks that will need to be investigated and mitigated at the Detailed Design stage. The Project Team have identified the risks and quantified their impact for inclusion in the project's budget estimate.

### **8.3 Equalities**

A full Equalities Impact Assessment for the scheme has been undertaken. Equalities issues have been taken into account as the scheme has developed and will continue to be monitored and analysed through the detailed design phase. The project aligns with Priority 1, 4, 5 & 7 of the Council eight equalities priorities of the 'Mainstreaming Report and Equalities Outcomes 2017 - 2021.

**8.4 Acting Sustainably**

There are no effects at this stage of the project.

**8.5 Carbon Management**

- (a) The construction of a flood protection scheme will generate a carbon footprint through the construction of the reinforced concrete walls and sheet piling. This is unavoidable in Hawick to deliver the project objective of a 1 in 75 level of protection with a 100 year design life.
- (b) The impact has been mitigated by delivering a lower level of protection for direct defences and focusing on up-stream Natural Flood Management provisions to increase the level of protection in future years.
- (c) Carbon will be reduced by the Scheme with the removal of flood risk below 1 in 75 and the associated works to repair infrastructure and property after every event.

**8.6 Rural Proofing**

Not applicable.

**8.7 Changes to Scheme of Administration or Scheme of Delegation**

Not applicable.

**9 CONSULTATION**

- 9.1 The Chief Financial Officer, the Monitoring Officer, the Chief Legal Officer, the Chief Officer Audit and Risk, the Chief Officer HR, the Clerk to the Council and Corporate Communications have been consulted and comments received have been incorporated into the final report.

**Approved by**

**Martin Joyce**

**Service Director Assets & Infrastructure Signature .....**

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**Background Papers:** 28 March 2013, 29 September 2016, 23 February 2017, 2 November 2017, 21 December 2017

**Previous Minute Reference:**

**Note** – You can get this document on tape, in Braille, large print and various computer formats by contacting the address below. Jacqueline Whitelaw can also give information on other language translations as well as providing additional copies.

Contact us at Jacqueline Whitelaw, Place, Scottish Borders Council, Council Headquarters, Newtown St Boswells, Melrose, TD6 0SA, Tel 01835 825431, Fax 01835 825071, email [eitranslationrequest@scotborders.gov.uk](mailto:eitranslationrequest@scotborders.gov.uk).