

Report of the Head of Economic Regeneration & Planning

Development Management and Control Committee

9 October 2014

SWANSEA BAY TIDAL LAGOON LOCAL EXAMINATION

Purpose:	To provide an update to Members on the examination by the Planning Inspectorate of the application for the tidal lagoon.
Policy Framework:	National Policy Statements, Planning Policy Wales and the adopted City & County of Swansea Unitary Development Plan.
Reason for Decision:	To ensure that a Section 106 Obligation is completed having regard to the issues set out in the Council's Local Impact Report and Written Representation.
Consultation:	Legal, Finance and Equalities.
Recommendation(s):	It is recommended: 1. That delegated powers be granted to the Head of Economic Regeneration and Planning to negotiate and agree a Section 106 Obligation for consideration by the Secretary of State for Energy and Climate Change.
Report Author:	Richard Jones

1.0 Introduction

- 1.1 Members will recall that a report was presented to this Committee on the 3rd July 2014 appraising the impact of the tidal lagoon proposals on the City and County of Swansea and recommending that a Local Impact Report and Written Representations be submitted to the Planning Inspectorate Examining Authority on behalf of the Council. Other recommendations to deal with the procedural aspects of the examination process, including dealing with matters within a Statement of Common Ground and responses to Inspectors questions were also made in the Report. For ease of reference a location plan and copy of the report are provided as Appendix A and B respectively. Due to the length of the Local Impact Report (LIR) and associated documents, this document is not reproduced, however, the LIR can be viewed via the following link:

<http://democracy.swansea.gov.uk/documents/g6303/Public%20reports%20pack%20Thursday%2003-Jul-2014%2017.00%20Development%20Management%20and%20Control%20Committee.pdf?T=10&LLL=-1>

- 1.2 As Members will be aware, the project is an offshore generating station, which would have a nominal rated capacity of 240 MW. Consequently, the project is a nationally significant infrastructure project (NSIP) as defined in the Planning Act 2008 with a generating capacity above a threshold of 100MW. A detailed description of the proposed development is provided in the appended report.
- 1.3 Accordingly, an application for a development consent order (DCO) has been made to the Secretary of State for Energy and Climate Change (the Secretary of State), via the Planning Inspectorate, to authorise construction and operation of the generating station and its component parts. These include both offshore and onshore elements of the project and the electrical grid connection works and recreational amenities which form part of the seawalls and/or the onshore operation and maintenance facilities.
- 1.4 The main focus of the application site essentially comprises the southern edge of Swansea Docks and formerly associated industrial land from the eastern side of the River Tawe to the eastern edge of the new Swansea University Bay Campus and the foreshore and seabed of part of Swansea Bay between the dredged channels of the Rivers Tawe and Neath.
- 1.5 The site is primarily focused within the administrative area of the City & County of Swansea and Welsh Territorial Waters other than the eastern landfall of the lagoon and grid connections, which fall within Neath Port Talbot County Borough Council (NPT).
- 1.6 The application is currently at 'examination' stage and is being examined by an 'Examining Authority' (ExA) appointed by the Secretary of State for Communities and Local Government. The Examining Authority is from the Planning Inspectorate, and comprises, in this instance, a panel of five Inspectors.
- 1.7 The ExA has six months to carry out the examination and a further 3 months to prepare a report on the application to the Secretary of State, including a recommendation. The Secretary of State then has a further 3 months to make the decision on whether to grant or refuse development consent. Once a decision has been issued by the Secretary of State, there is a six week period in which the decision may be challenged in the High Court. This process of legal challenge is known as Judicial Review.

2.0 Examination Update

- 2.1 The examination formally commenced on the 11th June 2014 and is currently timetabled to close on the 10th December of this year. This report has therefore been prepared at approximately two thirds of the way through the process.
- 2.2 In accordance with the resolution of Members the following actions have been completed or are ongoing:

- The LIR for the City & County of Swansea has been submitted to the Examining Authority of the Planning Inspectorate in accordance with the timetable for the examination process.
- The Written Representation of the City & County of Swansea has been submitted to the Examining Authority of the Planning Inspectorate in accordance with the timetable for the examination process and amended to incorporate the following final paragraph:

“The position of CCS is therefore to adopt a precautionary approach to the proposed development and it is accordingly requested that if, at decision making stage, there are any residual doubts as to the impacts of the scheme, the benefit of doubt should be given to the protection of Swansea Bay.”

- Formal responses have been provided to the Examining Authority’s Inspector questions in accordance with the timetable for the examination process and comments made on the submissions of the applicant within the terms of the Council’s LIR and Written Representation.
 - Officers are continuing to negotiate a Statement of Common Ground between the City & County of Swansea and the applicant within the terms of Council’s LIR and Written Representations for submission to the Examining Authority.
- 2.3 Officers attended a formal accompanied site visit with the ExA on the 30th July and it has been confirmed that the ExA will be undertaking further unaccompanied site visits to locations requested by Officers.
- 2.4 In accordance with the delegated powers granted to the Head of Economic Regeneration and Planning, Officers have attended two issue specific hearings to formally represent the views of the City & County of Swansea. These hearings allow the Inspectors to probe, test and assess evidence through direct questioning of the applicant and interested parties, including the City & County of Swansea. Oral representations made by officers at the hearings have been made with reference to and within the terms of the Council’s LIR and Written Representation.
- 2.5 The first of the hearings took place on the 31st July and concerned itself with the draft Development Consent Order (DCO) prepared by the applicant. The DCO is a key application document and sets the parameters for what is permitted in the event that development consent is granted by the Secretary of State (and by implication what other aspects of a proposal are not permitted by the DCO and may require further consents).
- 2.6 A draft DCO should include:
- A full, precise and complete description of each element of the project;
 - Provisions giving the developer authority to take actions necessary for the project to be implemented satisfactorily. These might include, for example, authority to compulsorily acquire land.
 - Conditions, known as “Requirements”, to which the development authorised by the DCO is to be subject.

- 2.7 At this stage of the examination, the draft DCO is an iterative document and Officers have provided detailed legal/technical comments to both the ExA and the applicant on the 3 versions prepared to date. These comments are made on a 'without prejudice' basis to any decision that might be made by the Secretary of State.
- 2.8 The second topic specific hearing took place on the 16th September and ran over 4 days. Specific topics covered included:
- General project issues including content of principal development, decommissioning and a Development Consent Obligation, all of which are discussed below.
 - Effect of the lagoon on the coastal processes within Swansea Bay.
 - Impact on protected sites and species such as Blackpill Site of Scientific Interest and marine mammals.
 - Water quality.
 - Flood risk.
 - Socio-economic impacts.
 - Commercial fishing, shipping and navigation.
 - Seascape, landscape and visual impacts.
 - Construction, noise and traffic.
 - Adaptive management (discussed below).
- 2.9 Between the above hearing dates, Officers were required to meet interested parties Deadline III on the 5th August for responses to:
- An updated Flood Consequence Assessment;
 - Comments on the Applicant's responses to Inspector questions;
 - Comments on Version 2 of the draft DCO;
 - Comments on further evidence from the Applicant;
 - Issues arising from the accompanied site visits and hearing on the draft DCO.
- 2.10 A Compulsory Acquisition hearing also took place over two days running from the 30th September. (The applicant does not currently own any part of the application site, but is negotiating for its acquisition and is also applying for powers of compulsory acquisition.) This hearing was not attended by the City & County of Swansea.
- 2.11 Most recently Officers have met Interested Parties Deadline IV (7th October) for receipt by ExA of:
- Comments on documents submitted on 1 September 2014 by the applicant including Habitats Regulations Report, updated Habitat Regulations Assessment, Water Framework Assessment, revised Operation, Construction and Adaptive Environmental Management Plans and new Piling Activity Plan.
 - All post hearing documents including draft DCO Version 3.
 - Written summaries of oral cases made at all hearings and any requested related information. (For the avoidance of doubt, these submissions fall within the terms of the Council's LIR and Written Representations.)

2.12 Further topic specific hearings are timetabled over 3 days from the 21st October with Deadline V following on the 28th October and Deadline VI on the 25th November.

3.0 Issues Arising

Section 106 Obligation

3.1 Members will recall that the Council's LIR set out comments on the Applicant's draft Heads of Terms for inclusion within a Section 106 Obligation. Comments were made in respect of traffic and transport, air quality, community provisions, environmental mitigation and public art. The Council's LIR also sets out further environmental monitoring and mitigation measures which should be included in any final Section 106 Obligation.

3.2 The Applicant has recently produced a draft Section 106 Obligation in support of the application with the intention that it is completed on a 'without prejudice' basis before the end of the Examination. This would take the form of an Agreement signed by the Applicant, the City & County of Swansea and Neath Port Talbot County Borough Council (NPT).

3.3 The draft Section 106 Obligation includes covenants relating to:

- *Traffic and Transport* – It is proposed:
 - To provide a bus stop for a shuttle bus to run between the development and the Fabian Way Park and Ride site;
 - Provide a viability assessment for a shuttle bus service and if viable the provision of the same;
 - Cycle parking;
 - A new pontoon for a water shuttle service to facilitate a western link to the lagoon. (The applicant does intend to provide a water shuttle service.)

- *Public Art* – Competitions are proposed to secure:
 - A major sculpture to be located within the footprint of the Lagoon;
 - Art work to be placed in or on the Lagoon; and
 - Community art and cultural projects within or in the vicinity of the Development.

- *Visitor Centre and Education Facility* – It is proposed to provide the same as part of the development.

- *Local Employment and Materials* – The Applicant proposes to support a local employment scheme to secure the use of local labour, contractors, and goods and services during the construction of the Project, so far as lawful and practicable and to use the local employment scheme with regard to staffing the visitor centre/educational facility.

- *Community Provisions* – It is proposed to provide:
 - A Community Trust Fund of a set sum (currently shown as £2,000) per annum per MW of installed capacity. (The installed capacity is currently stated as 240MW.) It is proposed to commence payment into the fund upon the 35th anniversary of commencement of Operation of the Development and thereafter annually upon that anniversary for the remainder of the Operation. The fund would be split between the communities of the City & County of Swansea and NPT.
 - An electricity subsidy of £500,000 per annum to be paid to or secured for eligible households within a defined subsidy area that will represent a reduction in electricity tariffs for such households of the electricity bills otherwise payable by the relevant eligible household subject to the development being sufficient for the Equity Sponsors to achieve a reasonable baseline return.
- *Environmental Mitigation* – This proposes a number of ecological enhancement measures and bathing water monitoring.
- *Public Realm* – The applicant proposes to provide the public realm as part of the development, to maintain and repair it and to keep it open to the public, subject to certain caveats.
- *Dedicated Council Resourcing* – This would commit the Applicant to contribute to the costs of employing dedicated officers for work relating to the discharge of requirements etc.

3.4 Officers have provided detailed comments on the shortcomings of the first draft. In respect of traffic and transport reference has been made to the representation within this Council's LIR relating to the lack of pedestrian access from the west and the convoluted nature of the main access. On this basis it has been advised that the shuttle bus provision and water shuttle service take on added importance to ensure accessibility to as many of Swansea's residents as possible. It has been submitted therefore that the starting position should be that the Applicant provides a bus service for at least the first 12 months and any viability testing should be based on the reality of usage. Going forward, as a minimum there should be a subsidy to assist its viability.

3.5 With regards to the provision of the new pontoon, it has been advised that this would appear to have limited value as it seems unlikely that a water shuttle service would be viable in its own right. Similarly to above, it has been submitted that the applicant should look to provide this service for a set period of time to examine viability and thereafter at least provide a continued contribution to plug any viability gap. From initial discussions however, it seems very unlikely that there will be an agreement to this effect.

3.6 For the visitor centre and education facilities, the applicant has been advised that for the avoidance of doubt the obligation should refer to the provision of the onshore and offshore buildings containing the visitor centre and education facility and all other items contained within the application and bind TLSB to the provision of the same as soon as practically possible following operation.

- 3.7 For local employment and materials, amended clauses have been provided to link into the Council's Beyond Bricks and Mortar scheme.
- 3.8 In terms of community provisions, whilst the new offer of a community trust fund is welcomed, the comment has been made that its introduction after 35 years will mean that there will still be a generation of local people who are impacted by the scheme but will not benefit from this provision.
- 3.9 For the electricity subsidy, clarification has been sought on precise details and eligibility whilst comments have been made regarding the caveat relating to a reasonable baseline return for the equity sponsors, i.e., if TLSB cannot provide enough of a return to Equity investors then this benefit will be at risk. It has been stated that the commitment to the subsidy needs to be clear.
- 3.10 For environmental mitigation, the comment has been made that the obligation should provide the link to the environmental management plans and the commitment to effective resourcing of mitigation measures either set out in the Environmental Statement, the Council's LIR and any requirements arising from monitoring results. Such matters may include ecological mitigation, increased sand blown costs/dune management and increased dredging costs.
- 3.11 Importantly, since the provision of the first draft of the Section 106 Obligation, the applicant has agreed to fund the re-calibration/validation of the designated water quality sample point prediction model. This commitment will therefore be included within the Section 106 Obligation.
- 3.12 For matters relating to the public realm it has been stated that the maintenance commitment should also explicitly refer to the public art elements.
- 3.13 In terms of dedicated council resourcing, it has been stated that the requirement will be for a planning officer, support officer and contributions to the cost of associated specialist advice from the Council's Nature Conservation Team, Pollution Control & Public Health Division and Transportation Teams, as well as external consultants.
- 3.14 Members will note that the recommendation is that delegated powers be granted to the Head of Economic Regeneration and Planning to continue to agree a final Section 106 Obligation. It will be for the Secretary of State for Energy and Climate Change to make the decision as to whether the Section 106 is necessary in the granting of any development consent.

Principal Development

- 3.15 During the course of the examination, the ExA has raised the question whether all of the works considered within the application can be considered as principal development in relation to an application for a generating station.
- 3.16 In this instance, the Nationally Significant Infrastructure Project is the generating station, essentially comprising the lagoon walls and, hydro turbines and sluice gates but it is the Applicant's submission that elements such as those set out below are also principal development:
- Offshore Building incorporating operation and maintenance (O&M) facilities, with integral visitor centre, leisure facilities and public realm;
 - Permanent access routes;

- Western Landfall Building incorporating O&M facilities including visitor orientation, recreational boating facilities, laboratory/hatchery building at the western landfall with slipways; vehicle parking; manoeuvring areas, public realm and lagoon side public open space;
 - Habitat creation works/mitigation, including beach/dune and saltmarsh creation within the lagoon.
- 3.17 This will be a matter for the ExA and Secretary of State to determine. If it is concluded that such elements are not principal development for a generating station, the applicant would be required to make a separate application to this Authority for planning permission for those elements excluded and falling within this Council's administrative boundary.
- 3.18 Within this context however, Officers have been asked at the topic specific hearings for the views of the City & County of Swansea and to agree with the applicant a list of main elements of key importance that should be secured as part of any development consent granted. Officers subsequently responded to confirm, without prejudice, as part of the Deadline IV submission, that it is the Council's preference that all elements be included within any development consent that is granted. The reason for this position is that the elements of the project over and above the generating station essentially comprise the 'gain' aspects of the proposed development and that their inclusion represents the most secure mechanism for their delivery. It was also confirmed that the whole scheme is the scheme that has been presented to Members and that the gain elements should properly be considered as part of the 'planning balance'.
- 3.19 Furthermore, a fully stripped down scheme would essentially leave just the generating station and rely on the applicant to make planning applications for the other elements and then to build the same. Accordingly, Officers have also made a submission to the ExA to the effect that if the Secretary of State does not include those aspects of the development this Council would wish to see as part of the project, these should be secured by way of a legal obligation.

Decommissioning

- 3.20 Members will recall from my previous report that at the end of the operational lifetime of the Project, two potential options for decommissioning are being put forward. These being:
1. Replace, upgrade and extend the life of the power generating station; or
 2. Remove the turbines and sluice gates leaving the seawalls and housing structure in place and allowing continued leisure use of the impounded area.
- 3.21 In response to the Council's LIR that there should be a requirement for a suitably detailed decommissioning strategy and appropriate funding arrangements along with a clear position of responsibility for maintenance or any future intended use and associated costs for the same, the Applicant has amended the draft DCO to include:
- A requirement to submit in the forty-fifth year of operation a programme for decommissioning to the Secretary of State; and

- Provision of a fund for maintenance of the development to be paid from the fiftieth year of operation onwards.

3.22 During the topic specific hearing, the ExA raised the question of the need for decommissioning before the end of the stated life of the project (120 years) and the Development Consent Order/Section 106 Obligation provisions to secure delivery of appropriate decommissioning. The issue of a 'tipping point' was raised where a point in time would be achieved when the established ecological and recreational benefits of the lagoon would outweigh the beneficial seascape, landscape and visual impacts arising from the removal of the lagoon walls.

3.23 As part of the Deadline IV response, Officers have advised the ExA that if the tidal lagoon prematurely ended its operation as a power generating station, a decommissioning strategy should ideally address the removal of the seawalls and turbine/sluice gate housing to the visual benefit of Swansea Bay.

3.24 It is the applicant's position that the proposal is entirely viable and there is no prospect of early decommissioning.

4.0 Financial Implications

4.1 As previously reported to Members, this Authority does not receive a fee for the application which has been made to the Planning Inspectorate. The cost of Officer time therefore falls to the Council.

4.2 Should the DCO be granted for the proposed development, this Council will be required to discharge and enforce the requirements of the DCO for geographical areas in addition to its own administrative area. As set out above, negotiations are ongoing regarding the Applicant funding two Planning posts to carry out this work along with the cost of associated technical support.

5.0 Legal Implications

5.1 The submission is subject to a detailed legal regime under the Planning Act 2008 and the associated Regulations.

5.2 The application includes a draft DCO and Section 106 Obligation. Comments on the same have been provided in consultation with the solicitor acting for the City & County of Swansea.

6.0 Equalities and Engagement Implications

6.1 A high profile initiative such as this will require a full Equalities and Engagement Implications report. Although the planned work is not thought to affect all protected groups, factors such as access and social inclusion (already covered in some detail in the LIR) are applicable to a Section 106 Obligation and will require thorough consideration as work progresses.

Background Papers:

The Planning Act 2008 (as amended), National Policy Statements, Planning Policy Wales, adopted City & County of Swansea Unitary Development Plan and the Tidal Lagoon Swansea Bay Ltd application documents including Environmental Impact Assessment, Draft Development Consent Order and Draft Section 106 Obligation.

Appendices:

Appendix A – Location Plan.

Appendix B – Report of the Head of Economic Regeneration and Planning to Development Management and Control Committee on the 3rd July 2014.