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Ein Cyf/Our ref: qA984851  
qA984866

Eich Cyf/Your ref: ACJ(P)/MRL/0336  
Dyddiad/Date: 6 March 2013

Dear Mr McCallum

**LAW OF PROPERTY ACT 1925 - SECTION 194  
PROPOSED WORKS ON LAND AT CEFN GWRHYD COMMON, GWAUN CAE  
GURWEN, SWANSEA  
INCLOSURE ACT 1845 – SECTION 147  
PROPOSED EXCHANGE OF LAND AT CEFN GWRHYD COMMON, GWAUN CAE  
GURWEN, SWANSEA**

**Section 194 Application**

1. I refer to your letter of 21 December 2011, and subsequent related correspondence, ending with your e-mail of 16 October 2012, which together comprise an application made for a consent for works on common land under Section 194 of the Law of Property Act 1925 (the '1925 Act').

**Section 147 Application**

2. I refer also to the application made on 5 February 2012, and related correspondence, culminating with your e-mail of 5 February 2013, which together comprise an application made for an Order under section 147 of the Inclosure Act 1845 to be made by the Welsh Ministers effecting the exchange of certain lands containing 5,027 square metres or thereabouts, forming part of Mynydd Gwrhyd, Pontardawe, Swansea, (CL 25B) and situated approximately 200m to the east of Penwaun Uchaf and sited at grid reference 273126 210822, in the County Borough of Neath Port Talbot, in which the Trustees of the Somerset Trust are interested, for certain other lands situated in the Community of Cwmillynfell in the County Borough of Neath Port Talbot, containing 8,626 square metres or thereabouts and situated at Penwaun Uchaf, Rhiwfawr, Languicke, registered at the Land Registry under the title number WA945543 adjacent to Cefn Gwrhyd Common (CL 25B), in which Awel Aman Tawe and Mr Eifion Lewis Williams are interested. The lands concerned are shown on the plans accompanying the application.



3. I am authorised by the Minister for Environment and Sustainable Development to determine your applications.

### **The Common**

4. Cefn Gwrhyd Common, which has an area of some 342 hectares, is registered as Common Land (CL25B) under the Commons Registration Act 1965. Rights of Common of pasture are registered over the Common and you have indicated in the questionnaire that those rights are exercised to a limited extent. The land is not subject to Section 193 of the 1925 Act by having been wholly or partly situated within an area which, immediately prior to 1 April 1974, was a Borough or Urban District, but it is subject to Section 193 by virtue of a revocable Deed of Declaration made under Section 193(2) and dated 10 February 1975. The Common is not subject to a scheme of regulation made under the Commons Act 1899 giving access rights to local inhabitants or the public, or to any other management scheme.

### **The Proposals**

5. The proposals the subject of the applications, as advertised, are:

- (i) place one wind turbine and hard standing approx 200m to the east of Penwaun Uchaf. This turbine is shown as Turbine 1 on the Site Plan and is sited at grid ref (GR) 273119 210852. Temporary steel mesh anti-intruder fencing will be used around the open excavation for the turbine. The fencing will measure 2m high and extend 35mx35m. It will be in situ for approximately 3 months, during the period of construction;
- (ii) build/improve a 2.45km access track on the Common, 4.5 m wide, with a crushed stone surface. The track starts opposite the entrance to Perthigwynion Farm where the existing tarmac road will be widened to 4.5m for 400m using crushed stone. The new track then runs in a north easterly direction from GR 271774 209565 past Penwaun Uchaf farm to the proposed turbine. The track is intended to be suitable for horseriding, cycling and disabled access;
- (iii) land affected during construction is 11,120m<sup>2</sup>. Once restoration has taken place, 5,190m<sup>2</sup> will be lost during the operational phase of the wind farm. To compensate for the loss of grazing, the intention is to exchange land totalling 8,626m<sup>2</sup> under Section 147 from Penwaun Uchaf into the Common;
- (iv) fencing will not be used during the construction of the access tracks, a warden will be employed, and temporary bunting used, to ensure the safety of the public and animals;
- (v) place a self closing single bar vehicular gate 5 metres wide and 1 metre high at GR 271776 209608 located approximately 10m before the entrance to Blaen Egel Fawr Farm. A ditch will be dug alongside the tarmac road for 280m approximately 0.6m deep by 1.5m wide in a north easterly direction from GR 271534 209573 to GR 271774 209565, to prevent unauthorised vehicular access to the Common as per the Site Plan. A 1.8m equestrian gate and a kissing gate suitable for wheelchair access (1.8m x 2.5m) will be located on either side of the vehicular gate. This gate would be locked at all times and keys provided to affected landowners and Commoners. An identical single bar gate, and equestrian and disabled access gates would be sited on the track 10m in front of the gate entrance to Fforch Egel Farm at the eastern end of the

Common. The existing bank will be continued for an additional 15.5m (0.45m high and 1.5m wide) to prevent vehicular access;

- (vi) provide a permissive bridleway/cyclepath along the wind farm access track to the turbine, and continuing across the Common adjacent to Bryn Melyn and joining the Gwrhyd Road;
- (vii) provide 4 car parking bays at GR 271773 209585 on the western side of the Common. The car parking area will be 30m by 3m, constructed of crushed stone. Low banks will be used to prevent vehicular access onto the Common from the parking area. The banks will be 0.45m height and 1.5m wide, with a total length of about 74m. Provide identical car parking at the eastern end of the Common off the Gwrhyd Road at GR 273964 210336; and
- (viii) after the construction period of approximately 6 months, undertake site restoration to reduce loss of grazing, wildlife and visual impact. Use revegetation to, reduce the track width from 4.5m to 3m and the turbine hardstanding from 2600m<sup>2</sup> to 300m<sup>2</sup>.

The locations of these works were shown on the drawings accompanying the application.

### **Considerations**

6. Notice of the application under section 194 was given in the "South Wales Guardian" of 28 December 2011 and the "Western Mail" of 28 December 2011. Notice was also given to Neath Port Talbot County Borough Council, Carmarthenshire County Council, Pontardawe Town Council, Cwmllynfell Community Council, Gwaen Cae Gurwen Community Council, Quarter Bach Community Council, the Countryside Council for Wales and The Open Spaces Society. You have confirmed that the West Glamorgan Commoners Association has been consulted on the proposals, but no response was received from the Association prior to submitting your application, you also indicated in the questionnaire that there has been extensive community consultation on the proposals. Your e-mail of the 30 December 2011 also indicated that ten notices had been placed on or around the site in different locations providing access to the Common.

7. Notice of the application under section 147 to exchange land was given in the "Western Mail" and in the "South Wales Guardian" on 28 December 2011 and 4 January 2012. Notice was given to Neath Port Talbot County Borough Council, Carmarthenshire County Council, Pontardawe Town Council, Cwmllynfell Community Council, Gwaen Cae Gurwen Community Council, Quarter Bach Community Council, the Countryside Council for Wales and The Open Spaces Society. You have also confirmed that notices were placed on the site and in the surrounding area.

8. The Welsh Ministers have received directly, or had passed on to them, around 454 pro forma letters as well as a number of individual letters and e-mails objecting to the proposals as advertised. The main issues raised in the representations made against the proposals related to:

- the access track would have an urbanising effect on the landscape;
- Commoners would not be able to exercise their rights to graze animals;
- possible effects on the animals hefting instinct;

- effect on the archaeology in the area;
- the proposals would be detrimental to the public enjoyment of the area;
- the proposed ditches and barriers would be ineffective as users of the Common would be able to go around (circumvent) the barriers;
- the proposal would open up the area to undesirable and anti-social activities, lead to a possible increase in noise and traffic to a tranquil area;
- the proposals include establishing a bridleway, car parking and other facilities that would not enhance the public enjoyment of the area; and
- two previous applications for generally similar proposals have already been refused consent.

9. The Welsh Ministers have received directly, or had passed on to them, around 186 pro forma letters as well as a number of individual letters and e-mails supporting the proposals as advertised. The main issues raised in the representations made in support of the proposals related to:

- the proposed access track, bridleway and cycle path would make the Common more accessible to disabled people;
- the profits from the community wind farm will be used for low carbon regeneration projects; and
- improvement in access for walkers using the Common.

10. Due to the number of representations received by the Welsh Ministers, submitted both for, and against, the proposals and, as the two previous applications under section 194 for generally similar proposals had been refused consent on 28 September 2006 and 10 May 2011 respectively, officials from the Planning Division of the Welsh Government took the view that, in the interests of natural justice in this instance and exceptionally, it would be appropriate for the revised application under section 194, submitted on 21 December 2011, to be considered by an independent Planning Inspector. Officials concluded that it would also be appropriate for the Inspector to consider the application made under section 147 of the Inclosure Act 1845. The Inspector was asked to consider the application and supporting information as well as all the representations made both for and against the proposals and to prepare and write a report for the Welsh Ministers' consideration.

### **Reasons For The Decision**

11. Consideration has been given to the report of the Inspector, Emyr Jones BSc(Hons), CEng, MICE, MCMI who was appointed to consider the applications made by Awel Aman Tawe.

### **Section 194 Application**

12. The Inspector's appraisal of the proposals under section 194 are set out in paragraphs 8 – 34 of his report and his recommendation is set out at paragraphs 41 - 43 of his report, a copy of which is enclosed.

13. The Inspector states at paragraph 8 of his report that, in considering applications for consent under Section 194, regard must be had to "the benefit of the neighbourhood" as well as to "private interests" in the land. The "benefit of the neighbourhood" includes the health, comfort and convenience of the inhabitants of any populated places in or near any community in which the land is situated in the context of the enjoyment of the common as an open space and for air and recreation. He agrees with the view in the previous decision letter of the Welsh Ministers of 10 May 2011 in which it was concluded that the benefit to the neighbourhood to which regard must be had is the existing benefit, although additional benefit as a result of the proposal being carried would need to be taken into account in considering the expediency of giving consent. The Inspector states that "private interests" include the interests of the soil owner, any commoners, tenants, licensees or parties with a legal interest in the land. He considers that the benefit of the public should also be taken into consideration. I agree with the Inspector's assessment in these respects.

14. At paragraph 16 of the Inspector's report he agrees with the Welsh Minister's view in the 2011 decision that the widening of the tarmac road would not have a significant or urbanising effect on the common. He does not agree, however, with the previous view that the upgrading of the existing track would have an urbanising effect. I note that the current application differs from the previous application in two significant aspects; firstly the length of the access track has decreased from 2.85km to 2.45km and, secondly, the current application proposes to reduce the track width from 4.5m to 2.5-3m, which was not considered as part of the previous application. I note also the intention to use locally sourced materials for the track, which is provided for by conditions 9 and 15 of the related planning permission dated 7 May 2009. Given these changes in the application I see no reason to disagree with the Inspector's view that the upgrading of the existing tracks would resemble farm tracks already found on the common and therefore not have a significant adverse effect on the common as a whole.

15. The previous decision of May 2011 concluded that the completed road would reduce the area of land available for grazing, although there was insufficient information before the Welsh Ministers at the time to conclude that it would warrant withholding the consent. I note, in this respect that the current application to exchange land proposes to compensate for the loss of land taken by the track and, in the Inspector's view, would represent a net gain in grazing land.

16. I note the Inspector's comment in paragraph 19 that the need for planning permission for the proposed parking provision is a hurdle that would need to be cleared. There is no guarantee that an application for planning permission for the additional works would be approved by the Council or on appeal to the Welsh Ministers, as it is a central principle that each planning application must be considered on its own merits and the grant of one permission does not necessarily follow another. I consider that in itself it is not sufficient reason, however, to disagree with the Inspector's conclusions that the measures proposed by the application would considerably enhance the public's ability to use the common.

17. At paragraph 23 the Inspector has referred to a one off payment of £3,000 and an annual payment of £1,000 over the lifetime of the development to the West Glamorgan Commoner's Association, which is not subject to the Section 106 legal agreement and could be withdrawn. I note the Inspector's comments and take the view that, in such circumstances, the benefits to the commoners and the public arising from the proposal would not be affected to such a degree that it would materially affect the Inspector's conclusions in these respects.

18. I note the Inspector's comments at paragraphs 25 and 26 relating to unauthorised vehicle access. I agree that the additional measure in the current application to place a ditch alongside the road addresses to a large extent the Welsh Ministers' concerns set out

in the May 2011 decision letter. I note the Inspector's comments as regards unauthorised motorcycle access and see no reason to disagree with the Inspector's conclusions in these respects.

19. The Inspector has concluded that, on balance, the benefits of the proposal outweigh the negative visual and noise impacts and it would be appropriate to grant section 194 consent. In considering whether to grant consent I must consider the "benefit to the neighbourhood" as well as private interests and interests of the public as set out in paragraph 13 above. I have taken into account all the information before me, including the conclusions and recommendations of the Inspector and all the correspondence received in relation to the application. I agree with the Inspector that the measures to improve public access would represent significant benefits to the public. In reaching that conclusion I have had regard to existing benefits relating to the health, comfort and convenience of the inhabitants of the neighbourhood and the wider public as regards improved access for the public for a range of uses, including walking, cycling, horse riding and benefits for disabled people. I have taken into account the benefits to the "private interests" of the commoners including improved access to tend their stock. I have also had regard to the additional benefits proposed by the applicant, which include among other things the proposed car parking, toilet facilities and measures to improve unauthorised vehicular access in considering the expediency of giving consent. I acknowledge the Inspector's views regarding the adverse visual and noise impacts of the turbine and the new sections of the access track, which accord with the view given in the May 2011 decision letter. However, given the benefits to the neighbourhood and public identified and, taking account of the additional benefits provided by the proposal, in the particular circumstances of this application, I do not consider that these impacts are such as to warrant withholding the consent sought. Subject to the comments at paragraphs 14 - 18 above, I therefore agree with the Inspector that it is appropriate to grant section 194 consent.

### **Section 147 Application**

20. The Inspector at paragraph 35 of his report states that the proposed exchange of land must be beneficial to the owners of the respective lands and its terms must be just and reasonable. He also states that consideration should also be given to the impact on commoners' rights over the land and the public's right of access to the land. I agree with the Inspector's approach to the consideration of the exchange of land.

21. The Inspector's appraisal of the proposals under section 147 are set out in paragraphs 44 and 45 of his report and his recommendation is set out at paragraph 46 of his report, a copy of which is enclosed.

22. At paragraph 38 the Inspector states that there is currently no stock proof fencing between the exchange land and the remainder of Penwaun Uchaf, which would need to be addressed. He also considers that a section of boundary bank and fence would need to be removed to facilitate access between the common and the exchange land. At paragraph 39 the Inspector also states that the exchange would require the provision of culverts at the access points, which the applicant is willing to fund. The Inspector concluded at paragraph 45 that the net gain in grazing land would enhance the rights of commoners and, although there would be no real benefit to the public, the current owner of the exchange land and the lord of the manor would benefit from the commercial arrangements negotiated with the applicants. He recommended that the exchange order should be made, subject to the resolution of the issues relating to the fencing of the common, if section 194 consent is to be granted.

23. On 29 January 2013, the Welsh Ministers by e-mail sought the following clarification

from the applicant as to what works would be undertaken to the exchange land prior to an Order of Exchange being made:

"In the application form under section 147 you indicated that the exchange land comprises one field with ditch and earth banks with fencing and that the boundary ditches and banks forming field enclosures will largely remain intact but the gate could be removed to allow free access for the cattle and sheep and for public access.

The Inspector appointed to consider the applications and advise us on their merits has expressed the view that some of the boundary bank and fence would need to be removed to facilitate access to the exchange land and the ditch crossing the land would need to be culverted at the access points to reduce the risk to grazing animals. In his report the Inspector records that the applicant has expressed a willingness to fund this culverting.

As you may be aware, it is not possible for an Order of Exchange to include conditions to require works to be carried out or works to be removed so we need to be certain as to what you propose and how, if what the Inspector has indicated as necessary to the exchange of the land is to be carried out, how that could be achieved and, if needs be, enforced.

We should be grateful if you would consider the above and let us have your response as soon as possible."

24. On the 1 February 2013 you confirmed by way of e-mail that you had taken advice on this issue and you stated that:

"We believe that funding these access improvements to the exchange land is covered under our Section 106 (attached). Point 1.4 c allows for the additional community contribution (£16k/year) to fund 'measures which promote the public's ability to walk, ride and cycle and access to the Cefn Gwrhyd Common and the sustainability of such groups promoting those activities in the local community;'. Culverting to enable people and stock to cross from the Cefn Gwrhyd Common to the exchange land falls under that.

I have spoken to one of the Commoners who also has a civils contracting business and grazes stock on the Common. He has advised us that 3 lengths of 6m pipe with a diameter of 600mm should be used in the ditch, covered by stone and earth, creating an entrance 18m long. The cost of this would be no more than £2k."

25. The Welsh Ministers are not able to attach any conditions to an Order of Exchange made under section 147 although the Welsh Ministers requested formal written confirmation that the enabling works to the exchange land would be carried out. On 5 February 2013 an e-mail provided written confirmation that the works required by the Welsh Ministers to the exchange land would be undertaken as indicated below:

"I formally confirm that we will undertake the works identified in your email of 29<sup>th</sup> January 2013 – those works are removal of some of the boundary bank and fence to facilitate access to the exchange land and culverting of the ditch crossing the land at the access points to reduce the risk to grazing animals. These works will be undertaken in exercise of the terms of S.106 undertaking (dated 5<sup>th</sup> February 2012) and emailed to you on 1<sup>st</sup> February 2013."

26 It should be noted that there has been no confirmation that stock proof fencing would be provided. I take the view that this is not an issue that would impact upon the commoners' rights over the land or the public's right of access to the land. As such, I attach little weight to this issue in considering whether it is expedient to make the Order.

27. On the information before me I am also satisfied that the relevant works identified by the Inspector that need to be undertaken to the exchange land will be carried out by the applicant. Therefore, I see no reason to disagree with the Inspector's conclusions that the section 147 Order should be made.

28. The Inspector recommended that, subject to the satisfactory resolution of the matters referred to in paragraph 22 above, section 194 consent be granted and a section 147 Order made. However, he considered that, should the Welsh Ministers not accept the recommendation in respect of the 194 application, the exchange land would not be required and a section 147 Order should not be made. As set out at paragraph 19 above I agree with the Inspector that it is appropriate to grant section 194 consent. I am satisfied that the issues raised by the Inspector in respect of the exchange land have been resolved and agree with the Inspector that a section 147 Order should be made.

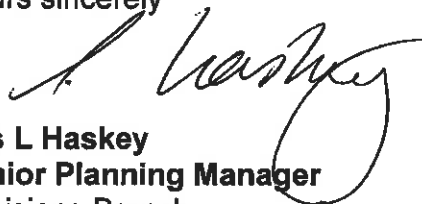
#### **Formal Decision**

29. For the reasons given above and, in exercise of the authority referred to in paragraph 3 above, I hereby allow your application for works on common land under Section 194 of the Law of Property Act 1925 and make an Order under section 147 of the Inclosure Act 1845 for the exchange of lands detailed in paragraph 2 above.

30. A copy of this letter has been sent to Neath Port Talbot County Borough Council, Carmarthenshire County Council, Pontardawe Town Council, Cwmllynfell Community Council, Gwaen Cae Gurwen Community Council, Quarter Bach Community Council, the Countryside Council for Wales and The Open Spaces Society and those individuals who requested a copy.

31. It should be noted that this letter does not convey any approval or consent which may be required under any enactment, bye-law, order, regulation or private agreement other than Section 194 of the Law of Property Act 1925 and Section 147 of the Inclosure Act 1845.

Yours sincerely



**Mrs L Haskey**  
**Senior Planning Manager**  
Decisions Branch  
Planning Division

Signed under authority of the Minister for Environment and Sustainable Development,  
one of the Welsh Ministers

Enc: Leaflets HC (S194) and H C (S147)