

Report No:	234/2008	Public Agenda Item:	Yes
Title:	Babbacombe Cliff Railway – Application for a Revised Parliamentary Order		
Wards Affected:	St Marychurch		
To:	Council	On:	31 July 2008
Key Decision:	No		
Change to Budget:	Yes	Change to Policy Framework:	No
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1. What we are trying to achieve and the impact on our customers

- 1.1 The aim of this report is to obtain formal authority for presenting to the Secretary of State for Transport a revised Babbacombe Cliff Railway Order in the terms now drafted
- 1.2 The approval of Council is a statutory requirement under the Transport and Works Act 1992 Section 20. An amended Order is required since the existing statutory instruments governing operation of the attraction are not sufficiently flexible as to permit optimum management and development of the attraction. Further, in June 2006 Cabinet resolved to grant a 40 year lease for the management and operation of the facility. Such a disposal would not be lawful within the existing Regulations.

2. Recommendation(s) for decision

- 2.1 That in the judgement of the Council it is expedient to apply to the Department for Transport for an Order under Sections 1 and 5 of the Transport and Works Act 1992 effecting all or some of the following purposes namely
 - a) to enable the Council to sell the lease charge or otherwise dispose of Babbacombe Cliff Railway (“the Railway”);
 - b) to make provision about charges for using the Railway;
 - c) to make provision about the operation of the Railway;
 - d) to amend and repeal local enactments relating to the Railway;

e) to enact any additional supplemental and consequential provisions that may appear to be necessary or convenient.

- 2.2 That the Corporate Support Commissioner, in consultation with the Cabinet Member for Community Services, be authorised to take all necessary steps to carry the foregoing resolution into effect.

3. Key points and reasons for recommendations

- 3.1 In January 2004 the report of the Overview and Scrutiny review of Access to the Coast recommended that alternative options should be investigated for the future management of Babbacombe Cliff Railway. By April 2005 it was apparent that there was no serious commercial interest in running the facility. A voluntary group was formed which approached the Council offering to take over the operation of the Railway upon the basis of a long lease and a management agreement. In return the Council resolved to manage and fund a £571,000 refurbishment programme. This has been affected over three financial years following a commitment from the 2005/06 capital budget.
- 3.2 It remains the case that there is no commercial interest in the operation of the attraction, notwithstanding recent market testing by the Council. In March 2008 a Community Interest Company was formed with a view to acquiring the facility. The company applied for heritage lottery funding of improvements. Following negotiations the external solicitors were instructed to draft a lease and management agreement. Subsequently it transpired that the 1923, 1926 and 1955 Regulations which governed the management and operation of the Railway contained no general power of disposal.
- 3.3 Application to the Department for Transport for a revised Order is necessary to permit the lawful transfer of the Railway. In addition variation of other Regulations will facilitate the Railways ongoing economic operation. A number of existing Regulations require modernisation: such as those relating to maintenance and to limitation of the fare structure.
- 3.4 Following resolutions of the Council and Cabinet in November 2007 the Director of Law and Support was authorised to instruct Sharpe Pritchard solicitors as Parliamentary Agents, with the assistance of whom the draft Order annexed has been prepared.
- 3.5 A guide to the details of the draft is attached at Annex 2.
- 3.6 Since the Cliff Railway is a "transport system" as defined by the Transport and Works Act 1992 the Secretary of State for Transport has the power to confirm the draft Order regarding its operation. However the power enabling the Council to apply for an Order (Section 20 of the 1992 Act) requires a majority of members to approve submission of the proposed Order to the Department for Transport.
- 3.7 In addition the Transport and Works (Applications and Objections) Procedure Rules 2006 will require the revisions to be advertised both before and after the lodging of the draft Order and supporting documentation (under Rule 10) once the consultation

procedure has been followed and any necessary additional information supplied a confirmed Order will be obtained. The ancillary specific ministerial consent to the disposal may then be granted. The revised Order combined with the approval will permit the Council to transfer the Railway to the Community Interest Company by means of a lease supported by a management agreement.

For more detailed information on this proposal please refer to the supporting information attached.

**Sue Cheriton,
Executive Head of Cultural Services**

**Sanjay Prashar
Executive Head of Legal Services**

Supporting information to Report 234/2008

A1. Introduction and history

- A1.1 Babbacombe Cliff Railway was built in 1924 by the Babbacombe Cliff Railway Company and transferred into the ownership of the Council in the mid 1930s. It is one of only 16 funicular railways operating in the United Kingdom. Its particular design is shared by only one other cliff railway, the designer being an apprentice of Isambard Kingdom Brunel. The cliff railway is one of 16 premises licensed in Torbay under the Marriage Act 1994 as a suitable venue for marriage ceremonies.
- A1.2 A major overhaul of the system took place immediately post-war. Since that time various components have been replaced and maintenance work has been undertaken on a regular basis as a result of the rigorous engineering inspection regime affected for regulatory and insurance purposes. A series of technical difficulties lead to an accident in 2003. This precipitated a major refurbishment programme which commenced in autumn 2005 and is continuing at a cost to date of £542,000.
- A1.3 A scrutiny report entitled "Access to the Coast" recommended in January 2004 that alternative options should be investigated regarding the future management of Babbacombe Cliff Railway. As a result in August 2004 expressions of interest in the commercial operation and management of the attraction were sought following the Council's initial commitment to invest. This resulted in approaches from four commercial operators. Preliminary talks were held with three prospective parties but all four subsequently withdrew.
- A1.4 In October 2004 a group involving the community local traders and business people was formed and designated "Friends of the Babbacombe Cliff Railway" (FBCR). The group currently has 291 registered members. FBCR was interested in improving the marketing of the facility in the short term and looking to acquire the management of the facility for the Community Interest Company in the future.
- A1.5 In March 2005 the Friends of Babbacombe Cliff Railway put forward a proposal for "not for profit" management of the attraction on the basis of a 40 year lease and management agreement. This proposal would be reliant upon the Council's commitment to managing and funding a refurbishment programme at a total cost of £571,000. In April 2005 this was agreed as part of the 2005/06 capital programme to be phased over a three year period.
- A1.5 Health and Safety Regulations require the Council to retain a suitably qualified maintenance contractor to carry out routine work and also to be on call for unscheduled support. A Lift Consultant additionally carries out inspections and provides advice. This arrangement currently costs the Council approximately £30,000 annually. Responsibility for maintaining a comparably rigorous arrangement for technical support would transfer to the voluntary group under the lease.
- A1.6 The profitability of the Railway has varied over the last five years. Income has been greatly affected by planned and unscheduled stoppages. Passenger numbers are also highly weather dependant since the Railway is used to access a beach. The

highest recent net profit recorded was for 06/07 of £17,000 however the preceding year was affected by “down time” and a small loss (£362) accrued.

A2. Risk assessment of preferred option

A2.1 Outline of significant key risks

A2.1.1 The preferred option continues to be to externalise the operation of the Railway. The need for an application for a Transport and Works Act 1992 Order has significantly increased the anticipated time scale: the commitment of officer time and the financial implications of so doing. The anticipated figure of £41,000 (see A.4 below) by way of Department of Transport fees and Parliamentary Agents charge is an estimate based on a “best case” scenario. There is no specific budgetary provision should this threshold be exceeded.

A2.1.2 The Friends of Babbacombe Cliff Railway and the Directors of the Community Interest Company could become de-motivated if the period of the wait for commencement of a revised Order and grant of Consent to Transfer becomes too protracted. The length will depend upon the scope and number of objections and the extent of additional detail or documentation requested by the Department for Transport from either the Council or the Community Interest Company. These are factors outside the Council’s control.

A2.2 Remaining risks

A2.2.1 The railway is located very close to a geological “fault” line in the underlying rock. The ground to the south has a history of instability. In 1998 a consultant geologist carried out a detailed examination of the area. He found no signs of recent land slippage in the immediate vicinity of the track. The Council would retain responsibility and liability for any future cliff work.

A3. Other Options

A3.1 **The Council continues to operate the Railway without applying for a new Order.** The Council would lack the necessary authority to transfer and/or manage future development to maximise the potential of the Railway. If the Railway is retained in-house a stable income flow will not be achieved since it is not possible for income to be ring-fenced to cushion deficits in income by applying reserves built up in better years.

A3.2 **Not to seek an Order and to close the Cliff Railway operation decommissioning the facility on a permanent basis.** When the Railway is operational for a full season it is possible to make a profit, for example 2001 net operating profit was £30,000. Further, the costs of decommissioning are substantial. The estimated costs of dismantling the carriages and removing material with a crane (to a standard to make the site safe) is in excess of £25,000. The removal of the transport link between the Downs and Oddicombe Beach would

be likely to impact on the usage of the leased facilities upon the beach. It would be likely to affect the value of the Council's reversion. Additionally given that the profitability of the leased facilities might be reduced by the direct and deliberate action of the Council it might be regarded as equitable to forego a percentage of the rent in this eventuality.

A4. Summary of resource implications

- A4.1 The Council is required by parliamentary rules to engage Parliamentary Agents. Sharpe Pritchard Solicitors who act as such on behalf of the Council have indicated that the fee for assisting with the procedure and finalising the draft of the revised Order may be in the region of £35,000. However if there are a number of statutory objections necessitating a Public Inquiry, the legal fee will be in excess of this sum and the time scale will extend from the standard six to fourteen months to a period of in excess of two years. In the particular circumstances, where the revision of the order is to enable a transfer rather than major works to the infrastructure of the facility, this is extremely unlikely.
- A4.2 The Department for Transport will charge an Application fee of £4,000 and a Consent to Transfer fee of £2,000. This sum will be funded from the repair and maintenance budget whereas provision has already been made within the Cliff Railway budget for the Parliamentary Agents costs to the extent of the estimated figure of £35,000.
- A4.3 Any enhancement of the Cliff Railway as an attraction would be complementary to the proposed development of the Cary Arms, Babbacombe, and the nearby beach facilities by Havana West Ltd. The developments should have a mutually beneficial effect upon the profitability of the two sites.

A5. What impact will there be on equalities, environmental sustainability and crime and disorder?

- A5.1 The recommendation will not have any detrimental effect on equalities environmental stability and crime and disorder. The revised Order will be deemed to include wider powers in relation to substance abuse, by passengers and by staff, upon the Railway as a result of a recent statutory instrument (The Cableway Installations Regulations 2004)

A6. Consultation and Customer Focus

- A6.1 Consultation with the community and traders was undertaken in 2006. There was found to be significant support for the operation of the Railway by a community group.

A7. Are there any implications for other Business Units?

A7.1 The processes necessary to ensure that the Secretary of State approves the Order will have an impact of the Council's Legal team. Reaching agreement on details of the lease will require the input of the Estates team and the council's additional external advisors, with the latter expected to cost in the region of £1500 plus VAT for completing this work.

Appendices

Appendix 1 Initial draft Babbacombe Cliff Railway Order

Appendix 2 Explanatory Notes

Documents available in members' rooms

None

Background Papers:

The following documents/files were used to compile this report:

Report to Business Development Meeting April 2005

Report to Cabinet 137/2006

Report to Strategic Management Team March 2007

Report to Cabinet and Council 29 November 2007