

Chris Mackay  
Burness Paull

Date: 9 June 2017

By email to [Chris.Mackay@burnesspaull.com](mailto:Chris.Mackay@burnesspaull.com)

Dear Chris,

## **HARBOURS ACT 1964 – TOBERMORY HARBOUR EMPOWERMENT ORDER**

I refer to the application submitted on behalf of your client, Tobermory Harbour Association (“THA”) for the making of the Tobermory Harbour Empowerment Order (“the Order”) under section 16 of the Harbours Act 1964 (“the 1964 Act”). This letter conveys the Scottish Ministers’ decision following their consideration of the application and representations made in relation to it.

### **Purpose of the Order**

The purpose of the Order is to confer powers on THA to operate as a statutory harbour authority and to define its powers and jurisdiction in Tobermory Bay.

### **The Application**

THA submitted an application for an empowerment order under section 16 of the 1964 Act to the Scottish Ministers on 13 September 2016.

The application was advertised in the Edinburgh Gazette on 16 and 23 September and in the Oban Times on 15 and 22 September 2016.

### **Objections**

The 42 day notice period ended on 27 October and 5 objections were received. These were from the Royal Yachting Association (“the RYA”), Caledonian Maritime Assets Ltd (“CMAL”), Argyll and Bute Council (“the Council”), Chris Cotton (who is the owner of Calve Island) and Colin Davidson (who appears to be objecting as a private individual).

CMAL objected to protect its interests in the ferry terminal on the west side of Tobermory Bay.

The Council objected to the inclusion of the public car park and other areas within the harbour jurisdiction.

Chris Cotton objected to protect his access rights to the island via a ford and by boat from the Aros pier on Mull.

THA engaged with all the objectors and provided a revised draft order and map which satisfied CMAL, the Council and Chris Cotton, who all withdrew their objections based on the revisions.

The issues raised by the RYA included:

- the inaccurate definition of the harbour,
- duplication in part of the draft,
- a perceived lack of clarity on the map,
- the absence of the qualification “reasonable” in relation to mooring fees,
- concerns over the power to appropriate parts of the harbour and some of the byelaw provision which they perceived as restricting navigation,
- the perceived unlawful sub-delegation within the byelaw provision,
- concerns about the general directions powers which they considered too wide,
- their preference that special direction powers not to apply in the approaches to the harbour,
- the absence of a “reasonable” qualification to the recoverable expenses in connection with enforcement of directions, and
- concerns about the power to levy charges on recreational vessels anchoring in the harbour.

Colin Davidson wished to see anchoring and landing at the harbour specifically made free of charge for pleasure craft and the potential prohibition on smoking in the harbour restricted to the fuel berth.

While the RYA withdrew elements of their objection in response to the revised draft, their objection was maintained, as was that of Colin Davidson.

These objections were subject to further written representations by all parties but ultimately both objectors maintained elements of their objection.

### **Scottish Ministers’ Consideration and Decision**

Having considered the points made by all parties, the Scottish Ministers have determined that the order should be made with certain modifications (which modifications are summarised in the following section of this letter).

Ministers note that the powers of direction are in similar terms to those applicable in relation to other harbours in Scotland. They consider that the powers of direction are proportionate for the safe and efficient management of the harbour and that there is no unlawful sub-delegation within the byelaw provision.

They further consider that the new harbour authority should have powers to levy reasonable charges in respect of the facilities and services they provide, including maintaining moorings and the seabed to facilitate safe anchoring. They also consider that none of these powers unreasonably limit the public right of navigation.

Section 16(5) of the 1964 Act requires that the Minister be satisfied that the making of the Order is desirable in the "interests of facilitating the efficient and economic transportation of goods or passengers by sea or in the interests of the recreational use of sea-going ships". Ministers are satisfied that the Order is desirable in the interests of facilitating the efficient and economic transportation of goods or passengers by sea and in the interests of the recreational use of sea-going ships.

## Summary of modifications

Modifications have been proposed by THA to address the concerns of the objectors. These include protections in regard to the lifeline ferry service, the rights of the owner of Calve Island and the as regards Council property within the harbour. Further, although not proposed by THA, Ministers consider that regulating the speed of vehicles in the harbour is not appropriate for a harbour authority and propose to remove that from article 14. The following is a summary of the modifications which Ministers have decided to make to the Order:

Article 2	fixed mooring added to definition of “ferry pier and slipway”; Harbour definition amended for clarity
Article 3	duplication removed
Article 7	description of operational land amended along with updated map
Article 9	“reasonable” added to charges for moorings
Article 12	minor amendments for clarity
Article 14	minor changes to prohibition of smoking, regulation of vessels for navigation and removal of speed in relation to regulation of vehicles.
Article 15	minor changes for clarity of process
Article 16 & 18	removal of the application of directions in the approaches
Article 21, 28 & 35	addition of “reasonable” to recoverable expenses for enforcement of directions and in relation to charges and their terms and conditions
Article 39	changes to the savings provision for CMAL and the ferry operator
Article 40	new savings provision to protect the access rights of the
Schedule	revisions to reflect reduced land area within jurisdiction and updated map

The Scottish Ministers are satisfied that the modifications do not substantially affect the character of the Order.

## Right to Challenge Decision

The foregoing decision of the Scottish Ministers is final but any person who desires to question its making on the grounds that there was no power to make it or that a requirement of the 1964 Act was not complied with in relation to it may, within six weeks from the date the order comes into force, make an application for this purpose to the Court of Session.

Any person thinking of challenging the decision to make the order is advised to seek legal advice before taking any action.

## Availability of Decision

A copy of this letter is being sent to all those who were consulted or made objections or representations on the order. It will also be published on the Transport Scotland website.

Yours sincerely

Val Ferguson  
Ports Policy Adviser