

Aviation, Maritime, Freight & Canals

Victoria Quay, Edinburgh EH6 6QQ
T: 0131 244 7488
martin.ritchie@transport.gov.scot



Monica Peto
Parliamentary Agent
Parliamentary & Infrastructure Consenting
Eversheds Sutherland

Date:
20 September 2019

MonicaPeto@eversheds-sutherland.com

Dear Monica

1. I refer to the application submitted by Eversheds Sutherland on behalf of your client, Caledonian Maritime Assets Limited (“the applicant”), for the making of the Caledonian Maritime Assets (East Loch Tarbert) Harbour Revision Order 2019 under section 14 of the Harbours Act 1964 (the 1964 Act). This letter conveys the Ministers’ decision following their consideration of the application.

Purpose

2. This order empowers the applicant to construct and maintain the following works:
- A pier of open piled construction.
 - The reclamation and infilling of an area comprising 5,200 square metres of the seabed at East Loch Tarbert and the levelling of that area together with the levelling of the adjoining land to form marshalling, parking and storage areas having rock armoured revetted slopes on the seaward side.
 - A single storey terminal building comprising passenger, baggage handling, ticketing and check-in facilities, sales areas, management offices, staff welfare facilities and storage areas.
 - A roundabout forming a junction with the A868 to provide an entrance and exit for vehicular traffic.
3. The order also confers the power to dredge for the purposes of constructing and maintaining the works and authorises the construction of subsidiary works:
- For the accommodation or convenience of vessels or for the loading and unloading of goods and the embarking and loading of passengers.
 - To alter the position of apparatus, including mains, sewers, drains, pipes, conduits, cables, electrical substations, electrical lines and telecommunications apparatus.
4. In addition, the order provides for new harbour limits and confers updated powers on the applicant including powers as regards the making of byelaws and issuing of general and special directions.

Application process

5. The formal application was submitted on 14 February 2019 and public notices were placed in the Edinburgh Gazette on 15 February 2019 and the Stornoway Gazette on 15 and 21 February 2019.
6. The 42 day notice period ended on 28 March 2019 with objections received from the Scottish Environmental Protection Agency (SEPA) and the Royal Yachting Association (RYA).

Objections

7. The SEPA objection dealt with waste water drainage, while the RYA objection covered five of the articles in the proposed order and included the RYA's general opposition to provisions on directions, byelaws and powers to appropriate parts of the harbour.
8. The applicant engaged with both objectors to discuss their concerns. SEPA agreed to the amendments to the site plans proposed by the applicant and withdrew its objection on that basis. However, the RYA objection remained unresolved.
9. Late objections were then received from the RYA and Harris Development Limited (HDL), the operator of a local marina. As these were received outside the statutory consultation period, they need not have been taken into account. However, the applicant agreed to address HDL's concerns as these partially overlapped with those of the RYA in regards to the changes in the limits of the harbour, directions, byelaws and power to appropriate parts of the harbour.
10. HDL withdrew its objection once the applicant addressed its concerns, which included the applicant agreeing that the order would not affect HDL's ownership of its marina and assets.
11. Ministers agreed on 20 May 2019 to handle the outstanding objections between the applicant and the RYA by written representations. During that process both parties made further representations; however, as outlined below, no resolution was achieved in several areas of the objection.

Written representations

12. The RYA's written representation of 24 June 2019 argued the following:
 - **Article 16 (Limits of harbour)** highlights the increased sea area over which the applicant may exercise its jurisdiction – It is for the applicant, as the promoter of the order, to make a case for its jurisdiction to be extended and/or new special powers to be granted. It is not sufficient that the proposed extension of jurisdiction and/or new powers are simply thought "appropriate" by the applicant.
 - **Article 16** – No adequate case has been made nor has any proper investigation or assessment been made of the likely impacts of the extension of jurisdiction and/or new powers sought by the applicant.
 - **Article 18 (Power to appropriate part of the harbour, etc.)** stresses to what extent the applicant may exercise its powers to appropriate or set apart any part of the harbour in regards to the public right of navigation in the harbour and any public rights of way affecting the harbour – Particularly where the powers sought involve significant interference with public rights, a strong case is required both that the powers are required and that adequate safeguards have been provided for.

- **Article 25 (Byelaws)** outlines how the applicant may make byelaws for the efficient management and regulation of the harbour – The principles of better regulation, in particular the principle that new regulatory controls should only be imposed only where the benefits justify the costs and where they entail the minimum burden compatible with achieving the desired regulatory objectives, are not satisfied in this case.
- **Article 25** – If the proposed new powers are to be allowed, the modifications proposed by the RYA represent minimum safeguards which will not unduly fetter the applicant in their management of the harbour and are a sensible and proportionate approach to the issues raised.

13. The applicant submitted the following response on 5 July 2019:

- The scope of the power to make general directions is necessary to enable the applicant to demonstrate, and to achieve, compliance with the Port Marine Safety Code.
- The provisions for making the general directions are in accordance with the usual procedure for direction making powers in Scottish harbour orders.
- The requirement for consultation with the Chamber of Shipping, RYA and other harbour users provides sufficient safeguards for their protection.

14. This was followed by a rebuttal from the RYA on 9 July 2019:

- The RYA has no objection to the applicant being granted the power to give general directions to facilitate the safe management of the harbour.
- However, the applicant should be well aware not only of the RYA's long-standing concerns in relation to the extent of those powers to give general directions.
- The applicant should also be aware of the substance of the RYA's proposed alternative provisions, which have no objection to the applicant retaining ultimate discretion and authority to proceed with its proposed general directions.
- This being the case, the applicant's response is described as being highly disingenuous and risks creating a false impression of the RYA's genuine concerns and proposed solution.

15. The applicant responded to the rebuttal on 17 July 2019 by repeating their conclusions of the 5 July and highlighting that:

- The representations made by the RYA relating to general directions should be seen in the context of their sustained campaign (i) to lessen the powers of harbour authorities so that leisure craft can come and go as they wish without restriction and (ii) to increase the RYA's control over those powers.
- The RYA stated that they have no objection to the applicant retaining ultimate discretion and authority to proceed with its proposed general directions.

Scottish Ministers' consideration

16. 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.

17. Ministers also agree that the powers sought by the applicant to expand its limits are reasonable, as are the powers sought to appropriate or set apart a part of the harbour. They consider that none of these powers unreasonably limit the public right of navigation.

18. Section 14(2)(b) of the 1964 Act requires that a Harbour Revision order shall not be made in relation to a harbour unless the appropriate Minister is satisfied that the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner, or of facilitating the efficient and economical transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships.

19. It has been determined that the proposed order is conducive to improving the management of the harbour in an efficient and economical manner. Ministers have decided to make the order with the modifications outlined below.

Summary of modifications

20. Based on the issues raised by SEPA, and the agreement between them and the applicant, no modifications were made to the order; however:

- The construction plans were altered to show the building's waste water connections to the existing sewer.
- The requirement for the contractor to protect the outfalls from blockage or damage during constructions was reinforced by adding this as a mitigation within the Construction Environmental Management Document (CEMD). The CEMD was dealt with via the Marine Licence process.

21. Based on the issues raised by RYA and HDL, and the agreement between them and the applicant, the following modifications were agreed in the made order:

- **Article 16** – Reducing the harbour limits under the applicant's control.
- **Article 25** – The words "or for the conservation of flora and fauna" were deleted as they are already present at Article 25(2)(o).
- **Article 25** – Before making byelaws, the applicant will consult with the appropriate harbour users.
- **Article 27 (General directions to vessels)** states with whom the applicant must consult when giving vessels general directions – The applicant may consult with the UK Chamber of shipping and relevant harbour users before giving general directions to vessels.
- **Article 27** – The applicant may consult with the UK Chamber of shipping and relevant harbour users before revoking or amending the general directions to vessels.
- **Article 42 (Exemptions, rebates, etc. in respect of charges)** outlines to whom the applicant may give exemptions/rebates on charges – The applicant shall not subject any person to liability for charges or dues in respect of a recreational craft merely for entering or passing through the harbour.

22. Ministers considered that the proposed modifications do not substantially affect the character of the order.

Right to challenge decision

23. 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.

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

Availability of decision

25. Once the order is made, the applicant must:

- Publish notice of the making of the order in the Edinburgh Gazette and a local paper.
- Send copies to the people notified of the original application.
- Copy the notice to Transport Scotland.

26. A copy of this letter is being sent to all those who were consulted on the order and will be published on the Transport Scotland website:

www.transport.gov.scot/transport-network/ports-and-harbours/harbour-orders/#

27. The finalised order will be available on the UK Government Legislation website:

www.legislation.gov.uk/

Yours sincerely



Martin Ritchie

Head of Ports, Shipping, Freight and Canals

