

Aviation, Maritime, Freight & Canals

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Keith Armstrong-Clark
Dumfries and Galloway Council

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Dear Keith

1. I refer to the application submitted by Dumfries and Galloway Council (the Council) for the making of the Kirkcudbright Harbour Revision Order (the order) under section 14 of the Harbours Act 1964 (the 1964 Act). This letter conveys Ministers' decision following their consideration of the application and representations made on it.

Purpose of the HRO

2. The Council determined that the current legislation applying in Kirkcudbright is generic and dated and reviewed it as part of their compliance with the Port Marine Safety Code. They determined a major update was required to provide a full suite of modern powers to operate the harbour, including directions, charges and harbour limits.

The Application

3. The Council is the statutory harbour authority for Kirkcudbright harbour and submitted an application for a revision order under section 14 of the 1964 Act to Scottish Ministers on 24 July 2017.

4. The application was advertised in the Edinburgh Gazette on 11 August and in the Galloway News on 10 and 17 August 2017.

Objections

5. During the 42 day consultation period 1 objection was received from the Royal Yachting Association (RYA). The objection covered 9 of the articles in the proposed order and included opposition to provisions on directions, byelaws, powers to appropriate parts of the harbour and the reasonableness of charges.

6. The Council engaged with the objector to discuss their concerns and agreed to propose some amendments to satisfy the objector; however, several elements of the objection remained unresolved.

7. Ministers agreed on 13 December 2017 to handle the outstanding objection by written representations. During that process both parties made further representations but no resolution was achieved in several areas of the objection including :

- The perceived failings of the map illustrating the harbour limits
- The provisions relating to damage to the harbour being too wide
- The requirement for reasonable notice prior to boarding a vessel
- The powers of appropriation being too wide
- Directions powers being too wide ranging
- Byelaw powers allowing prohibition on use of personal watercraft

Handling and Consideration of objections

8. RYA argued that the map should have been an admiralty chart, rather than an ordnance survey map. The map is for illustration only and the limits of jurisdiction were clearly specified in a schedule to the order. The main concern in relation to harbour limits is that these are clear to users. Ministers were satisfied that the description of the limits was clearly set out and that the map was sufficient for illustrative purposes.

9. The council argued that the damage provision was in similar terms to those in other orders relating to council harbours and would not prevent vessel owners from seeking redress where a third party has responsibility for damage caused by their vessel. The RYA cited the instance of weather related damage being caused by a vessel, and the council responded that they expect vessels should be insured for this situation. Ministers were satisfied that the provision is reasonable as drafted.

10. The RYA argued that reasonable notice should be required prior to the harbour master boarding a vessel in relation to any byelaw or other enactment or to extinguish a fire, except in an emergency. The Council conceded that written notice should be provided but the RYA contended that it is the timing of the notice rather than the means that was of concern. Ministers determined that notice should be in writing and should be given prior to the boarding of a vessel by at least 24 hours. This would not affect the use of the boarding power immediately in an emergency.

11. The RYA argued that the powers to appropriate parts of the harbour were too wide and would infringe the rights of public navigation. The Council cited safety as the main reason for use of this provision. A similar objection was raised on the Tobermory HEO made in 2016 and wording similar to that used in that order appeared to Ministers to balance the needs of both the harbour and its users, to be reasonable, and to allow efficient management of the harbour.

12. The provisions for general directions were generally objected to by the RYA and they cited other orders in England where cumbersome provisions for consultation and arbitration have been agreed. The provision as proposed for Kirkcudbright is in similar terms to those in other Scottish harbour orders and Ministers consider them to be proportionate to the needs of harbour authorities to regulate the use of the harbour while allowing for consultation with users.

13. The byelaw provisions allow for byelaws to be made prohibiting certain activities in the harbour but not so as to prohibit the use for navigation of certain vessels. The RYA objected to the exclusion of personal watercraft from the vessels cited. Ministers were of the view that a byelaw to regulate the use and navigation of personal watercraft within the harbour would be reasonable for safety reasons.

14. The RYA argued that an advisory committee should be established to represent harbour users and that the Council be required to consult such a committee. The Council responded that as part of their commitment to the Port Marine Safety Code compliance they already had established forums for engagement with stakeholders and harbour users. The sailing club to which the RYA referred were already engaged in these forums and a further committee was not necessary to engage fully with stakeholders. Ministers were satisfied that existing user forums are sufficient for the size of the harbour.

Summary of modifications

- Article 12 – power to board a vessel subject to 24 hours written notice and requiring the harbourmaster to produce his authority if requested
- Article 14 – provision is replaced with text similar to that used in Tobermory HEO which limits appropriation to reduce restrictions on navigation.
- Article 18 – power of special direction removed from the approaches to the harbour
- Article 23 – minor amendments for clarity relating to removal of vehicles illegally parked in the harbour
- Article 24 – charges subject to a lein to be charges levied under this order
- Article 25 – conservation text moved to main body of the byelaw power and minor changes on the prohibition on smoking and the process of approving byelaws and the removal of charges for copies of byelaws
- Article 27 – charges to be reasonable
- Article 38 – regarding location of the harbour office removed as unnecessary

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

Scottish Ministers' Consideration

16. 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.

17. It has been determined that the proposed order is conducive to the efficient management of the harbour and would facilitate the efficient and economical transport of goods or passengers by sea and therefore meets these criteria.

Right to Challenge Decision

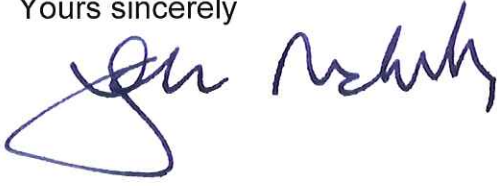
18. If and when the order is made, then any person who desires to question its making on the grounds that there was no power to make it or that a requirement of the 1964 Act was not complied with in relation to it may, within six weeks from the date the order comes into force, make an application for this purpose to the Court of Session.

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

Availability of Decision

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

Yours sincerely



JOHN NICHOLLS
Director – Aviation, Maritime, Freight & Canals