

CHAPTER 22

Conditions

22.1 The inquiry was advised in submissions that the applicant and HS had been unable to come to agreement as to the conditions to be attached should Ministers be minded to grant SMC.

22.2 It was stated on behalf of HS that, in the event that the Reporter advises Scottish Ministers to grant consent (“the Consent”) for these works, HS is required to provide a list of those conditions (if any) which should be attached to the consent. HS’s objection to the proposals had been informed by principle rather than detail. For that reason it was possible, on the basis of the information supplied, to advise Scottish Ministers to refuse consent. However, the proposals do not contain the level of detail normally required for SMC to be granted for works of this scale, and therefore the conditions are wide-ranging.

22.3 It was submitted that the approach of the applicant was not accepted as it specified only particular aspects of design that require to be finalised with HS. The approach of HS allowed greater control on the appropriateness of design decisions. The applicant appeared to object to the level of detail sought as to plans and specifications. Such a level of detail was normally required by HS and is necessary against a proposal which has many areas that have not been finalised. It was HS’s view that the conditions would be best framed in terms of over-arching provisions which apply to all aspects of the proposals equally and which, through the simplicity of structure, ease the adherence and management of them. The conditions proposed by HS are appended at Appendix 3A. The following comments in justification were made by HS in respect of each of the conditions it has suggested:

HS1 This condition is intended to create a programming structure for the work which, while devised by the applicant, permits the ongoing monitoring of the project by HS on behalf of Scottish Ministers.

HS2 This condition is intended to ensure that HS, as the agent of Scottish Ministers, is kept informed of the progress of all works and given suitable notice of works to provide the opportunity of arranging monitoring visits.

HS3 This condition dispenses with the need for a complicated and, potentially, confusing list of details. The proposals currently before Scottish Ministers are not in finalised form; contradictions exist between documents submitted.

HS4 This condition makes it clear that the work being proposed must not proceed without the approval of the Scottish Ministers. Notification alone is not sufficient.

HS5 It is an essential aspect of works on a project such as Castle Tioram, that spot-checking of works on site can be carried out. This is especially important when dealing with archaeological sites where the destruction of archaeology can be quickly disguised by backfilling. Such “cold calling” rarely forms the major component of a monitoring programme but it is an essential part of that work. The programme of on-site visits allows the applicant to be sure that visits can be relied upon. Such a series of regular visits will allow the applicant to plan for particular site-meetings and to be sure that any objection there may be to particular works is raised quickly following execution, thereby assisting in the good management of the project.

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HS6 This condition is intended to ensure that the archaeological aspects of this project are run in a clear and controllable way. Since the 1970's it has been accepted that archaeological interest is not limited to buried remains. Accepted best practice requires archaeological investigation to look at the building as well as buried remains. This condition also provides an administrative structure to the archaeological work which is familiar to all archaeologists working in Scotland.

HS7 This condition is a matter of mitigation; not directly associated with the design of the building. The aim is to ensure that temporary works which may have an impact on the monument are designed in such a way as to avoid this.

HS8 This condition is included to ensure that any works undertaken by the applicant in respect of one of the identified phases is completed and that financial security is available to ensure completion.

22.4 The following comments are made by HS in respect of the applicant's proposed conditions:

AC1 It is unclear to what documents reference is made. They should be listed with specific reference being made to them in any consent. The reference to "development" in the final sentence is inappropriate in the context of Schedule Monument Consent (SMC). The 1979 legislation deals with consent to works to a monument: it does not deal with land-use and development. The final sentence has no meaning in the context of SMC.

AC2 In addition to specification drawings it will be necessary for HS to approve the written specifications and any method statements.

AC2.2 HS cannot be bound by such a rigid time limit. If the caseworker for Tioram were on holiday when a substantial package of information arrived, this timescale might be impossible to meet. HS can agree that they will not delay unreasonably but the suggested time-scale is too short, particularly as HS has no control over the volume of material that might be submitted by the applicant.

AC3.1 This is essentially the same as the corresponding condition from HS.

AC4 This condition must not preclude unannounced visits by HS staff.

AC5 This is essentially the same as condition 1.6 from HS but omits reference to the standing buildings. This, it could be argued, is covered by the applicant's condition 10. However, condition 10 does not require the monitoring of works to the standing structure to be recorded archaeologically, nor does it oblige the applicant to ensure that the final report on the archaeological works integrates investigation below ground with what is going on above it. The work done to date should be incorporated into the final report on Castle Tioram.

AC6 This is the same as condition 7 from HS.

AC7 [All parts] This provides no information on the internal fitting-out of the building. Details of plaster finishes, timber work and decoration, in particular for the rooms open to the public, should be provided. The problem with such a list is that there is always the potential for such items to be left out. It is generally far simpler for the works to proceed with a comprehensive condition covering the approval of all details.

AC7.6 Any masonry, that is found, which is not claimed by Treasure Trove or reused in the building should be retained, stored and conserved on site. Any other material with more significant conservation requirements may best be cared for away from the

site. It is a principal for HS that historic material is best preserved as close to its site of origin as practicalities allow.

AC8 It is not immediately apparent what divides this list from that in 7. As with 7, there are elements which seem to have been omitted; e.g. scaffolding, landscaping (inc. paths), treatment of the courtyard. As with the list at 7, it is suggested that the simple, overarching procedure of ensuring that all proposals will have to be provided and approved in detail would be far easier to work with and would ensure that items of concern are not missed by mistake.

AC9 This is a matter which would be covered by the provision and approval of method statements for working practice. It is unusual to deal with it as a separate condition in a project of this size. There are numerous matters of working-practice, such as this, which will require agreement with HS. It is considered that the applicant is binding itself to a working practice that may be impossible to adhere to at all times. In most situations, HS would include a proviso that special consideration would be given to particular circumstances; problems of supporting scaffolding safely often require this sort of dispensation.

AC10 This condition should be incorporated into the archaeological condition at 5. As it stands, there is nothing to say that this recording should be carried out archaeologically rather than by a labourer with a camera. The work of recording should, as with other archaeological work, be followed up by analysis.

Section 75 Agreement

22.5 It was submitted on behalf of HS that the draft Section 75 Agreement between the applicant and HC under Section 75 of the Town and Country Planning (Scotland) Act 1997 is not a document that Ministers would be party to, nor would they be able to seek enforcement thereunder. HS submitted that any legal agreement should be entered into under Section 17 of the 1979 Act.

22.6 **It was stated on behalf of the applicant** that it would prefer a more onerous condition framework. The project would be a very complex piece of work. The organisation of the contract and its administration, the supervision of work, the identification of materials, the research, and all the discussions which would require to take place about each and every aspect of the proposal before final approval is given amounts to a formidable logistical organisational exercise. It was submitted that the best model for this approach is not the relatively simplistic framework proposed by HS, but a more exhaustive, specific approach modelled on the more detailed provisions which would be imposed on a reasonably complex planning permission.

22.7 The applicant submitted a proposed consolidated schedule of conditions which is appended at Appendix 3B. The following comments in justification were made by the applicant in respect of each of the conditions it has suggested:

AC1 The purpose of the applicant's suggested condition 1 is regarded as indispensable. Its purpose is to define the project for which permission has been sought, in a manner which makes it clear for both HS and the applicant of the point of departure for any adjustments or discussions. Both parties would therefore have a base line understanding as to what is to be achieved, which would then form a framework for discussions about fine tuning as and when they are required.

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AC2 This provides in what is understood to be a non-controversial manner for the prior approval of the actual contract drawings and contract specification.

AC3 HS to be made aware of the programme, and to be given an opportunity to comment.

AC4 This provides for a minimum number of visits by HS. The applicant has no objection to reasonable access by the statutory authorities. By virtue of its statutory powers HS can attend at any time. The purpose of the condition is by and large to ensure that the minimum visits of HS can be slotted into the programme. Quarterly has been suggested for regular reviews, however if HS preferred they would be welcome to attend the normal monthly progress meetings.

AC5 and AC6 These provide specifically for prior agreement of an archaeological programme to accepted standard.

AC7 In a draft circulated by HS, it was specifically suggested that all items identified in the design analysis and technical impact assessment as requiring agreement be approved by HS. This is not unreasonable. The applicant understands that HS takes exception to the specific nature of the material condition, suggesting that it is far too specific and exhaustive. The applicant has, for ease of reference and avoidance of ambiguity, extracted and specified the works specifically from the design analysis and technical assessment, ensuring that all matters that were noted from the evidence as of potential concern at the inquiry, such as grouting, etc. were specifically included. In addition, the applicant has expanded the level of information to be provided and made provision for samples. The effect of the condition would be to ensure that HS is aware of exactly how the process is to be gone about, and will be able to be closely involved.

AC8 This adopts an exactly similar approach to the crucial elements of the structure.

AC9 and AC10 It is understood that HS has no objections to these.

22.8 The following comments were made on behalf of the applicant in respect of HS's proposed conditions:

HS1 The suggested condition is identical to the applicant's draft condition 3.1, and is accordingly agreed as acceptable.

HS2 The suggested condition is identical to the applicant's draft Condition 2 and is accordingly agreed as acceptable.

HS3 This condition requires the submission of all fully detailed production information for approval prior to the implementation of any operations on-site, i.e. comparable to stages F and G of the RIBA Plan of Work. The applicant submitted that this condition does not reflect the practical implications of the action proposed. The project team anticipate the issue of a large volume of highly detailed information, preparation of which is likely to have taken many months. There may be as many as several hundred drawings, as well as a Comprehensive Specification, Contract Preliminaries, Bills of Quantities, and the Pre-Tender Health and Safety Plan. It was suggested that it would take HS's officers a lengthy period to review these documents in a comprehensive manner, to consider the impact which specific proposals might have on sections of the fabric, and then to review any items which might arise with the applicant. Any revisions could then lead to review and delay at a very late stage in the project incurring unnecessary expense. The efficiency and smooth running of the project would, in the applicant's view, be better served by

agreement of those areas of interest to HS at an earlier stage: broadly comparable to the RIBA Plan of Work stage F, "Final Proposals"; and thereafter a more selective regime of submitted detail. The applicant is also unclear as regards the suggestion that "method statements" be submitted. There are two aspects of this normally practised within the construction industry:-

1. The project team might indicate outline methods of undertaking particularly sensitive sections of the work, for example the erection of scaffolding or dountaking of masonry, as part of the Contract Preliminaries or Specification, for further development by the selected contractor prior to the implementation of works;

2. As a result of the Construction (Design & Management) Regulations 1994, the project team may indicate outline method statements for elements of the work which have significant Health and Safety implications. The selected contractor would then develop these as part of his Construction Phase Health and Safety Plan, together with any additional areas of concern which he had identified.

This ambiguity should be removed. It was submitted that the applicant's consolidated condition is sufficient, comprehensive and clear in its terms.

HS4 The applicant contends that this is not practicable and for the reasons given above therefore suggests an alternative approach with the same objective.

4.1 At completion of Stage F the applicant shall submit drawings to HS for its review of any areas of concern and its approval in principle,

4.2 No less than 2 months prior to the proposed commencement date, the applicant will submit to HS a full set of all contract documents comprising the Contract Preliminaries or Specification and the Health and Safety Plan for final approval or amendment by HS.

HS5 The applicant submits that the current wording of this draft condition, requiring that all drawings are to be submitted prior to the commencement of works does not, on a literal interpretation, make any allowance for those details which cannot be finalised prior to commencement on-site (for example scaffolding and service runs), or for those subsidiary details which in the normal course of a construction project might not be finalised until after commencement.

HS6 Anta Estates fully acknowledge the statutory position and has no objection to reasonable access by the statutory authorities during the works. The suggested text, which is substantially similar to that proposed by the applicant, is acceptable to the applicant.

HS7 The only difference between HS's Condition 6 dealing with archaeology and the applicant's Condition 5 is the phrase in the second sentence "... address both buried archaeology and the archaeology and recording of the castle structure". The inclusion of the phrase is acceptable to the applicant.

HS8 This condition was first supported by the applicant and is accordingly acceptable.

HS9 It was stated that HS departs from normal practice in utilising a condition to provide for a Section 17 Agreement. If Ministers consider a Section 17 Agreement to be necessary, it was suggested it would be appropriate for Ministers to issue a "minded to grant" letter which should allow the applicant and the other parties to engage in any discussions which were indicated to be appropriate by the Scottish Ministers.

Proposed Agreement between the Anta Estates Limited and The Highland Council under Section 75 of the Town and Country Planning (Scotland) Act 1997.

22.9 It was submitted on behalf of the applicant that, since HC resolved to grant a planning permission subject to conditions in an agreement between themselves and the applicant under Section 75 of the Town and Country Planning (Scotland) Act 1997, the applicants and the council have worked steadily together to put together an agreement which would provide for the various topics comprised within the Castle Tioram Project proposals, but which were considered by the council as part of the planning application. All of these elements should equally be considered as merits of the application for SMC.

22.10 It was maintained that the Section 75 Agreement would be sufficient because:

1. HS's officers on behalf of Scottish Ministers already have sufficient powers to fully supervise the works under the 1979 Act;
2. There are more development controls than the matters under the 1979 Act to be taken into account in the restoration of Castle Tioram; and the Section 75 Agreement provides for these;
3. In any event, Section 17(2) provides for such an agreement with the local authority. The statute itself recognises that the local authority can take the lead role in the management of a project. It was submitted that this is particularly suitable for a remote monument of local significance. The draft agreement has been consciously designed to be convertible to a Section 17/Section 75 combined agreement.

22.11 It was reiterated that, if Ministers should so wish, the Agreement could be entered into under Section 17 of the Ancient Monuments and Archaeological Areas Act 1979, with or without the involvement of HC. For the applicant's part, the normal practice that such matters are best dealt with at local level was preferred. Any such Section 17 Agreement must be based substantially on the arrangements contained in the draft Section 75 Agreement, insofar as those are relevant to Section 17 of the 1979 Act, and the statutory powers of Scottish Ministers. The agreement provided for is a voluntary contract, and would require to be negotiated with the applicant.