

## **8. CLOSING SUBMISSIONS**

---

### **8.1 CLOSING SUBMISSIONS FOR EAST AYRSHIRE COUNCIL**

---

8.1.1 The council submits that planning permission ought to be granted, subject to conditions in respect of the matters covered by the conditions in Appendix 2a.

#### **The current use of the SAM**

8.1.2 The description of the proposal in the planning application is accurate. Mr Walker had stated that residential use of the castle was abandoned following the fire. It then lay empty and with minimal maintenance until 1950. To establish a use in terms of the 1997 Act, planning permission (or the notification procedures that apply to Crown development), an existing use certificate or a certificate of lawfulness of existing use (CLEUD) needs to be obtained. There is no evidence that HS had pursued any of these options. In any event, irrespective of whether the current land use is a vacant castle or a Class 10 use, opening it as a visitor attraction would result in an intensification of use due to the estimated visitor numbers and the facilities on offer. That should therefore come within planning control.

#### **The Castle Tioram decision and the outline planning permission for Rowallan Estate**

8.1.3 As the Castle Tioram inquiry did not consider a planning application, the report of that inquiry is irrelevant to the planning application for Rowallan. While it may have a bearing on the SMC application, the 2 castles are in a very different condition from each other, and caution should be exercised in the conclusions that may be drawn.

8.1.4 The outline consent granted for Rowallan Estate in 2001 is relevant to the current planning application only in that the change of use now being proposed is as an annex to the main hotel and would rely on it for staff and related services. The conversion of the Lorimer House to an hotel does not stand or fall on the current application. Notwithstanding that link, this is the first planning application for the SAM, and there is no history of previous consents to be taken into account.

#### **Section 59(1) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997**

8.1.5 The planning application is to change the use of a building that is both a listed building, and a SAM. If the council's conditions are imposed, no physical development (i.e. works) would be granted planning permission. Section 55 of the LB & CA Act refers to those sections of that Act that do not apply to a SAM. As these sections do not include section 59, it applies to SAMs. However, its relevance to a planning application for a change of use, rather than for physical development, is minimal.

#### **Whether scheduling and occupation of a SAM are mutually exclusive**

8.1.6 Section 1(4) of the 1979 Act excludes from the Schedule "any monument occupied as a dwelling house by any person other than a person employed as the caretaker thereof or his

family". However, the planning application is for a change of use to an hotel annex, not for residential use. The 1979 Act does not define "dwelling house". Although there are similarities in the residential nature of use as a dwelling house, and use as an hotel annex, there are also differences - particularly the temporary nature of each visitor's "residency" in the latter. In EAC's view there is considerable doubt as to whether the grant of planning permission would automatically raise the issue of de-scheduling the monument.

## **Determination of the planning application**

### *Assessment against the development plan*

8.1.7 In assessing the planning application, the council has proceeded on the basis that a change of use would not have an adverse impact on the SAM. Mr Walker's approach, namely to consider only the principle of the change of use, is sound. That has resulted in a dispute between HS and the council as to which policies are applicable and, more significantly, the assessment of the application against these policies.

8.1.8 If it is accepted, firstly, that it is appropriate to take account of the works required to implement the use and; secondly, that the proposed change of use would have an adverse impact on the SAM, then the proposal would not comply with development plan policies. Alternatively, if it is considered that the works should not be taken into account, and that the proposed change of use would not have an adverse impact on the SAM, then, provided the other relevant criteria of each policy are met, the proposed change of use would comply with the policies.

8.1.9 As far as the council is concerned, it is inappropriate to take account of the refurbishment works. These do not constitute development in terms of section 26 of the T & CP (S) Act, they do not therefore require planning permission, and are controlled through the SMC process. Paragraph 54 of NPPG 1 makes that clear. Planning and SMC processes are separate and each has to be determined in terms of the statutory criteria that apply.

8.1.10 While that application is for change of use and refurbishment; proposed condition 1 (as amended), confirms that only the change of use is being approved. The refurbishment works are not a matter for the planning authority to determine. However, the council accepts that, as the application does not include works outwith the scheduled area, impact on the setting of the SAM is not an issue. The reason for the condition should be amended accordingly.

8.1.11 Sections 25 and 37(2) of the T & CP (S) Act set out the statutory test for determining planning applications. The statutory development plan comprises the approved AJSP and the adopted SLP. The council and HS agree that the age of the SLP means the weight to be given to its policies must be reduced. In that respect, the approach of the Reporter who conducted the previous Rowallan inquiry should be adopted.

8.1.12 The application has nevertheless to be assessed against all relevant policies of the SLP, which identifies Rowallan Estate as including an ancient monument. The terms of Policy 4.7.15 exceed those of the 1979 Act, which does not prohibit development. They also do not appear to accord with the reason for the policy, which is to afford SAMs "adequate

protection". Reading the policy and the reason together, as required by NPPG 1, the policy should not be interpreted as a "blanket ban" on development at SAMs. Although the SLP indicates there is a lack of hotels, guesthouses and holiday flats within the local plan area, there is no specific policy against which to determine a proposal for hotel accommodation in the rural area. For guidance in that regard, it is necessary to look to the policies in the EALP.

8.1.13 The strategic policies against which the planning application requires to be assessed are contained in the AJSP, which includes among its objectives obtaining a robust and sustainable development strategy; assisting in the development of a healthy and diverse economy as a source of wealth and jobs; and conserving and enhancing the natural and built environment and exploring enhanced leisure opportunities.

8.1.14 The structure plan makes clear that its policies and strategic guidelines are inter-related and complementary, that the objectives of one policy should not be achieved at the expense of another, and it should be read as a whole without policies being taken out of context. EAC views the proposed change of use as having a potential benefit in terms of jobs for a rural community, and the provision of much needed tourist accommodation in an existing building, linked to an additional tourist experience. Rowallan Old Castle is a SAM and a Category A listed building, and is located within a designed landscape. At present, few people are able to appreciate its undisputed cultural significance. The proposal would improve the quality of facilities, attractions and experiences for day and longer stay visitors to East Ayrshire, as well as paying guests staying at the hotel annex.

8.1.15 The AJSP also recognises economic activity in the countryside as a necessity. Policy W6 indicates that the countryside will be sustained as a place of varied and productive social and economic activity, whilst safeguarding and managing natural and built resources. There is guarded support for the planning application, in that development must not be at the expense of the natural and/or built heritage. That approach is taken forward by the environment policies of the plan, in particular Policy E20. The plan recognises that the AJSP is not the only protection afforded to built heritage resources. The protection of Rowallan Old Castle is multi-layered. It is a SAM, is subject to the protection of the 1979 Act; it is a PIC, and is subject to a DG.

8.1.16 NPPG 5 and "Passed to the Future" indicate that government policy and local plans are directed to contain policies for the protection and enhancement of such resources. The AJSP makes clear that "development having an adverse effect on built heritage resources will not be supported. If it is accepted that only the principle of the change of use requires determination, then there would not be an adverse effect on the built heritage resource.

#### *Assessment against material considerations*

8.1.17 As the planning application accords with development plan policies, it should be approved unless material considerations indicate otherwise. The EALP, NPPG 5, NPPG 18, PAN 42, The Conservation of Architectural Ancient Monuments in Scotland - Guidance on Principles, Passed to the Future, consultation responses relevant to the planning application, and the current condition of the castle are relevant material considerations in that regard.

8.1.18 The council assessed the planning application against all the relevant policies of the EALP, namely Strategic Development policies, Tourism, Leisure and Recreation policies, and Environment (Built Heritage) policies. There was considerable debate at the inquiry as to which of the Built Heritage policies apply to the planning application. Unlike the SLP, the EALP has no policies directed solely to SAMs. It acknowledges the protective role of the 1979 Act as regards SAMs and therefore directs its attention to the protection of other sites of interest which do not enjoy this statutory protection. That may in part explain why only Policy ENV1 refers to SAMs.

8.1.19 The strategies in the plan that are most relevant to this application are the economic strategy (which aims to promote tourism, enhance the image of the area, and assist economic development) and the environmental strategy (which aims to safeguard and enhance the natural environment and the built heritage). Tensions between these 2 strategies are clear. Weighing up the acceptability or otherwise of a planning application against that background is a matter of judgement. By its nature, that is a subjective matter and differences of opinion will occur. Policy SD7 states the council will positively support, encourage and promote the sympathetic upgrading, reuse and conversion of existing properties, in preference to the construction of new build properties. It does not exclude SAMs from consideration. There were no objections to the policy during the local plan process.

8.1.20 Consultees should not use reasons for objecting to the SMC application as reasons for objecting to the planning application unless those reasons are material planning considerations. Much of the content of the consultation responses are not material planning considerations. SNH had advised that, if it was concluded that the proposal would have an adverse impact on bats, the Conservation (Natural Habitats &c) Regulations 1994 would require a licence to be obtained before any works begin. That procedure would provide further checks and balances.

8.1.21 The council had taken account of the policy guidance contained in NPPG 5 and NPPG 18 where appropriate. It remains of the view that granting planning permission would not have implications for that guidance. Neither document prevents development at SAMs. The more recent guidance and advice issued under the auspices of HS (HS/12 and HS/13) recognise that monuments can be restored for re-use.

8.1.22 It is possible to change the use of the SAM without an adverse impact on the built heritage. HS maintains that the SAM has a use, and that it is preparing to open the monument to the public and to promote it as such. That would be a welcome tourist development in an area that traditionally under-performs in this market sector. As far as the condition of the SAM is concerned, HS has already undertaken considerable works in order to bring its proposal to fruition, as the condition survey in HS/25 shows. Mrs Grove stated that other works remain to be done prior to opening, including the replacement of the electricity supply. HS refuses to accept that its works to date do more than preserving the SAM.

8.1.23 The council accepts that the minimum works necessary to ensure preservation can, in fact, be considerable in both size and cost. However, it also considers that the castle is being prepared for re-use, whereas Mrs Linge stated that the building, once promoted as a visitor attraction, would simply be continuing its existing use. If HS accepts that its work is necessary for its use of the SAM, it seems inconceivable for it to reject the principle of such

works proposed by the applicant. While a new electricity supply is only one of the works proposed by the applicant, HS does not acknowledge that the same works, undertaken for a different end use, would be acceptable.

8.1.24 As matters stand, the SAM is a tourism resource that remains under-exploited and under-developed. The inquiry would be very different if HS had opened the SAM as a visitor attraction. However, its plan, after 50 years of guardianship, is to open to the public on a seasonal basis next year. Occupation of a building that is currently unoccupied, other than for short periods to carry out necessary works, is bound to have an impact on the fabric, particularly if the numbers anticipated are realised. Occupation as an hotel annex would have no greater impact on the fabric than occupation by visitors on organised tours.

### **Conclusions**

8.1.25 In conclusion, the council submits that the application would accord with the policies of the development plan and the EALP, it would have a positive economic benefit for the rural area, and would meet the terms of its tourism strategy. While there are policy tensions between development and preservation, granting permission would not have implications for the policy guidelines in NPPG 5 or in NPPG 18. As it would also not result in de-scheduling of the SAM, or remove it from Guardianship, that protection would remain in place. Only considerations that are material to the planning application must be taken account of in the determination of the planning application. Those relevant only to other statutory protection fall to be considered by the decision makers involved in that context.

## 8.2 CLOSING SUBMISSIONS FOR HISTORIC SCOTLAND

---

### **The role of Historic Scotland**

8.2.1 HS is responsible for discharging Scottish Ministers' functions in relation to the protection and presentation of Scotland's built heritage and advising Ministers on policy. Its evidence was given by, and at the instance of, those within HS charged with the responsibility of advising Scottish Ministers on DML's applications and for administering guardianship over the monument.

### **The monument**

8.2.2 The detailed understanding of the history, construction, architecture and cultural associations of the monument that is required to properly assess the applications is encapsulated in the concept of "cultural significance" defined in the Burra Charter. Planning policies direct attention to the impact of development upon the built environment. For SMC, the emphasis is on "preservation", with policy advocating the minimum intervention required for conservation. There was broad agreement between DML and HS regarding the history and construction of the castle. However, there are differences regarding its cultural significance, and how that is best maintained and enhanced.

8.2.3 HS led more detailed evidence than the applicant regarding the history of the monument, its construction, and the history of the families associated it, including documentary sources, fabric and archaeological evidence. Its known human use begins in the Bronze Age. Remnants of at least one Iron Age timber building have been discovered in the tower. The first identifiable building, of the latter half of the 13<sup>th</sup> Century, was erected by Gilchrist Mure, a member of the important family associated with the castle throughout its 7 phases of construction. The development of castle is consistent with the wide and cultural interests of the Mures. In the 18<sup>th</sup> Century it passed to Campbell of Loudoun, who did not appear to use it as the premier family residence. By the mid-19<sup>th</sup> century, it was used for estate staff, and at the end of the century was no longer being lived in.

8.2.4 Lord Rowallan, who bought the estate in 1901, chose to build a larger residence. The abandonment of the castle as a house is relevant to a proper understanding of its cultural significance and what is now an appropriate use. Lord Rowallan was not keen on the castle being used for accommodation, considering that it would cease to be what it was – an Ancient Monument. He urged repairs and that the Ministry of Works took the Castle over on that basis. DML's suggestion that Lord Rowallan was "hawking" the castle around in an attempt to dispose of it is disputed and the claim that Lord Rowallan came to regret his offer was not substantiated. The castle was included by the Ancient Monuments Board for Scotland in their "first priority group" for Guardianship, as a "unique specimen of 17<sup>th</sup> century domestic architecture".

8.2.5 The present condition of the castle is the base for considering whether the principle of minimum intervention necessary for the conservation of the monument is being met. DML accepts that it is structurally sound, and requires little physical works. None of the matters that HS has identified for attention constitutes a threat to the monument's survival, and only one is stated to require urgent attention. The applicant's CP subscribes to the principle of minimal intervention.

8.2.6 Understanding the value or usefulness of an ancient monument is essential to the consideration of whether the planning application should be approved, the understanding of the effect any operational development or physical works, and assessing the SMC application. The value or usefulness of a SAM includes:

- evidence of the past development of society, with associated potential for education;
- its resource for historical, architectural, artistic, and scientific understanding;
- recreation, leisure and tourism; and
- its contribution to "quality of life".

These features are spoken to in almost all considerations of the historic environment and conservation philosophy referred to: in particular, HS/13, HS/5, the Valetta Convention, the Venice Charter, the Burra Charter, HS/12, and HS/9.

8.2.7 Cultural significance encompasses a range of features, tangible and intangible, intrinsic to a monument, and is defined in the Burra Charter as aesthetic, historic, scientific, social or spiritual value for past, present or future generations. There is broad agreement between the applicant and HS on the significance of this monument. EAC made no such assessment. Mr Walker admitted that he had relied on the information provided by the applicant, and little weight appeared to have been given to the advice obtained from WoSAS and HS.

8.2.8 DML undervalues the national significance of the monument. Mr Stell's evidence, which was accepted for its terms, explains that structures which did not serve an obviously military role were previously on the margins of scholarly attention. The castle is an example of a Scottish Renaissance home, which mimics, on a domestic scale, major royal works. With a change in academic study to consider the social and domestic history of Scotland, the true significance of the castle as a fine and complete specimen of the Scottish mansion of the 16<sup>th</sup> and 17<sup>th</sup> centuries has been better appreciated. Key to its cultural significance are:

- the archaeological excavations that revealed the late Bronze Age and Iron Age remains. The site has the potential to provide important archaeological information;
- the castle is a precious and delicate manifestation of the life-style and ancestry of the Mure family, a Renaissance family of the first rank epitomising the polymath culture of their age;

- it provides physical evidence of its cultural links, with the woman house being, as currently understood, the clearest and oldest example of its genre in Scotland and highly susceptible to change;
- it is an ancient lairdly residence, which was transformed into a Renaissance home with architectural allusions to the Mure's royal connections (it has also been associated with three other locally and nationally important families);
- it is associated with the Covenanters;
- the 7 phases of construction illustrate the evolution of the function and use of a laird's house –bringing a complexity to the site not yet clearly understood and of highly significant historical and architectural interest;
- its interior includes rare and fragile material – 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> century panelling, the bed screen in Room F7, and the mud and timber 'cob' partitioning, one of very few known surviving examples of its type.
- it is in a good state of preservation;
- it is a rare, surviving example of Scottish Renaissance, domestic architecture - not only such buildings but documentary records of their construction and form are missing;
- it was once surrounded by elegant formal gardens;
- it has an aesthetic appeal;
- it presents evidence of social use, cultural associations, construction techniques, and architectural developments; room layouts and use are important in those respects;
- as a SAM, it has been accorded the highest level of statutory protection, and is of national importance. That importance and protection is further illustrated from being under guardianship;
- it is a educational, leisure and tourist resource in its present condition.

8.2.9 The decline and end of residential use are also integral to its cultural significance.

8.2.10 The 1979 Act imposes duties and creates rights in respect of properties under guardianship. It places Scottish Ministers under a duty to maintain such a monument and gives them full control and management of it. To fulfil those duties, they have "power to do all such things as may be necessary for the maintenance of the monument and for the exercise by them of proper control and management with respect to the monument". The public have a right of access, as do Scottish Ministers. The applicant cannot terminate guardianship: that can only occur with the consent of Scottish Ministers, provided that satisfactory arrangements have been made for ensuring preservation after guardianship.

### **Scheduling history**

8.2.11 The 1979 Act came into force in November 1981. Prior to that, since at least 1955, the castle was an "ancient monument", as defined in section 22 of the Ancient Monuments Consolidation and Amendment Act 1913 (the 1913 Act), as it appeared on the list of monuments published by the Commissioners of Works. The Introduction to the 1955 list (HS/31) explains that it contains all extant monuments that appeared on earlier lists and also includes all monuments in care. Rowallan Old Castle is listed, as a



property "wholly or partly in the charge of the Minister under the provisions of the Ancient Monuments Acts". In 1979, HMSO published "Ancient Monuments in Scotland, a list corrected to 31 December 1976" (the 1979 List). That list includes " .... all monuments in Scotland scheduled, and therefore under the protection of the Ancient Monuments Acts, up to 31 December 1976", including Rowallan Castle. The 1979 List was the list last published before the 1979 Act came into force. Accordingly, on the basis of section 1(2)(a) of the 1979 Act, the castle was a scheduled monument from the commencement of, and in terms of, the 1979 Act, having been included in the List of monuments protected under the 1913 Act from, at least, 1955.

8.2.12 It is incorrect to suggest that the castle was only scheduled in 1994. The 1994 notice of the proposal to schedule related to the castle, together with surrounding ground, larger in extent than the area of guardianship. The entries in the 1955 List and the 1979 List refer only to Rowallan Castle itself, and not to the surrounding ground, which was scheduled in 1994. It might have been clearer if the 1994 scheduling process had referred to "re-scheduling" of the castle, and scheduling of the surrounding area. However, there is no such statutory term as "re-scheduling" and what occurred in 1994 falls within section 1(3) of the 1979 Act. The letter of 6<sup>th</sup> September 1994 makes clear that the 1994 process made no difference to the consent procedures through which the owners required to pass. As the castle was in Guardianship, its maintenance and management fell to the Secretary of State and were not the responsibility of the owner.

#### **The present use of the monument**

8.2.13 The monument has both a present use and usefulness. It is a SAM under the guardianship, and a resource for public visits. Members of the public do visit, though perhaps not extensively at present. All the factors of "usefulness" or "value" are present. It cannot be claimed that the castle is vacant or has a nil land use.

8.2.14 It cannot be concluded that the State's involvement has been other than beneficial to the monument. The evidence shows that the castle was in a poor state in 1950, and its survival as a roofed structure with valuable and delicate interiors was at threat. The works undertaken to remedy those threats conform to the principle of minimum intervention necessary for conservation. Without them, the castle would not have survived as it has. Conservation philosophy has not remained static, in terms of technology or approach. Earlier works to Rowallan reflect this refinement. These are not necessarily what would be done today, and should not be regarded as a precedent for current best practice, but no HS witness regarded them as inconsistent with good practice at the time. The applicant led no evidence to the contrary, nor did it establish that the works are posing a significant threat to the building or to its cultural significance. It also did not address detailed measures for remedying any such threats.

#### **Miscellaneous matters**

8.2.15 As regards DML's allegation of a change of policy towards its proposals, the estate was marketed in the period 1995-96, when HS expressed an interest in acquiring

the castle. It also asked the selling agent to advise interested parties that the castle was not a development opportunity and that HS wished to retain it in Guardianship, with opening to the public. Mr Watkins had explained that Government policy in the 1990s was more sympathetic to the release of properties in state care, but nothing was agreed with Mr Campbell in 1992. HS had maintained then that it required details of the proposals and that its concern was for the protection of the building and for it to remain in State care. It had also indicated throughout the level of detail it would require to assess any SMC application, but that it considered it difficult to conceive that the applicant's proposals could be accommodated without unacceptable damage to the fabric.

### **Statutory and policy framework**

8.2.16 Separate statutory provisions apply to the planning application and to the SMC application. However, the status of the monument as a SAM under the 1979 Act is a material consideration for the planning application. Neither of the 1997 Acts are relevant to consideration of the SMC application. The national and international policy guidance referred to in evidence is relevant to both applications; with the exception that listed buildings policy is not relevant to consideration of the SMC application. The development plan has to be considered in relation to the planning application, but is not relevant to the consideration of the SMC application.

#### *Planning and listed buildings legislation*

8.2.17 The planning application is for a material change of use. DML's proposals also include matters that may amount to building works, under section 26 of the T & CP (S) Act. Mr Walker conceded the latter in respect of the proposal for harling, although EAC considered the change of use alone. In any event, as the application is for "development" in terms of section 26 of the 1997 Planning Act, sections 25 and 37(2) apply. The UCO also applies. As the castle is a listed building, regard must also be had to section 59 of the LB & CA (S) Act. That makes the listed status of the building a material consideration to the planning decision, along with the desirability of its preservation, and the preservation of any features of special architectural or historic interest. However, it does not follow that policies relating to listed buildings are to be applied in preference to those applying to SAMs. That would make no sense as SAMs have a higher status – as illustrated in PAN 42. Section 55 of the LB & CA (S) Act removes the need for listed building consent for SAMs.

8.2.18 Section 59 makes clear that there is to be a balancing act: (i) consideration of the planning permission for development; and (ii) the desirability of preserving the building or its setting or any of its features of special architectural or historic interest. The desirability will be influenced by the extent to which there are features of special architectural or historic interest, and their importance. A listed building that is a SAM has the very highest level of architectural and historic interest. The decision maker must assess that interest and the desirability of its preservation against any proposed development. The same exercise applies to a SAM.

### *Ancient Monuments Legislation*

8.2.19 The starting point for considering whether or not SMC should be granted is a thorough understanding of the provisions of the 1979 Act, which is a consolidating statute, including its statutory history. That understanding, and consideration of whether to grant SMC, will also be informed by consideration of national and international conservation policy.

8.2.20 The statutory history of the protection of ancient monuments in the United Kingdom began with the Ancient Monuments Protection Act 1882, which was prompted by a concern regarding the over-restoration of medieval buildings and the development of a philosophy that the duty should be on preservation. Significantly, the 1882 Act also introduced the mechanism of Guardianship. Its provisions were consolidated, amended and extended by the 1913 Act.

8.2.21 In considering the purpose of, and the construction to be given to, the 1979 Act, some principles of statutory interpretation should be noted. An Act of Parliament falls to be read as a whole and is its own best interpreter (*K v Craig 1999*). The title and the preamble may be referred to as determining the scope of the statute. Where a statute is divided into parts by headings, the heading limits the application of the sections that follow. Other statutes covering the same matter should be examined (so the Act's predecessors are of interest. Regard should be had to the social and political situation when the Act was passed, and the state of the law at the time. The mischief that the Act was to overcome should be considered, as should the ends that it was intended to achieve, and the practical means by which it was expected to do so. There is a presumption that there is no intention that a consolidating act should change the law. References to "Secretary of State" in the 1979 Act are now to be read as references to "Scottish Ministers".

### *National Importance*

8.2.22 The only criterion in the Act for inclusion in the Schedule is that a monument is of "national importance". A SAM is afforded greater protection than the definition of "ancient monument", in section 61(12). "National importance" is not defined in the Act and its interpretation is to be taken from reading the whole of the Act and, as it is a consolidating Act, its statutory predecessors. However, it is legitimate to conclude that part of "national importance" is the public interest in the monument by reason of its historic, architectural and archaeological interest. In considering the meaning of the term, regard should also be had to statements of policy, issued by or on behalf of Government, including non-statutory sources, such as paragraphs 45 and 46 of PAN 42. These are consistent with such guidance on interpretation as is to be obtained from the 1979 Act. The significant restriction that Government has imposed on the rights of owners, by the need to obtain SMC for any works to a SAM, is also relevant. The degree to which consent is required is considerably more extensive than with listed buildings.

## *Preservation*

8.2.23 “Preservation” is to be construed as being consistent with the principle of minimal intervention necessary for the conservation of the castle. The purpose and focus of the 1979 Act in respect of SAMs is to secure preservation. Protection, which equates with preservation, was the stated aim in the preamble to the 1882 Act. As the 1913 and 1979 Acts are consolidating Acts, the presumption that there is no intention to change the law operates. The following provisions in Part 1 of the 1979 Act (Part II has never applied in Scotland) are consistent with a principle of limited intervention in respect of SAMs:

- the reference in the preamble to “preservation” of matters of historical importance;
- the authority, in section 5, for Ministers to carry out works “for the preservation of a SAM;
- section 6(5), in relation to notices for the purpose of preserving a SAM from accidental or deliberate damage;
- the provisions for payment of compensation for refusal of SMC relate to maintenance of the *status quo* and not in respect of development - see section 7(2);
- powers of compulsory acquisition are afforded “for the purpose of securing its (i.e. the ancient monument’s) preservation”;
- the statutory provisions relating to guardianship of ancient monuments are framed with an emphasis on minimal intervention - see sections 12, 13(1), 13(7) and 19;
- the provisions which may be included in any agreement entered into by Scottish Ministers with the occupier of any ancient monument include “the maintenance and preservation of the monument and its amenities” - see section 17(4)(a).
- the powers afforded to the Scottish Ministers to make funding available is for the costs of preservation, maintenance and management - section 24. Scottish Ministers and a local authority cannot incur expenses in respect of any monument occupied as a dwelling house by any person other than a person employed as the caretaker - section 24(5).

8.2.24 Limited intervention is consistent with the principle of minimum intervention necessary for the conservation of a monument contained in national and international conservation policy. There is no subordinate legislation under the 1979 Act in respect of the approach to be taken to considering SMC applications and it would seem illogical to ignore planning policy that specifically refers to SAMs. Paragraph 11.23 of the Report of the Castle Tioram inquiry correctly summarised the approach to be taken in considering an application for SMC.

## *Scheduled Monument Consent*

8.2.25 The issue in considering the SMC application, and recommendations to Scottish Ministers, is whether consent ought to be granted for the works identified by the applicant or intrinsic to any proposed change of use. There is no competing application for SMC. The proposals in HS/25 are not relevant to consideration of DML’s

application, whether or not one agrees with them. Evaluation of their merit is an entirely separate matter.

8.2.26 The criteria for determining the SMC application are found in:

- the status accorded to the monument by virtue of being a SAM – i.e. it is of “national importance”. There is no higher form of statutory protection granted to the historic environment.
- national planning policy – NPPG 5 and NPPG 18;
- SE policy guidance on the historic environment;
- international conservation charters;
- HS guidance in published sources such as HS/12 and HS/5.

8.2.27 SMC may be granted either unconditionally or subject to conditions. However, the 1979 Act does not empower Scottish Ministers to grant outline SMC. PAN 42 makes clear that concept is specific to planning applications. Section 15(2) of the LB & CA (S) Act allows listed building consent to be granted subject to conditions, provided that the application contains sufficient details to describe the works that are the subject of the application. However, the Memorandum makes clear that section 15 of that Act is not intended to allow the granting of listed building consent subject to a condition which would have the effect of leaving major details crucial to an assessment of the merit of a proposal unclear.

8.2.28 While a presumption in favour of development applies within the planning system, there is no such presumption in respect of works under the 1979 Act, which is primarily concerned with the preservation of monuments. In the case of SAMs, the presumption will be against change of use, reconstruction or recreation. Consent is required for virtually all physical works to a SAM. Small physical details may be material to its status as a monument of national importance - the Ancient Monuments Board criteria for national importance note that the significance of a monument may include matters such as structural or decorative features. Without knowing the details of any proposed works, it is impossible to know whether the principles of conservation philosophy and the Scottish Executive’s policy on sustainability will be met. Criminal sanctions apply to those executing works to a SAM without SMC or without conforming to conditions attached to a SMC. Where such penalties exist, it is essential to have certainty as to what will constitute an offence.

8.2.29 It would therefore be inappropriate, and potentially damaging, to grant SMC in a form that amounted to “outline consent”. It would defeat the purpose of the 1979 Act to reserve details for later consideration or a further consent when these could undermine the whole basis of the consent. If these details had been known at the outset, SMC might have been refused. It might also be difficult or impractical to refuse such details at a later stage, particularly if work had begun and had compromised future options. A severely damaged building as a result of a partially implemented consent is not in the best interests of a monument of national importance.

### *Scheduled ancient monument status and habitation*

8.2.30 In the absence of a definition of “dwelling house” in the 1979 Act, the term has to be given its natural and ordinary meaning, and in the context of the whole Act, including its purpose. The arrangement described by Mr Campbell would mean that all of the roofed area of the Castle, except the basement kitchen (B16) and Rooms G6, G4 and G3, would be used for letting accommodation. It would have all the facilities of a dwelling, other than a full kitchen. While it would not be used regularly by the same people and occupants would be staying on a commercial basis, the context in which the term appears is that of preservation of monuments. The definition of monuments, the criteria for listing (i.e. “national importance”), the prohibition of public expenditure on a dwelling house, and the exception made for structures occupied by a caretaker or his family, argue in favour of interpreting “dwelling house” widely. SMC procedures are compatible with such an interpretation, being required for virtually any form of physical works to a SAM. Such a burden would be onerous, if not inappropriate, for a building used regularly for accommodation. The normal enjoyment of such property regularly requires redecoration, updating of services, and repairs to fixtures and fittings. The reference to “person employed as the caretaker” implies that his use is not the predominant use of the monument.

8.2.31 The view that the proposed use would be a “dwelling house” is consistent with two English decisions where the construction to be given to the term for planning purposes was considered. In *Gravesham Borough Council v Secretary of State for the Environment*, it was found that what amounted to a “dwelling house” was a matter of fact: one was concerned with buildings “that ordinarily afford the facilities required for day-to-day private domestic existence”. An hotel would not come under such a definition, but occasional use and lack of a bathroom did not prevent the structure concerned there from being a dwelling house. In *Moore v Secretary of State for the Environment*, the Court of Appeal agreed that it was not necessary for a building to be occupied as a permanent home to be a dwelling house. Properties were regarded as dwelling houses, though they were managed for holiday or other temporary lettings.

8.2.32 The phrase “or at any time thereafter include therein” in section 1(3) prevents Scottish Ministers from continuing to include a SAM that has become a “dwelling house” in the Schedule. As it is not simply the use of a building for that purpose at the time of its first inclusion that disbars it from being scheduled, the castle could not continue in the Schedule and would have to be “de-scheduled”. Mrs Grove had also stated that, as a matter of practice, HS would not recommend the continued scheduling of a monument being used for the purposes proposed by the applicant.

8.2.33 Separately, if the proposed use is not, of necessity, incompatible with the provisions of section 1(4), any owner of the castle would have strong grounds to request that it be “de-scheduled” and to take any refusal to judicial review. Irrationality and proportionality of decision-making are two grounds of challenge under that process. It could be forcefully argued that, given the exclusion of dwelling houses from scheduling, it was irrational to continue to schedule the castle. It might also be argued that a decision

to refuse to de-schedule was lacking in proportionality, in that the consent requirements implicit in scheduled status were unduly onerous for the use and proper enjoyment of ownership of the building.

8.2.34 The legal opinion (HS/28), that occupation for residential or similar purposes is not prohibited, is concerned with guardianship and not with use compatible with scheduling. It contains no consideration of section 1(4) of the 1979 Act, or of section 24(5), and provides no basis for concluding that the proposed use would not equate to "dwelling house" and entail de-scheduling. Finding 23.8 of the Castle Tioram inquiry report states that HS can move to modify the entry in the schedule to exclude that part of the monument which is inhabited. It had been argued there that the castle might be de-scheduled but that the island might remain scheduled. In the present case, the equivalent move would be to de-schedule the castle, but not the remainder of the scheduled area.

### **Policy, philosophy and guidance**

8.2.35 Statements of Ministerial or national policy, such as Passed to the Future (HS/13) and NPPG 5, the Stirling Charter, and international charters are material considerations for both applications. The question of which policies and which parts of them are most relevant is resolved by considering the status of the monument. All emphasise the need to determine the importance of a monument, which will then inform what is appropriate for its future. Particular weight should be accorded to Passed to the Future and to NPPG 5. The Stirling Charter, which HS/13 states constitutes national policy and guidance, should be given the same weight as NPPG 5. The international charters are also referred to in HS/13 and have also to be given considerable weight.

8.2.36 Mrs Linge's evidence regarding the value of these various sources is commended. Mr Walker accepted that he had not had particular regard to the status of the monument as a SAM. Mr McNally afforded no particular weight to the monument being a SAM and considered the designation to have no relevance. Mr Walker had not considered HS/13 in detail. Mr McNally had had no regard to it at all, to the Stirling Charter, or to international conservation policy.

8.2.37 HS/13 commits Scottish Ministers to the sustainable management of Scotland's historic environment, so that it can be enjoyed by all, including future generations. It stresses the value of retaining, and, where it is possible and right to do so, re-using existing structures. That demonstrates that, for some structures, continuing use or re-use may not be appropriate and supports HS's contention that re-use is not necessarily appropriate to SAMs. HS/13 also recognises that conflicts in approach to management may arise, and should be governed by the application of the precautionary principle.

8.2.38 The Stirling Charter states that there should be a general presumption in favour of preservation, securing conservation for the benefit and enjoyment of present and future generations, and countenances only the minimum degree of intervention appropriate to the monument. It also states that it has been informed by, and builds on, international conservation charters, thus giving these Government recognition.

8.2.39 As regards NPPG 5, Mr McNally's focus on encouraging private sector efforts ignored other matters such as looking after PICs (where private involvement will be less possible); promoting the enjoyment and understanding of the heritage; and ensuring that the legislative system properly protects and preserves it. Paragraph 17 is directly relevant to both applications. As SAMs are ranked at the first level of importance in considering archaeological features, any development of adverse impact should not be permitted unless there are exceptional circumstances. Paragraph 25 states that the preservation of ancient monuments is a material consideration in determining planning applications.

8.2.40 NPPG 18 is of limited assistance. It applies to the built environment in general and provides no specific guidance on how SAMs are to be treated under the planning system, in contrast to its references to listed buildings. Nevertheless, its presumption against development that adversely affects the character of a listed building or its setting is consistent with Mrs Linge's approach. In considering impact, one must start by recognising that the castle has the highest level of statutory protection. The presumption against development of adverse impact to a listed building is not as stringent as that for SAMs, contained in paragraph 17 of NPPG 5.

8.2.41 PAN 42 is also a material planning consideration, particularly on the question of "adverse impact". It is also of direct relevance to the SMC application, including in terms of providing the fullest statement of policy on what amounts to "national importance", and in considering how dual status as a listed building and as a SAM is to be approached, where "ancient monuments legislation takes precedence".

8.2.42 BS 7913: 1998 (HS/9) is a statement of good practice for those undertaking works to historic buildings, although of less weight than the above policy documents.

8.2.43 Conservation of Architectural Ancient Monuments in Scotland – Guidance on Principles (HS/12) is also material, particularly in determining what may constitute adverse impact on a SAM. TAN 8 provides comprehensive and accessible information on the international conservation movement. It is appropriate to take account of international conservation philosophy, consistent with the UK government becoming a signatory to the Valetta Convention (following TAN 8). That philosophy informs what is thought to be acceptable conservation practice and what is adverse impact on the monument has to be assessed by reference to it. HS/12 fully discusses the principle of minimum intervention necessary to the conservation of the monument.

8.2.44 The HLF guidance (HS/8) deals with the preparation of a CP by applicants for grants under the Fund. While a plan is not a formal requirement for either of the applications, a reasoned conservation strategy is necessary to justify works. While of less weight than the previous sources, HS/8 is relevant to assessing whether DML has fully and accurately justified its conclusion that there is no adverse impact. HS/27 amplifies the views in HS/8. Although not of great weight, it is nonetheless also a material consideration.



8.2.45 The Valetta Convention, The Venice Charter, and The Burra Charter are material planning considerations of considerable weight. They are highly and widely regarded, inform the practice of HS and other bodies, and should be followed in considering the SMC application. As a signatory to the Valetta Convention, the UK has agreed to abide by and further its aims. Interpretation and application of national legislation should, so far as not inconsistent therewith, accord with the principles of the Convention. Although the UK is not a signatory to the other 2 charters, good practice dictates that the State should accord with their terms as far as possible. DML's CP refers to the Burra Charter and accepts that it provides guidance. The Stirling Charter and HS/13 also refer to international charters.

8.2.46 The inquiry must report on the basis of the evidence led. The only evidence on appropriate conservation practice was led by HS. It was all to the effect that the proposed works would have an adverse impact and went beyond the principle of minimum intervention necessary for the conservation of the Monument – in particular the castle. The following broad principles are to be drawn from consideration of the sources of conservation guidance and philosophy:

- the built heritage has a range of values to society, providing an understanding of our history and national identity; it is an educational, a recreational, and a finite resource, which should be conserved for future generations;
- the cultural significance of a monument must be assessed before one is able to assess what is the appropriate conservation strategy; all aspects of the cultural significance are to be respected;
- conservation is based on respect for the fabric of the monument together with its use, associations and meanings; it requires a cautious approach;
- an appropriate conservation strategy will be one that maintains or enhances the cultural significance of the monument;
- the appropriate conservation strategy will be one that incurs the minimum amount of intervention to a building that is necessary for its conservation, not simply justifiable by one person's aspirations;
- where the cultural significance is not threatened, one should do nothing.

### **Planning permission**

#### *The 2001 outline planning permission*

8.2.47 The 2001 permission is not a material consideration for the present planning application, and certainly not one of any weight. While the reference in the 2001 decision letter to "Rowallan Castle" may suggest a degree of ambiguity, it does not mention the castle by name. The buildings on the estate covered by condition 2(b) also do not include the castle, which ought to have appeared first, if a hierarchy was intended. Findings F3 and F9-10, based on evidence led by DML, appear to exclude the castle from consideration. Mr Walker had stated that the Council did not consider the castle to be part of the outline permission. Counsel for DML agreed that it is not included. As the

outline permission did not cover the castle, HS was concerned that the EALP should make clear that it was not a development opportunity.

8.2.48 There is uncertainty as to the final allocation of the Old Castle in the EALP and its apparent inclusion of as development opportunity ref 193 in the EALP should also be given no weight. It is not an effective local plan land allocation as required by NPPG 1. That is because the castle is a SAM, the protection of such is a material consideration under the planning system; SMC and planning permission would be required to implement such an allocation; and there is no guarantee that either would be given. The inclusion of the Castle as a specific land allocation therefore fails to satisfy paragraph 23 of NPPG 1, which states that, "to be effective development plans must contain relevant and realistic policies...". Section 59 of the LB & CA (S) Act, the consideration of SAMs in planning applications, and the development plan, all focus on whether there is an adverse impact on the building. Separately, significant weight should be attached to the designation of the monument in terms of paragraph 17 of NPPG 5.

#### *Approach to the evidence*

8.2.49 Mr Walker had no previous experience of SAMs in the planning context and had not considered HS/13 in detail. Crucially, neither he nor the Council had assessed the question of adverse impact to the monument but had accepted DML's position. He also accepted that he did not have detailed knowledge of the building's features of special historical or architectural interest, or of the work done by HS. He also gave no apparent consideration to section 59 of the LB & CA (S) Act. Little if any weight can be given to his evidence.

8.2.50 Mr McNally gave no consideration to the scheduled status of the monument, referring instead to its listed status. His evidence was to the effect that scheduling was of no relevance. The provisions of NPPG 5 which refer specifically to the treatment of SAMs and the criteria appropriate to different categories of archaeological remains were ignored. The focus of his evidence was on regeneration, as was his experience, which lacked any previous consideration of planning permission for a SAM. However, he had not taken account of HS/13, which is the Executive's policy on regeneration. His evidence was of no value to the inquiry.

8.2.51 In contrast, Mrs Linge has extensive experience of advising on the interface between the planning system and scheduling. She gave full consideration to the development plan and other material considerations, with a detailed analysis of policies for SAMs. Her evidence is commended.

#### *The development plan*

8.2.52 The development plan identifies 3 recurring concepts: adverse impact on the SAM; site specific locational need; and sustainable development.

8.2.53 As far as the first of these is concerned, the shortcomings of Mr Walker's evidence have already been identified. To comply with the requirement regarding the development plan, and section 59, EAC ought to have assessed whether the impact on the monument would be adverse. The evidence led by HS shows that DML's proposal would have an adverse effect and that it would not accord with the development plan, or with the direction in section 59.

8.2.54 The development plan promotes (i) a presumption against any development affecting the built environment and, in particular SAMs; and (ii) the preservation of SAMs. The principle that any proposal having "an adverse effect" on the built heritage, and in particular SAMs, will not be approved, recurs. Policy 4.7.15 of the SLP correctly recognises the presumption under the 1979 Act against development and notes a distinction in the approach of the planning system and the legislative controls on SAMs. It should be applied to the castle, placing the onus on DML to show how its proposal is appropriate to the status and policies applicable to the built heritage and to SAMs.

8.2.55 Policies ENV1-3 of the EALP operate as a descending hierarchy, according to the relative importance of the site, consistent with paragraph 17 of NPPG 5. Policy ENV1 has to be read in light of the protection for SAMs under the 1979 Act and of government policy. "Preservation" is to be construed in the context of the purposes of the 1979 Act and the principle of minimal intervention. As the castle does not require the works associated with the change of use for its preservation, it cannot be concluded that the change of use is consistent with these policies. Policy ENV2 is a recognition that the treatment of SAMs differs from that of non-listed buildings and of listed buildings that are not SAMs. Mr McNally failed to recognise that. Policy ENV3 is not relevant as it applies to sites of lesser importance than SAMs, again in accordance with the hierarchy in NPPG 5. It would not be appropriate to SAMs, envisaging as it does the loss of the resource to developers.

8.2.56 No site specific locational need has been demonstrated. There is no approved local plan that identifies a development need in respect of the castle, nor has a need been demonstrated for this development. There is no evidence that the approved hotel development needs the castle, and the outline consent was "stand alone". While it was stated that the area would benefit from high quality hotel stock, the provision of hotels is only one tourist objective. Others include visitor attractions and the development plan does not indicate that one type of tourist development is to be preferred to another.

8.2.57 The AJSP and the EALP both promote "sustainable development", which is a commitment of Scottish Ministers (HS/13). Its approach was not considered in detail by EAC, or by Mr McNally. The statutory protection of the SAM, particularly Guardianship, affords the best guarantee of future preservation. In that context, the proposed change of use, and the necessary works, would not accord with Government or with development plan policy for the sustainable development of the built environment.

8.2.58 The change of use would also not accord with development plan policies regarding business development. The AJSP promotes sympathetic industrial and

business development, but not at the expense of the environment. That will include the built environment. Policy W6 should be read in the context that a SAM can have a "usefulness", and the value of ancient monuments and the significance of the castle should be borne in mind. The proposed change of use would diminish the usefulness of the castle as a place of education, tourist interest and recreation. It would be rendered into more commercial accommodation and variety will be lost.

8.2.59 Policy IND10 of the EALP also refers to sympathetic business developments; and, in the countryside, requires these to be justified and assessed against their impact on the environment. In this case, that will include impact on the SAM. The only justification offered is the claimed need for high-quality hotel accommodation in the area. However, that would be provided by the hotel development at the Lorimer House, which is not dependent on the castle. In addition, no need has been demonstrated as required by Policy G5 of the AJSP and by Policy SD3 of the EALP. The need must arise at the proposed location, but also be identified as such in the development plan.

8.2.60 As the castle has a tourist function and use, and a "usefulness" value to tourism, the proposals should not be regarded as bringing tourist value where none existed before. DML's proposals and those of HS both serve tourism functions. However, the AJSP makes clear that the promotion of economic growth is not to be at the expense of the environment. The only type of commercial development to be allowed in the countryside allowed by Policy 5.3.9 of the SLP is tourist or recreational facilities, and locational need is to be demonstrated. That has not been done here. The proposals would also not satisfy proviso (ii) of Policy TLR3 of the EALP - for resources "requiring conservation" the retention of cultural significance and securing preservation for the future are key issues. As no specific locational need has been demonstrated, and there would be an adverse impact, it would not accord with Policy TLR4. Policy W5 of the AJSP encourages development that will increase the range and improve the quality of facilities. However, this proposals would provide the same type of facilities as in the Lorimer House. The proposals for public access to the interior are minimal: the interiors make a key contribution to the national importance of this Monument. In contrast, the castle at present, and even more so under HS plans for regular opening, provides a unique tourist facility. It is to be seen as one of Ayrshire's most historic sites; is of national importance; and contains very rare historic fabric sensitive to any interference.

#### *Material considerations*

8.2.61 In addition to the material considerations already listed, recognition that the castle is a SAM is integral to the assessment of desirability of the proposals, and is also material. The evidence shows that the proposals would have an adverse effect on the SAM. In such circumstances, in terms of paragraph 17 of NPPG 5, it should not be permitted unless there are exceptional circumstances. No such circumstances have been demonstrated. NPPG 18 is a material consideration insofar as it is a statement of national policy and if it has policies of relevance. However, it relates primarily to listed buildings, and has less weight than NPPG 5. The advice at paragraph 8 is nevertheless relevant. DML's proposed use is tied to the success of the Lorimer House hotel development. As

viability or demand have not been demonstrated, the future of the Castle, able to sustain itself through State protection, is linked to a commercial development of unknown prospects. Paragraph 18 weighs against the proposals. The emphasis in paragraphs 21-25, on retaining buildings in use, is more relevant to listed buildings and must be on appropriate use. SAMs can justify themselves. In any event, the castle has a use.

### **The scheduled monument consent application**

8.2.62 The issue for this application is whether SMC should be given for the works detailed in the application form, the submitted drawings and the CP, with its Methodology Statement and Bill of Quantities. Amplification of the proposals in evidence was largely to the effect that some modifications might be made: e.g. the castle would not be harled if not thought appropriate, and the use of some rooms might change e.g. the woman house might not be used as a bedroom. However, attention must focus on the works that are proposed, and the implications of the proposed use. Material changes to those works would constitute a different application, which has not been made. Nothing that HS has done or may propose to do, including in HS/25, is relevant in considering whether DML's works should be granted SMC.

8.2.63 As there is a presumption against works to a SAM, the onus is on DML to establish that its proposals should be granted SMC. The 1979 Act focuses on preservation and imposes a requirement for consent for even minor works. The principle of minimum intervention necessary for the conservation of a monument; and the emphasis on the needs of a monument accepted in the Castle Tioram inquiry support that view. On that basis, the principle of "minimum intervention necessary for the conservation of the building" stands to be applied. This monument is of national importance. It is wind and water-tight. There is no threat to it.

### *HS response to the applicant's proposals*

8.2.64 HS has consistently intimated the level of detail that it requires in order to consider DML's proposals. DML had criticised it for failing to produce information and attributed deficiencies in the CP and the proposals, at least in part, to that alleged failure. However, HS acts on behalf of Scottish Ministers to whom maintenance and management of the monument is entrusted. It is neither appropriate nor necessary for materials produced for those purposes to be produced in their entirety immediately. DML did not indicate, prior to the inquiry, that its applications were other than in detailed form. As HS had indicated the level of detail required, it is inconsistent to argue that it was understood that the SMC application would be in two parts with the principle being determined first. As stated above, a grant of outline SMC would be incompetent.

8.2.65 Mr Campbell had advised EAC that the drawings submitted with the planning application were derived from the Loys Survey. However, Mrs Grove had stated that some later Loys material is only available now. Mr Wright had stated that properly considered proposals require a proposer to assess a site closely himself, in order to gain a proper understanding of it. This is consistent with the advice in the HLF guidance.

Mr Campbell did not explain what difference it would have made to his proposals if he had been provided with the information alleged to have been withheld.

*Evaluation of the applicant's conservation plan*

8.2.66 The value of a conservation plan is to assess the cultural significance of a monument and to work from there towards an appropriate conservation and management strategy. A plan, if properly carried out, is therefore the hinge between what is important about a building and how that is to be preserved. There is no benefit in preparing a plan with the aim of justifying one's own aspirations. Although DML's CP sought to follow the template of HS/8, it omits the final two sections in the template - "Conservation Policies" and "Implementation and Review". Mr Campbell, who wrote it, has no experience in leading or devising conservation strategy in respect of SAMs. Rowallan is a complex site, but the advice in HS/8, that a team of professionals should be involved in the preparation of a CP, was not followed.

8.2.67 DML led no evidence to counter the weight, experience and analysis of Dr Bell and Mr Wright, who considered that the CP does not provide a sound basis for concluding that the proposals are the appropriate conservation strategy for the Monument. Dr Bell stated that no significant risk to the monument's cultural significance had been demonstrated; there is no description of how past works are endangering it; and no details of a short or long term repair and maintenance plan, or of a conservation policy. It is not explained how the proposed use, with the need for works such as bathrooms, residential heating and finishes suitable for commercial accommodation, would maintain or enhance the monument's cultural significance. Indeed, no need for any degree of intervention is demonstrated.

8.2.68 Mrs Grove considered that the highest and not the mean value is appropriate to rating heritage value. Separately, the CP's discussion of acceptable levels of intervention indicate that the level of intervention proposed does not accord with what is stated to be the acceptable level. None of the works are demonstrated to be necessary for health and safety, or for conservation reasons; rooms would be used as bathrooms and bedrooms that never had such functions - notably the use of the woman house for bedrooms and the use of F7, which has a particularly important and sensitive cob partitioning, as a bathroom.

*Evaluation of the applicant's proposals for works*

8.2.69 It is axiomatic to an application for SMC that works are proposed. For the reasons stated above, it is essential to know what those works are. The description in the SMC application is of little assistance in that regard, and one must look to the CP and the drawings. HS witnesses referred to the implications for the fabric of the proposed use. That use is relevant to an assessment of the works required for its execution and realisation. In that regard, the evidence of Mr Wright, in particular, on the demands imposed on a building for the sort of use envisaged is highly relevant. He had described the proposals as in outline only, equating to RIBA Work Stages C and D, whereas Stage

E is required. His evidence on the lack of detail was not contradicted by the applicant. Mr Campbell had accepted that his proposals are deficient.

*Criticisms of the works, implications of the lack of detailed proposals and adverse impact on the monument*

8.2.70 The practical implications of these deficiencies are as follows:

- in the absence of detailed proposals for works, it is impossible to determine whether it is appropriate to grant consent.
- no consideration is given to any requirements imposed under the Building Standards Regulations, fire protection requirements, or the Disability Discrimination Act.
- elevations are not provided at key areas, such as service routes and the impact of falls on the archaeological resource – e.g. the soil vent pipes from G4 and G13.
- although interior fittings and fixtures (cob partitioning (F7), bed recess (F13), panelling and doors) are of historical value and interest, contributing to the cultural significance of the castle, the routes and the location and means of fixing electrical cabling; light fittings; the finalised positions and fixing of heaters; telecommunication positions and fire detection systems are not clearly indicated.
- room allocations and layouts have not been finalised. Without that information, it is impossible to evaluate the true impact on cultural significance. An incompatible use would not illustrate how the historically significant woman house was used. Using F7, in the absence of any evidence that it was ever used as a bathroom as now understood, also deprives that space of any association with its past. The changed layouts and orientations of bathrooms in the drawings is important as the location of sanitary fixtures may require attachment to vulnerable, historic fabric.
- Use as high quality, expensive, lettable accommodation in association with a country club hotel assumes a sophisticated level of servicing, such as luggage, linen, and clothes storage; drying facilities; room cleaning with dedicated sinks and staff accommodation. Providing for such requirements could have an adverse effect on the historic fabric. While Mr Campbell had provided some explanation, there is no consideration in the proposals of how these matters would be addressed. Granting SMC in the absence of such information could involve subsequent requests for consent for other works, which would be difficult to refuse but of adverse impact. Potential but unconsidered needs are therefore relevant to whether the present works should be granted consent.
- inadequate consideration has been given to the need for instant hot water in large quantities, and the associated piping and equipment.
- the architects who produced the drawings are not demonstrated to have experience as conservation architects with experience of SAMs.
- the drawings omit key features such two windows to the east of the entrance.
- the proposals refer to “electrically operated pump/macerator to convey soil by way of narrow diameter pipework...”, probably to minimise the bore of soil vent pipes. Such systems are rarely appropriate for hotels.

- the proposal to remove the historically important box bedding recess in F13 (on the grounds that it might be prone to damage) would remove an original feature that contributes to the cultural significance of the Castle. It is not otherwise at risk and Mr Campbell accepted that its form is related to its surroundings. That proposal also runs counter to the position in respect of the vulnerable cob partitioning in F7.
- the Bill of Quantities provides for many of the internal walls to be lined in gypsum plasterboard, coated in lime based plaster, which Mr Wright considered inappropriate. It would hide the underlying stone and obscure part of the historic record, and would be very similar to the much criticised finish in F13/14.
- the Bill of Quantities also includes the application of Scots Harl to all external faces. Such a proposal can only be justified where there is sufficient evidence of an earlier finish and its composition. The CP does not consider any such evidence. Harling is not required for the safety of the building, or its external stonework. It would obscure the constructional evidence apparent from the stonework and have a dramatic impact on the appearance and aesthetic appeal of the Castle. The failure to consider the issues raised by reharling in the CP shows that those proposing the works do not understand the issues attendant to works on SAMs.
- the redecoration proposal will have a significant effect on the look of the castle. The CP does not consider what information is to be gleaned from the existing remains of paint finishes, how interior finishes will affect the cultural significance of the castle, or what finishes would retain or enhance that significance.
- DML has swithered as to what form of heating is to be adopted: the merits and demerits of different systems have not been assessed in the CP. Mr Campbell's preference in evidence was for a dry heating system; but the drawings are incorrect in locations given for radiators: e.g. in Room G11 a radiator was shown attached to original panelling. The location and design of radiators should have been considered and finalised
- the insulation needs of the building are ill-considered.
- the original timber fittings, such as doors and panelling would be vulnerable, both in the execution of works and in the use of the building as proposed.
- the proposals would reduce the potential occasions on which the Castle would be available for public access – Mr Campbell had referred to only 25 days of full public access.

8.2.71 DML did not lead a conservation architect or conservation practitioner to rebut these criticisms. The use of the rooms as bedrooms and bathrooms is required for the proposals, not for conservation. Private funding is not a justification for the proposals, as guardianship secures the castle's preservation.

8.2.72 The evidence on building standards and fire protection requirements addressed a final area of concern regarding the extent of potential invasive works. That concern focuses, not on whether compliance with the relevant standards could be achieved, but on what impact that would have on the fabric. As that remains unresolved, it is impossible to evaluate what works would be involved, and therefore inappropriate to grant SMC. No EAC Building Control official appeared to support Mr Campbell's claim that representatives of the department had said that the proposals would comply with the



Building Standards Regulations, with intelligent application and relaxations. There was also no documentary evidence to that effect and Mr Wallace was sceptical that such remarks would have been made. Building Control has to consult the Firemaster, the applicant, and bodies such as HS, before it can issue an approval. That is only done when compliance with the Regulations has been demonstrated. If EAC's Planning Department regarded the proposed use as an hotel, Building Control would assess it as an hotel, as it will always apply the requirements of the most onerous use. Mr Wallace accepted that compliance is almost always possible, but may involve significant work to the fabric.

8.2.73 Mr Wallace described the letter from the Assistant Firemaster as in a standard form, listing the criteria that would apply. It does not indicate what works would be required to make the castle satisfy the requirements of the Fire Authority. A Fire Certificate would probably be required for the second floor, ground floor being taken from the basement level as there was access at ground level to that floor. As the current use and state of the building do not require to comply with building standards and fire safety requirements, the proposals import a level of intervention that is not necessary for the preservation of the castle. That is contrary to the principle of minimum intervention.

## **Safeguards**

### *Safeguards offered by the applicant*

8.2.74 DML provided very little evidence regarding the safeguards that would be afforded to the monument under its proposals and management. Mr Campbell said that the castle would be owned by DML or passed to a Trust with a capital sum of £50,000 being made available for its upkeep: his reference to a bond was not fully understood. No detailed costs for upkeep were provided; the hotel operator was not identified; and no business plan was produced to demonstrate the feasibility of the proposals at the suggested nightly charge. Mr Campbell conceded that, if the venture was unsuccessful, the Castle would be maintained by the Trust or DML as it stood. In such an eventuality, the works would have been unnecessary. No public access arrangements were proposed for the planning or the SMC applications. That all contrasts with the current position whereby the State funds the maintenance and management of the monument. Section 14(3) of the 1979 Act prevents it from rescinding Guardianship unless satisfactory provision has been made for its preservation.

### *Safeguards offered by the statutory protection of the monument and their limitations*

8.2.75 The castle is presently afforded the highest level of statutory protection. That may not continue if SMC is granted. Either as a matter of legal necessity or practical consequence, the castle, if not the wider scheduled area, would be de-scheduled if the proposals are implemented. It would remain a listed, but under a less comprehensive and stringent protection regime, and policies related to SAMs would no longer apply. As its new use would have to be recognised in determining any planning or listed buildings consent applications, works affecting its valuable and vulnerable interiors could result.

8.2.76 It is also questionable what content would be left to its Guardianship status. Section 24(5) of the 1979 Act precludes Scottish Ministers from spending money in connection with any monument occupied as a dwelling house. Ministers might not regard it as appropriate - if not in fact precluded by section 24(5) - to spend public money on maintenance or management if the castle was used as proposed and it is difficult to see how they could manage it in those circumstances. These factors might argue in favour of renouncing Guardianship under section 14(3): though they must be satisfied that satisfactory arrangements have been made for its preservation. An agreement on maintenance under section 17 can only be made in respect of a de-scheduled monument.

#### *Conditions and limitations*

8.2.77 The draft SMC conditions tabled are submitted with grave reservations, for the reasons explained at paragraphs 9.5-9.8.

#### **Conclusions**

8.2.78 In conclusion:

- (i) As a SAM and in guardianship, the monument currently has the highest level of statutory protection afforded by the state.
- (ii) The rights of an owner of such a property are subject to the controls imposed by the 1979 Act and to the protection conferred by Guardianship.
- (iii) The scheduling and the Guardianship illustrate that the State has accepted a responsibility for the preservation of the monument.
- (iv) Preservation as a concept has its practical manifestation in a principle whereby works are only justified if they are the minimum necessary for conservation.
- (v) The castle is of the very greatest cultural significance to Scotland. It is a rare example of Renaissance domestic architecture having evolved over a number of centuries being associated with a number of important families. It contributes to our historical, architectural, artistic and scientific understanding of the past. That resource in both its tangible and intangible forms is fragile.
- (vi) Guardianship has allowed the Castle to survive to the present time. The works done by the State have been consistent with practice and thinking at their time of execution. Guardianship has presented no threat to the Monument.
- (v) The castle is in sound structural condition and the only level of works required is essentially that of maintenance.
- (vi) Both the planning application and the SMC application require one to have regard to whether the proposed works and proposed use will have an adverse effect on the monument and its cultural significance.
- (vii) The proposals will have an adverse impact on the monument and its cultural significance and as such should not be permitted.
- (viii) The proposals if granted consent are likely to lead to a loss of statutory protection.

Accordingly, the refusal of planning permission and SMC should be recommended.

### The applications

8.3.1 The proposal is to use the castle as an annex to the hotel to be created at Rowallan House, for which planning permission was granted in 2001, and at the same time to institute a management regime for public access to the castle for a part of the year. To achieve that change of use, planning permission is required. As the castle is SAM, SMC is sought for the works necessary to effect that purpose. In the absence of any guidance from the 1979 Act or related UK documents, it is a matter for the inquiry as to the extent to which these works have to be defined for the purposes of such an application.

8.3.2 It is accepted that these are the first applications for planning permission and for SMC made in respect of the Castle. The scheduled area was excluded from the purview of the previous inquiry, although impact on the setting of the Castle and, *a fortiori*, on the setting of the scheduled area was a relevant matter for the planning application with which that inquiry was concerned. The Reporter found that the effect on the setting of the SAM would be adverse (F65) and drew that finding into his recommendation of refusal to Scottish Ministers. That recommendation was not accepted. Very unusually, the present applications join together a number of fairly complex legal and planning issues for a building and its curtilage which are both scheduled and listed, and also in Guardianship. Consideration must therefore be given to the precise extent, effect and significance of these different regimes in order to isolate and articulate the tests that must be applied.

### The applicant and ownership

8.3.3 The lengthy and impressive credentials of Mr N Campbell and DML are set out in Mr Campbell's precognition. The case *R v SoSEnv, ex parte Rose Theatre Trust [1990]* has established that the co-operation of a public authority with an intended developer, or "owner" in this instance, may be a material consideration in assessing an application, in that public expenditure had been, or might have been, saved. While not binding, it presents and elucidates some issues of principle that may assist here. The case may also be authority for the proposition that Scottish Ministers can interest themselves in, and take account of, the general standing of an applicant. The Reporter at the Castle Tioram inquiry appears to have accepted such a proposition. The applicant is also content to accept it, and to have its general standing weighed as a material consideration. Since that standing has not been challenged, it is difficult to conclude other than that DML and Mr Campbell are *prima facie* suitable persons to have day to day care of the Castle.

8.3.4 The applicant explained the reasons for the change of ownership between AGL and DML. The suggestion by HS in its Statement of Case that DML is financially unsound or financially suspect is not borne out by the evidence. It is also clear that the estate is not for sale. What was for sale was the investment opportunity for housebuilding, for the management of the hotel, and for the development and management of the golf course. These substantial commercial activities

are not necessarily best carried by those with no track record in those fields at a sophisticated level, hence the search for partners. That search has led to discussions with candidate investors who are well established, and are either concluded (for the housebuilding) or are likely to be fruitful. In any event, the evidence that the development is fully funded was not challenged. On that basis, there is a transparent, visible progression of ownership from Lord Rowallan, to AGL, to DML. A private trust to hold the castle, which Mr Campbell expressed as a possible aspiration, will not be progressed while decisions on the castle's future use remain outstanding, nor without - at the very least - intimation to Scottish Ministers as Guardians.

### **Legal context and the application of control regimes**

8.3.5 As a SAM and a Category 'A' Listed Building sitting in a landscape contained in the Inventory, works to the castle, and planning permission for its change of use, are covered by the separate and distinct statutory regimes contained in the 1979 Act and in the 1997 Acts. Section 2 of the 1979 Act sets out the nature and circumstances in which works require SMC. Although section 55 of the LB & CA (S) Act disapplies section 6 and the listed building consent regime with regard to SAMs, it does not disapply the entire 1997 Act. In the absence of disapplication, the rules remaining must be applied.

8.3.6 Because section 59(1) is not disapplied, the decision maker has a statutory duty to have special regard to the desirability of preserving the castle or its setting. The setting of a SAM is therefore a material consideration for any application for planning permission affecting such a monument or its setting, not by virtue of the 1979 Act, but by virtue of the GDPO, and as a result of the guidance in NPPG 5 and PAN 42. It must therefore be taken into account in terms of section 37(2) of the T & CP (S) Act in determining any planning application which has these features.

8.3.7 Where provisions of the 1979 Act are neither disapplied nor superseded by the 1997 Act, the 2 statutes apply equally. How they apply is firstly a matter of law, then a matter of planning judgment, but perhaps primarily a matter of common sense, since one regime applies to considerations surrounding applications for planning permission to change the use of a listed building, while the other focuses on works to a SAM. One does not take precedence over the other, each is applied for its own purpose. It is a fundamental principle of UK Constitutional Law that all Acts of Parliament have equal application. There is no hierarchy, although there is a hierarchy among statutes, which may spawn subordinate legislation. Accordingly, while some of the controls imposed by the 1979 Act might appear more onerous than those contained in the 1997 Act, neither has priority over the other. It may be a matter for comment that HS, which administers these regimes, has not grasped this essential point, and seems to be operating one to the exclusion of the other where a SAM is concerned.

8.3.8 A systematic approach to the various sets of rules is therefore appropriate. As two decisions are required, these distinctions should be made in a structured fashion. It is unfortunate that HS seems to have an incomplete understanding of what is required, particularly when so much of its technical advice and literature is of such a high standard. While it may have been confused by the singular set of circumstances with which it has been confronted, and by the

applicant's persistence in following what he saw as a plain and simple agreement with HS and its predecessors, its understanding is manifestly incomplete.

8.3.9 Section 59(1) is the starting point for the application, since the case *Campbell v City of Edinburgh 1999* makes clear that "special regard" must come before any consideration of the development plan in terms of sections 25 and 37(2). The desirability of preserving or enhancing the building and its setting presents no real difficulty, since it is obvious that a building of such distinction should be preserved, and that no harm, in the real sense, should be done to it, or to its setting. However, the question is whether the change of use will serve to preserve or enhance the Castle. The answer must lie in the affirmative, as effective conservation to HS standards; the retention of state guardianship and scheduling more or less in their present form; the buttress of well drafted conditions; and above all the use of private funds, present an irresistible combination. That applies unless one takes the view that the Guardian of a monument in private hands always has the last word as of right, and that the fact of State care always dictates the end use for such a monument as being, in effect, a museum.

8.3.10 For the SMC application, the question is then whether the proposed works would "harm" or have an adverse impact on the Castle in a real, rather than a precious, theoretical sense, and whether they can be accommodated having regard to the condition, knowledge and importance of the monument. Whether or not the monument is scheduled and/or in state guardianship, it is central to an understanding of this tricky conundrum that Parliament must have intended that SMC applications from persons other than a guardian must at least be capable of being granted.

### **The Deed of Guardianship**

8.3.11 Nothing in the consideration of either application turns on the terms and wording of the Deed of Guardianship, other than that it recognises the castle's national importance, and secondly the inordinate length of time it has been in State care without works other than those required to secure it. Guardianship is an arrangement which has not arisen by accident, and which has a firm basis in statute, being directed towards the care by the State of monuments which are given over by their owners for that purpose. Section 12 of the 1979 Act describes the Guardianship process, and must be read with section 61, which defines "monument" and "ancient monument" in a way which makes it clear that it is a process designed for the care of monuments which are either scheduled (and, axiomatically, of national importance) or are of other historical, architectural, traditional, artistic or archaeological interest. Section 12 does not say that guardianship monuments are scheduled monuments, but since Rowallan is both, that distinction may not matter, other than the date of actual scheduling, which is dealt with below.

8.3.12 HS contended that State care imposes a duty to preserve or conserve and to go no further; not to find a beneficial use; not to try to make a building earn its keep; not even to allow a building to evolve when our understanding of it is complete and has been recorded for posterity. That view, encapsulated by Dr Bell's statement that minimum intervention was the correct solution so that the building could be handed onto future generations in the condition in which it was handed to us, is misconceived, and falls to be rejected. It denies this generation the opportunity to contribute to the building's evolution, despite its very fascination lying in the fact

of that evolution. It displays a failure in logical progression. If it has been good enough to conserve but adapt for 900 years, why that should have stopped being the case? The evidence also indicates that stance has only commanded the recognition of HS for a decade at most.

8.3.13 The main effect of the guardianship agreement is set out in section 13 of the 1979 Act, which imposes a duty on Scottish Ministers to maintain a monument which is under their guardianship, and a power to do all things necessary to maintain it, and for the exercise of proper control and management of the monument. The foundation of these statutory powers is therefore one of maintenance only, and they are limited by Parliament to that function. Parliament did not say “take over and treat as your own in accordance with the generally accepted norms of the day”. “Maintain” and “maintenance” are defined in section 13(7) as including “fencing, repairing, and covering in, of a monument and the doing of any other act or thing which may be required for the purpose of repairing the monument or protecting it from decay or injury,…”.

8.3.14 Proper control and management means control and management for the purposes of maintenance, not a blank canvas on which the ambitions of HS can be worked out over as long a period as HS decide, and in whatever manner, without reference to the owner of the Castle. That is clear from the ordinary meaning of the words used. A “guardian” takes care of a subject. “Maintenance” is defined in the 1979 Act, and as Mrs Grove pointed out, may mean the construction of a new roof or a mere minor repair. However, no matter where the requirement lies on that spectrum, the duty and power of HS have to be read alongside section 12(11), which preserves intact the rights of any owner alongside the state as guardian, “except as provided by the (1979) Act”. The rights of a Guardian, which flow only from the 1979 Act and the Guardianship agreement, are expressly limited to acts which protect from decay. The applicant agrees that it is the mark of a civilised society to recognise, explore and record the potency of history, and to explain it to the public for society’s benefit, but it is intolerable arrogance and an unjustified extension of statutory powers to hold out a monopoly of wisdom and method as to how that objective should be achieved.

8.3.15 HS attitude to the applicant has been inconsistent, arrogant and condescending and coupled with an evident determination to defeat its reasonable ambitions for the Castle at any price. While that attitude cannot be determinative of either of the applications, it has inevitably coloured the approach taken. The correspondence files (DML/2-DML/4) show the full picture. These show that 40 years had passed with the castle in Guardianship, and that, while essential repairs were carried out, quite properly, as part of the duty of maintenance, they were executed in a piecemeal, almost haphazard fashion, and with little regard for an end purpose or for authenticity. Some of them may be found wanting today, and might be done differently, but that is hardly the point.

8.3.16 There was no declared objective until after 1990, when Mr Campbell sought to begin to bring the estate back into beneficial use. It was clearly his activity, and not a sudden awareness of the importance of Rowallan, which prompted HS to display a new found enthusiasm for the castle. That is now cloaked in the phoney and precious disguise of conservation, to the exclusion of all other purposes, and in a new found compelling need to open the castle to the public. The castle has been conserved. Every stone has been recorded, and its history is known and

apparently well understood. The history of its owners is traced, recorded, and available for display. While it would be wrong not to pay proper attention to the vast resource of modern thinking on this subject, "swells" in conservation philosophy, availability of state resources, and other criteria, is it mere coincidence that the recent surge of activity runs alongside Mr Campbell's efforts? There is no evidence that the applicant is not aware of his responsibilities, or unprepared to accept the guidance and supervision of HS. HS/25 has evidently been in preparation for many years and is an impressive tool for Rowallan's benefit, Mrs Grove and HS felt under no duty whatsoever to share its contents with the owner, except where its activities might physically impinge on him. It saw the light of day only when documents were lodged.

8.3.17 An opportunity is now being presented, which HS has failed to grasp, which would give the State all it requires and, indeed more than it is entitled to. It could retain care and control; it could modify the Guardianship agreement without relinquishing its essential features, and adapt it to modern conditions (for example, overcoming the access and parking difficulties which have caused a lot of trouble); it could retain overall supervision of works; it could institute and maintain monitoring systems for the effect of those works; it could interpret and explain the evolution of the building to and for the benefit of the academic and lay public; and in addition it could put in place all necessary legal and other safeguards against the possibility of failure, resulting in its resuming responsibility if DML fail to meet the standards required. Not much mention has been made of section 17 of the 1979 Act, which provides for agreements akin to, but wider, than the section 75 agreements common in planning applications. The use of section 75 in association with the planning application also cannot be ruled out.

### **Accommodation within a SAM**

8.3.18 The argument that accommodation within a SAM is disallowed is legal nonsense. There is nothing in the 1979 Act relating to guardianship agreements which preclude the occupation of the monument concerned. The legal opinion obtained (HS/28) appears to agree. Section 1(4) seems to be the source of this shibboleth. However, it does not follow from that, nor is it anywhere provided, that where an unoccupied building has been scheduled, it may not be used as a dwelling house thereafter. There is also no mention of use as a hotel or hotel annex, or of the general term "occupation". HS proposition simply has no basis, and should be rejected. It may frequently be the case that a SAM is incapable of occupation, but that is a different matter.

### **The planning application**

#### *The use of the castle*

8.3.19 Despite the strenuous assertions by HS to the contrary, the present use of the Castle does not fall within Class 10, either as a building for educational provision or as a museum. Circular/1998 makes it clear that in order to fit within those descriptions, the institution in question requires to be visited by the public. Occasional tours by special invitation do not constitute "use" by the public. While a right of access exists, to say that just because it exists it has always been by analogy a Class 10 use turns logic on its head. That is reinforced by the HS sign at the Gatehouse. The most that can be said is that the Castle has the potential for Class 10

use, but that is not the same as a lawfully established use. There is also no such thing as use as a SAM, in planning terms. A SAM is a designation. What Mrs Linge's evidence amounted to was that the nearest approximation to the use of the castle as a SAM was that of a museum, and that the closest one could get to visits by the public were occasional visits to it by invitation. That does not demonstrate an established use as set out in the UCO.

8.3.20 As HS has never applied for a change of use, or for CLEUD, it will need to obtain planning permission to proceed with its plans to open up the SAM to the wider public. In the absence of Class 10 use, the previous known use of the Castle was as a house. While the change of use on that view might be from Class 9, it would be more realistic to conclude that the sale of the estate (including the castle) by the Earl of Loudoun, on the basis that the castle was not suitable for a man of his stature, amounted to abandonment of that use. The construction of the Lorimer House, and its subsequent occupation as the estate residence, reinforces that view. Accordingly, the basis on which EAC considered the change of use application, from a non-use to use as an annex to the hotel, was correct.

8.3.21 The designation of the proposed use as a "hotel" by some HS witnesses puts an inaccurate gloss on what is intended. The fabric of the Castle will be safeguarded against the intense level of use that one would normally associate with a hotel. Mr Campbell confirmed that it would be an annex to the main hotel, with no cooking facilities, and a maximum of 6 guests per night as part of a single party, rather than as a series of unconnected occupancies. It would, as explained, be the "jewel in the crown" of the estate and would not require to be profitable in itself. Its prestige, history and cultural significance would add to the attractiveness of the estate and the overall development, both for guests and the public, and would provide a compatible use on a relatively occasional basis for the hotel and golf course as a whole. The use proposed would secure the future of the building, financially, aesthetically, physically and in every other way, as well as providing for access to the public. Scepticism regarding its likely profitability as a hotel annex is misplaced, since it would be part of a larger commercial development. In any event, Mr Campbell confirmed that there is a market for the kind of guest he envisages.

8.3.22 Guarantee against failure would be provided by the continuation of the castle in Guardianship. Failing that, or following the renunciation of Guardianship, which Mrs Grove appeared to suggest was a possibility, a condition could be devised, or an agreement entered into under section 17 of the 1979 Act providing for reversion into state care. That was a recourse agreed to by HS in 1991/92 (letters of 7 August, 25 September, 8 October, 26 October (2), and 12 and 13 November, all 1991, and 22 April 1992, in DML/2). It would not be difficult to frame a condition allowing HS to serve a notice containing a demand to remedy some matter of which it disapproved (reasonableness always being assumed), and for the castle to revert to guardianship in the event of failure to comply.

#### *National planning policy*

8.3.23 Mrs Linge accepted that the application had been called in because of its possible implications for policies in NPPG 5 and NPPG 18, and that those are the NPPGs most relevant to the application. However, all the HS witnesses sought to downplay the guidance in NPPG 18,



apparently taking the view that a listed building changes character by virtue of scheduling, so that all policy considerations that previously applied disappear. However, as stated above, both regimes apply, unless expressly disapplied. Mrs Linge was confused and self-contradictory and misunderstood the twin effects of the 1979 and 1997 Acts. She accepted a hierarchy of statutes, where the provisions and policies relating to listed buildings evaporated upon scheduling. Yet, at the same time, she conceded that, since section 55 did not disapply the entire LB & CAs Act from SAMs, the castle remains a listed building and therefore section 59(1) relating to setting still applies. Quite apart from her fundamental misconception relating to the parity and validity of Acts of Parliament, her evidence was internally inconsistent and must therefore be given little weight. If Parliament had wished to extinguish the status of listed buildings immediately upon scheduling, it would have done so.

8.3.24 NPPG 18, which complements NPPG 5, is highly relevant and reflects a different approach to the minimalist, or do nothing, approach espoused by the Burra and other charters. Paragraph 22 states out that there have been instances where historic buildings have been successfully adapted to new uses. The aim of the guidance is to find the best viable use compatible with the fabric, setting and character of the historic environment. The applicant has identified such a use. It has also accepted that the "best viable use" is not necessarily the most profitable use. NPPG 18 also sets out stipulations regarding sensitive and careful adaptation, having regard to the building's architectural and historic interest and character and setting. DML and Mr Campbell are clearly committed to those standards. They also agree with the more positive approach to conservation set out in paragraph 58 of NPPG 18. Paragraph 6.3.2 of BS 7913 supports that positive approach. HS stressed the passage dealing with SAMs as indicating that they should be conserved for their cultural significance alone. The applicant also agrees with that, and submits that careful conservation does not rule out the intended use. He is committed to applying skill and understanding in order to maintain cultural significance, with the possibility of realising at least some of the wider economic, social and environmental benefits discussed in NPPG 18. HS has successfully applied that approach at Edinburgh and Stirling Castles. With appropriate safeguards in place, there is no reason why it could not be applied at Rowallan.

8.3.25 There are also other valid schools of thought, such as that expressed at pages 54 and 55 of HS/12. The castle itself contains countless examples of work carried out at different times during the period of state care, which are less than perfect, less than minimal, even unsightly, heavy handed and miles away from HS current purist approach. That approach reached its zenith in the evidence of Mrs Linge, who stated that any change to a SAM would be adverse, and that the only issue was just how adverse that impact was. If that was so, why does the 1979 Act provide for consent to be granted for works to a SAM, and why has it not been thought necessary to prescribe criteria which might apply to SMC applications. Mrs Grove accepted that the chance of obtaining SMC was slim while HS remained opposed to an owner's ambitions; that she could not take away an owner's right to apply; and that it was for it to persuade Scottish Ministers that the application had merit; but she did not contradict the premise.

### *Institutional separation*

8.3.26 That attitude might be fine, if one could detect any difference between HS and Scottish Ministers. However, HS/20 and HS/21 make clear that, as an executive agency of, and fully accountable to, Scottish Ministers, they are inseparable. HS makes and publishes policy; keeps the list of SAMs; advises local authorities; and advises Scottish Ministers in individual cases. Mrs Grove confirmed that HS routinely takes decisions on SMC applications without reference to Ministers. The consequence of this aggregation of power and responsibility must be that there is no realistic prospect for anyone other than HS obtaining SMC. Starting from the assumption that a building in guardianship will never be at risk, the corollary is that any works to such a building will have an adverse impact, and therefore proposals for an alternative use can never be contemplated. If that is right, then for practical purposes it has become impossible to gainsay the opinion of HS. If its line was consistent, it might be supportable, but the ready admission of past mistakes gives the lie to its intellectual integrity. Who can say that conservation thinking may not evolve in another decade or two, as the demands of society evolve?

8.3.27 However, it is not for this inquiry to make a ruling, or even a finding, on the adequacy of the decision making processes in human rights sensitive conditions. Instead, the applicant seeks some recognition from the Reporters that this is more than just a problem of perception, and asks that they consider making a recommendation that in the light of the evidence on this particular issue, no member of staff of HS connected with this application should provide advice or substantive comment on the merits of this case to the division of the Scottish Executive charged with the duty of reporting it to Scottish Ministers and taking the decision. It is striking that counsel for HS was unwilling at the inquiry to provide an undertaking that institutional separation would be constructed, so that the applicant and the public might have confidence that the decisions on the applications would be taken by persons other than those who are so plainly opposed to them. The adoption of such a posture would be simple.

8.3.28 As Parliament must have been minded to allow applications to be made, it is untenable to suggest that it was minded to provide that all such applications should be refused if any impact *at all* was contemplated. Yet that is the consequence of HS's reasoning. It seems to be in the grip of an inflexible, yet inconsistent orthodoxy, characterised by a refusal to recognise that each generation may have something to say about a building, and not merely that as trustees for our heritage we should take special care of its essential features, yet turn it to beneficial use if the necessary safeguards are in place. That means that HS has stepped over the boundary between the fulfilment of a *defined* public duty (in section 13 of the 1979 Act), and has taken the place of legislators in redefining, expanding and stretching the boundaries of that duty so that theirs is the only permitted course. This is the occasion to curb those ambitions by making a clear statement redrawing the lines of competence between those who are the caretakers, and have the acknowledged expertise, and those such as the applicant and Mr Campbell who would willingly and at their own expense follow and submit to that guidance, while translating a national asset from ossified, but highly distinguished and important remains, to something of which the entire nation can be proud, and which will be a force for good in its own community.

### *The development plan*

8.3.29 EAC's Director of Planning had concluded that the proposal accorded with the development plan and ought to be granted planning permission. He also considered that, where there were areas of concern, these would be appropriately addressed in the context of the SMC application and by conditions and agreement. Mrs Linge considered the planning application against a more extensive raft of development plan policies and arrived at the conclusion that it was contrary to the development plan. The error of her approach was to consider the application for the castle as an isolated application standing on its own. For planning considerations to function properly, proper account must be taken of the actual context of a proposal. Mrs Linge referred development opportunity 193M in the EALP as if it was an irksome technicality, and explained the attempt by HS to include a rider in the plan to the effect that it did not include the castle. While HS might not like the fact that the outline permission was granted, it exists, and provides the context for the present application. It is not a valid approach to ignore the fact that the castle sits at the heart of a 135 ha Estate where (reserved matters being first approved) there is to be an hotel, five outbuildings converted for ancillary hotel use and two golf courses. This is the approach taken by EAC, and should be followed.

### **Scheduling and "re-scheduling" of the Castle**

8.3.30 Appendix A (following this summary submission) sets out the history of Ancient Monument protection. Mrs Grove had referred to the "re-scheduling" of the castle in 1994. HS/31 is a list of Ancient Monuments in Scotland dated 1955, i.e. before 1979. On the face of it, that would mean that the castle was scheduled as an Ancient Monument at least from that date, and was therefore liable to be included on the List to be compiled under the 1979 Act. However, there is no document before the inquiry showing what was done by the Secretary of State to compile any List in 1979 after that Act was passed. Since HS/31 is evidently an official document, it can be assumed that the castle was indeed included on a List. However, it is shown on that List as being in state care, and not as a SAM. It may be that an assumption was made that the castle was scheduled because it had come into state care. Since the 1979 Act differentiates between the two types of protection, that assumption seems mistaken.

8.3.31 Officialdom appears to have thought differently to Mrs Grove. The letter that AGL received in 1994 intimating a proposal to schedule Rowallan Old Castle was not a proposal to alter an existing List or schedule, but on the face of it a proposal *de novo*, despite the gloss placed on the letter by Mr Brodie. It was accompanied by a draft entry arising from "A2: Other Lists" and occurred 15 years after the passing of the 1979 Act. That covering description may support the contention that it was included in the 1955 and 1976 Lists as a monument in state care only. The formal entry in the schedule, recorded in the Register of Sasines, is dated 23 May 1994. It does not mention a previous scheduling. The confirming letter, of 11 August 1994, is similarly silent. This may be symptomatic of the urgency with which these matters were attended to in those days, or there may be some other reason. It may not be coincidence that formal scheduling arrived about the same time as Mr Campbell, when it was realised that the interests of the new owner and the guardian might not always coincide. For accuracy only, since the date of

scheduling does not affect either of the applications, it can be said with reasonable confidence that there was no scheduling, as the term is understood today, until 1994.

### **The application for Scheduled Monument Consent**

8.3.32 HS had asserted that DML must set out in every detail the works proposed to the SAM. Given the undoubted value of the heritage resource, certainty is desirable. However, the paramount consideration is the protection of the monument. DML acknowledges that its CP departs from the archetype proposed by the HLF, and the criticisms made. However, the intention is clear, and the pass is sold by HS on the need for minutely detailed specification by the use of draft suspensive conditions, which appear as a reserved matters condition might appear in a more routine application. While the 1979 Act makes no provision for outline applications for SMC, it provides for conditions to be applied and for an agreement between Scottish Ministers and an occupier of land within the vicinity of the SAM.

8.3.33 The applicant has been put into its current position as a result of his dealings with HS in the past. The note of the meeting of 25 April 2001 (53 in DML/4) shows that Mr Campbell was told that he should not spend further time and resources working up plans for the Castle until the "principle" of development was resolved. He proceeded on that basis, and now finds himself in a half-way house, where HS view as presented at the inquiry is that he has provided with insufficient detail as to the appropriate conservation strategy, policies and works which will be applied to the castle, but (paradoxically) has supplied enough information to demonstrate that his proposals would have an adverse impact on the SAM, and should therefore be refused.

### **Conclusion**

8.3.34 Scottish Ministers should be recommended:

- (a) to grant planning permission subject to the conditions proposed by EAC; and
- (b) to grant SMC subject to the draft conditions produced by HS, and, if considered to be appropriate, to an agreement under section 17 of the 1979 Act covering the matters outlined in paragraph 8.3.22 and in paragraphs 9.11-9.12.

## APPENDIX A

### The evolution of Ancient Monuments ("AM") protection

1. The Ancient Monuments Act of 1882 ("AMA1882") related solely to "ancient monuments" which were defined as those listed in the Schedule to the Act, and "*others...of a like character of which the Commissioners may consent to become the guardian, together with adjacent land for preservation and access*". That schedule listed 26 monuments in England, 22 in Scotland (of which Rowallan was NOT one), 18 in Ireland and 3 in Wales. All were unoccupied prehistoric structures. In 1900 the Ancient Monuments Protection Act ("AMPA1900") empowered the Commissioners and local authorities, and county councils, to become guardian of any "monument", other than a dwelling, and to enable public access. By then "monument" was defined more widely than in AMA1882, as "any structure, erection or monument, of architectural or historic interest. The Ancient Monuments Protection Act of 1910 ("AMPA1910") applied s. 4 of the 1882 Act (dealing with gifts of AM's to the Commissioners) to any "monument" as defined by the AMPA1900, and applied its penal provisions for non-compliance.

2. The Ancient Monuments Consolidation and Amendment Act 1913, ("AMCAA1913") repealed the three earlier Acts, established the Ancient Monuments Board, provided for Guardianship and for the first time anticipated public access to monuments. It introduced a "preservation order" which could be placed on any monument which was in danger, and once in place, all works on the monument required to be approved by the Commissioners. It also introduced a duty to compile a List of Monuments whose preservation seemed to the Commissioners to be of national importance. "Monument" was defined as being "any structure or erection other than one in ecclesiastical use" and "Ancient Monument" as any one which was in the Schedule to the 1882 Act, which remained in force, or any monument the preservation of which was in the public interest by virtue of its special historic, architectural, traditional, artistic or archaeological interest, or the site of any monument or its remains.

3. The Ancient Monuments Act 1931 ("AMA1931") strengthened the 1913 Act, providing for preservation schemes, effectively restricting the carrying out of development within the vicinity of an ancient monument, for the purpose of ensuring its preservation. A "monument" became "*any building, structure or other work, above or below the surface...*", and "*Ancient Monument*" was extended to include anything on the list prepared under the 1913 Act.

4. The Historic Buildings and Ancient Monuments Act 1953 ("HBAMA1953") survives in Scotland only in so far as it makes provision for the Historic Buildings Council for Scotland and the making of grants for the preservation of historic buildings. The scheme of all the legislation up to that date made it clear that although the definition of "monument" included "building" the legislative Codes for buildings of architectural and historic importance and for ancient monuments were intended to remain distinct.

5. The Ancient Monuments and Archaeological Areas Act 1979 ("AMAAA1979") was a consolidating measure, replacing the 1913 and 1931 Acts, and Parts II and II of the 1953 Act.

Importantly though it provides (in s.1) that the Secretary of State (now SM) *shall* (i.e. in the future) compile and maintain a schedule of monuments, and that he *shall* on first compiling the schedule include "any monument included in the list last published before the commencement of the Act under s.12 of the 1913 Act" and any monument in respect of which a Notice has been served under s. 6(1) of the 1931 Act, and thereafter any monument which appears to him to be of national importance. The power given does not extend to buildings occupied at the time of entry in the schedule as a dwelling house, (other than by a caretaker), and provision is made for alteration of the list, and exclusion of monuments therefrom.

6. There have been no modifications to AMAAA1979, save only the Order made in 1981 creating classes of works which are permitted without the need for SMC. The Ancient Monuments (Class Consents) Scotland) Order 1981 (1981 No 1468 S.148) may be found extended at the back of NPPG 5.