

APPENDIX B – APPEAL EXTRACTS

18 Braemore Court, Kingsway, Hove
Email: emurphy2@me.com
mobiles: +44 (0) 7825005297. +353 (0) 863185784.

PAS Accredited. LPA Contracts Site Appraisals & Feasibility Studies. Urban Design Strategies Heritage. Appeal Statements & Representations.

Murphy Associates (UK) Ltd registered in England. Trading as Murphy Associates. Company No: 6993572. VAT No: 934 4436 20.

Registered Office: Apex Accountancy, Orchard Business Centre, Badsell Road, Five Oak Green, Tonbridge. Kent TN12 6QU

Appeal Decision

Inquiry held on 13 March 2007
Site visit made on 14 March 2007

by John H Martin RIBA MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
4/09 Kite Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372
e-mail: enquiries@planning-inspectorate.gsi.gov.uk

Date 26th March 2007

Appeal Ref: APP/B3410/C/06/2020734
Land known as Barton Turns Marina, Barton under Needwood, Burton upon Trent, Staffordshire DE13 8DZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Shakespeare Classic Line Limited against an enforcement notice issued by East Staffordshire Borough Council.
- The Council's reference is EN/21110/016.
- The notice was issued on 31 May 2006.
- The breach of planning control as alleged in the notice is, without planning permission, change of use of the land from use for mooring canal cruising vessels, to a mixed use for mooring canal cruising vessels and to accommodate floating timber-clad structures on pontoons used as holiday accommodation.
- The requirements of the notice are to permanently remove from the land the timber-clad accommodation superstructures, foul drainage holding tanks, service connections and floating pontoons forming the holiday accommodation.
- The period for compliance with the requirements is 30 days.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice quashed subject to corrections, all as set out in the formal decision below.

Procedural Matters

1. At the Inquiry an application for costs was made by East Staffordshire Borough Council against Shakespeare Classic Line Limited. This application is the subject of a separate Decision.

2. During the week before the Inquiry, the Council submitted a bundle of documents (Doc.5) that they had omitted from their proofs of evidence, but I did not receive a copy until the day of the Inquiry. The appellants considered these to be too late to be considered but on examination I found that, apart from a few additional policies not previously referred to, which I am unable to take into account, the bundle included The Trent and Mersey Canal Conservation Area Statement and British Waterways Board (BWB) Boat Licence application, which were both submitted by the appellant (Doc.5 Apps.5 & 6), and a copy of the British Waterways Inland Marina Investment Guide which was submitted by their witness, Mrs Hemming (Doc.7).

OT100-048-045
Case copied by COMPASS under click-use licence

The appeal site and its surroundings

3. The water basin of Barton Turns Marina forms part of a hotel and leisure centre with nature reserve and fishing lake on 34.9 hectares of land off Station Road, Barton under Needwood, close to the Barton Turn interchange on the A38 trunk road corridor. The marina is laid out with floating pontoons providing 324 berths mainly for canal narrow boats and small cruisers, the size of which is restricted by a narrow bridged water link from the Trent and Mersey Canal that passes to the east within the linear Canal Conservation Area. The appellants operate a 21 canal boat hire business in the marina administered from a two temporary timber buildings on the east side, and each of the 3 floating structures provides 2 bedroom time-share holiday accommodation.

4. The Barton Turns Leisure Centre development provides a buffer between the A38 trunk road with the Barton Business Park beyond and the village of Barton under Needwood. Work on the marina element has been largely completed and the Public House, restaurant and retail scheme is currently under construction. The final Hotel phase to the south-west of the marina has yet to commence.

5. The marina itself was quite full of narrow boats and small cruisers at the time of the site visit, but I understand there is always some capacity, particularly during summer months. When the enforcement notice was issued, the 3 structures were moored on 3 double berths on the pontoon nearest the canal, close to the temporary fleet hire office building, as can be seen on the submitted photographs (Doc.5 App.2.5 & Doc.6 App.PF2). Mr Harris for the appellants explained that were subsequently moved to other berths to demonstrate that they were not permanently moored.

Planning History

6. Outline Planning Permission No.OU/21110/001 was granted on 19 October 1992 and this was followed by a series of approved applications for reserved matters as set out in the Statement of Common Ground (Doc.3), full details of which can be found in the appellants appendices (Doc.5 App.3). Reserved matters for the whole development were permitted on 23 September 1993 (RM/21110/002); full planning permission for the canal lock between the marina and canal was granted on 16 October 1995 (PA/21110/005) and; full planning permission for the marina services building, workshop, services compound and footbridge etc. was granted on 16 August 2000 (PA/21110/010).

Appeal on ground (c)

Legal Submissions (Doc.4)

7. At the inquiry, the appellants' advocate, Mr Anderton, made submissions that the planning unit should be the whole leisure complex and not just the marina, against which the alleged change of use should be considered to judge the extent to which it might be material. He gave examples of 4 judgements where, respectively, increases of 21 to 27 caravans; 11 to 16 caravans and; 1 to 2 caravans had not been considered material, and one judgement where an increase of 6 to 16 lorry parking was similarly regarded as immaterial.

8. He dismissed the Council's reliance on the judgement on the case of *Sussex Investments Ltd V Secretary of State for the Environment and Spelthorne Borough Council (1977) EWCA Civ 3049* (Doc.4) because the subject structures are substantially different and do not amount to a material change of use. He preferred the British Waterways Act 1971 *"houseboat"* definition of any *"boat or barge or any vessel or structure"* which are not *"bona fide used for navigation"*. He pointed out that the appeal structures fall into this category and have been granted business licences by the BWB.

9. Finally he gave examples at Hartford Marina where similar structures had been granted planning permission as houseboats by Huntingdonshire District Council (Doc.5 App.7).

10. The appellants' request that the whole planning unit be included for the purpose of this enforcement action includes the entire leisure complex on which Outline Planning Permission OU/21110/001 was granted on 19 October 1992 *(Doc.5 App.3.1)*, because the marina formed part of that permission, was integral to it and had not been formed into a separate planning unit. The Council acknowledged that this was a more accurate assessment of the situation than is shown on the enforcement notice which they felt could be corrected without injustice to either party.

11. While I agree that the notice should be put in order in this respect, the allegation would also need to be altered to bring it into line within the change of planning unit. I shall therefore correct the notice by deleting the allegation and substituting a new allegation to read *"Change of use of the Land, within the marina of the approved Hotel and Leisure Centre, from a use for the mooring of canal cruising vessels to a mixed use for the mooring of canal cruising vessels and use for the mooring of floating timber clad structures on pontoons used as holiday accommodation"*.

12. In my view, the British Waterways Act definition clearly implies that a *"houseboat"* must be a boat or barge or any vessel, although the use of the word *"structure"* is unclear. As was found in the *Spelthorne* case, where a two storey house was built on a pontoon, I find that there is a considerable difference between a boat or vessel designed for or converted into residential accommodation, where the hull usually forms part of the living space, and a flat pontoon on which a timber holiday chalet has been erected.

13. While such a structure might be construed as conforming with the above definition, I find it a tenuous connection. I accept that the appeal structures on their pontoons are floating and are capable of being towed around the marina, as has been demonstrated, and that they are too large and too high to be taken out onto the canal so cannot be used for navigation. Nevertheless, they represent a materially different form of holiday accommodation that is not included within the outline planning permission and cannot strictly be regarded as ancillary to the marina use.

14. The structures bear absolutely no resemblance to a boat or vessel of any description, notwithstanding that other planning authorities may have chosen to permit similar examples. The fact that they are licensed by the BWB was shown to be irrelevant at the Inquiry when their witness, Mrs Hemming, stated

in her evidence in chief that houseboats that cannot be used on the canals do not need to be licensed in any event. In the light of the judgement in the cited case of *Westminster City Council v British Waterways Board (1985) A.C.676, [Bridge L.J.]*, I consider the structures to be out of character with the predominant moored canal narrow boats, they are wider and higher and stand prominently above them. If they were to be regarded as being similar in planning terms, there would be nothing to prevent all the berths being used for floating chalets which I consider would, in Lord Bridge's words, be *"beyond the range"* (Doc.4 p.103) of the uses normally found within such a marina.

15. I heard at the inquiry that the marina is generally full of canal boats and cruisers largely in private ownership, and that the appellant company operates 21 narrow boats for hire by the week. While there is nothing to prevent the hirers from remaining in the marina, it is more likely that these boats will be taken out onto the canal. In contrast, the siting of 3 time-share holiday chalets on pontoons in the marina, designed for mooring canal boats and cruisers, could, as raised by Mr Sharpe in his questions to Mrs Hodson, be considered analogous with the stationing of 3 time-share mobile homes on the car parking areas of the complex that are not designed for that purpose. There is no doubt in my mind that such a change would be considered material, apart from the visual impact, because of the introduction of an element of holiday accommodation into the complex for which there is no planning permission.

16. In answer to my question, the appellants' witness, Mrs Hodson, agreed that for planning purposes water is considered to be "land" so, for the reasons stated above, I conclude that the siting of 3 holiday chalets on pontoons used as holiday accommodation amounts to a material change of use from that granted on the original planning permission and that a breach of planning control has thereby occurred. The appeal on ground (c) therefore fails.

Appeal on ground (a)

Main Issues

17. (i) The effect of the 3 timber clad structures on pontoons on the visual amenities of the marina and the adjacent Trent and Mersey Canal Conservation Area and; (ii) the impact of the structures on the cultural and heritage qualities of the canal network, and on the vitality and activities of the marina – all in the light of relevant development plan policies.

Policy background

18. The development plan in this case comprises the West Midlands Regional Spatial Strategy 2004, the approved Staffordshire and Stoke on Trent Structure Plan 1996-2011 and the adopted East Staffordshire Local Plan 2006-2011. All these plans encourage tourism proposals in the area and along the canal in particular, while seeking to control the design of developments, protect conservation areas and improve canal facilities. These matters were explored in detail when the Barton Turns Leisure Centre was permitted in outline, during the consideration of reserved matters and when subsequent full planning applications were approved for the marina element.

19. There was no dispute at the inquiry that development itself accords with the raft of policies set out in the Statement of Common Ground, so my concern in this case is whether or not the unauthorised floating structures also comply with the aims and objectives of the development plan as set out in Local Plan Policies BE1 – Design; BE6 Conservation Areas; E19 & 20 – Tourism; L7 – Water-based Recreation and L13 Leisure/Tourism Uses. Tourism Accommodation Policy E21 was raised by the Council in cross examination but does not feature in the reasons for issuing the enforcement notice. I shall pay special attention to the desirability of preserving or enhancing the character or appearance of the Trent and Mersey Canal Conservation Area as required by section 72(1) of the Planning (Listed Buildings and Conservation Ares) Act 1990.

Reasons

20. Section 5 of the Conservation Area statement, Barton Turn to Alrewas, is described in the submitted extract (Doc.5 App.4.5) as running for some distance along the A38, which was built on the line of the Roman Road Ryknild Street, through open farmland. Distinguishing features are the lock, bridge No.38 and listed buildings at Barton Turn which lie some 350m north-east of the entrance to the marina.

21. At this point, the linear conservation area is confined to the width of the canal, the unpaved towpath on the south-east side and about 2.0m width of bank on the marina side. Despite its historic interest as part of the network, the canal passes an area of mixed commercial/residential development to the east with open farmland to the west. The waterway has reinforced banks on both sides where a wide turn into the marina has been formed as part of the approved scheme. While the marina lies outside the conservation area and has caused limited harm to its character, the siting of the 3 floating structures on the pontoon of moorings closest to the boundary would have had a detrimental impact on its appearance at the time the notice was issued. Since they have been moved away, any harm they would have caused has been removed.

1st Issue

22. In my conclusions on the ground (c) appeal, I found that the timber chalet type structures sited on floating pontoons were not truly houseboats because they were not built for that purpose and bore no resemblance a boat or vessel of any kind. They are clearly designed as holiday chalets and are substantially larger than the narrow boats that form the large proportion of the vessels moored in the marina, being over twice the height above the waterline and nearly twice as wide. The structures almost fill their pontoons except for a small deck at one end where gas cylinders are stored, while a projecting deck over the water at the other provides a sitting out area.

23. While I have every sympathy for those people who are either no longer able to enjoy boating on the canal, or are too disabled to access the boats or even just wish to enjoy the ambiance of staying on the water without having to operate locks, this static form of holiday does not sit comfortably in a marina context where the main purpose is to provide a home base for cruising vessels.

24. Nevertheless, I appreciate that 3 structures occupying only 6 of the 324 moorings is less than 2% of the available berths and, provided they are located in the most unobtrusive locations and not lying together as they were when the notice was issued, I consider that this relatively small proportion of incidental water based holiday accommodation is not unacceptable within the overall Leisure Centre scheme. However, I stress that such a use must remain at a very small scale and this can be controlled by planning conditions.

25. Turning then to where the floating structures might be located, it was agreed that their current temporary positions are unacceptable because one is prominently set amongst narrow boats on one of the largest marina pontoons while the other two occupy visitor moorings and obstruct narrow boats moored behind them. At the inquiry, an area of the marina was agreed between the main parties as being beyond any likely impact on the canal conservation area and this is shown hatched in grey on the attached Plan C.

26. Even so, at the site visit I explored with the parties 3 specific locations within this area where the structures could be sited with least impact on the appearance or working of the marina and be seen against the backdrop of the new Public House and Marina Administration buildings, and where they would best preserve the character and appearance of the conservation area. Subject to being relocated in these positions, I conclude that the 3 timber clad structures on pontoons would have a minimal effect on the visual amenities of the marina and the adjacent Trent and Mersey Canal Conservation Area.

2nd Issue

27. Although examples of similar structures have been drawn to my attention, they appear to be on older more established marinas served by rivers rather than a canal. In contrast, this is a new development where the marina makes a valuable contribution towards the British Waterways policy of off-line moorings to take the pressure off on-line canal moorings and, as their witness Mrs Hemming told the Inquiry, a New Marinas Unit has now been set up to encourage such investments (Doc.7).

28. It therefore seems to me that, in taking 2 narrow boat berths each, the 3 structures have resulted in the loss of 6 off-line berths to the detriment of the canal system as a whole. However, if relocated in wider berths on the edge of the marina where it might be more difficult to manoeuvre a narrow boat, this effect would be minimised, while in such peripheral berths they would not interfere with the daily workings of the marina.

29. I accept the commercial benefits in widening the attractiveness of the marina as a tourism destination by making water based holidays available to the non-cruising public, but this can only be permitted if incidental to the main purpose of the marina as a haven for the off-line mooring of cruising vessels that navigate on the canal system. Subject to this proviso, which can be controlled by planning conditions, I conclude that, in their relocated berths, the 3 timber clad structures on pontoons would have no significant impact on the cultural and heritage qualities of the canal network, nor on the vitality and activities of the marina.

30. For the reasons stated above, I conclude that the 3 timber clad structures on pontoons in their relocated berths would have a minimal effect on the cultural and heritage qualities of the canal network, while preserving the character and appearance of the adjacent Trent and Mersey Canal Conservation Area and the vitality and activities of the marina. The appeal on ground (a) therefore succeeds and the appeals on grounds (f) and (g) do not need to be considered.

Conditions

31. I have studied the conditions discussed at the Inquiry in the light of the advice in Circular 11/95. I agree with the parties that, to ensure that these structures do not become permanent residential accommodation, the use shall be solely for holiday purposes, with a longest letting period of 4 weeks over a maximum number of 51 weeks per annum, to which Mr Harris agreed in answer to my question. I shall also add conditions that limit the number of units to 3 and that they be sited, in the first instance in the agreed locations shown on the Plan C and, thereafter, only within the area hatched in grey. I am less convinced of the need to control their external appearance, or replacement because any changes which significantly alter their size, form or materials would require planning permission in any event. It was also agreed that, as the structures have been moved away from the canal bank, there is no need for a landscaping condition.

Other matters

32. I have taken account of all the other representations submitted, either in writing or at the Inquiry, in particular from Mr Wedgwood, a local resident, Parish Councillor and member of the East Staffordshire Heritage Trust, and Mr Sharpe for the Inland Waterways Association. I noted their general support for the Leisure Centre development and their concern over the static nature of the structures in an area devoted to narrow boats and canal activities where the new hotel should provide all the accommodation needs of tourists.

33. While I have sympathy with this view, I also acknowledge the need of a relatively small number of people, who cannot or do not wish to hire narrow boats, to holiday on the water which will contribute to the diversity of tourism uses around the marina, in the spirit of the development plan policies. I have found nothing to outweigh the considerations that led to my conclusions.

Conclusions

34. My overall conclusions are: on ground (c) that the unauthorised timber clad structures on pontoons constitute a breach of planning control and; on ground (a) that, the structures in their relocated berths would have a minimal effect on the cultural and heritage qualities of the canal network, while preserving the character and appearance of the adjacent Trent and Mersey Canal Conservation Area and the vitality and activities of the marina and, thereby, they also accord with the aims and objectives of the relevant development plan policies.

Formal Decision

35. I direct that the enforcement notice be corrected by: (i) deleting the word *"red"* in the second line of paragraph 2 of the notice and inserting the word *"black"*,

and by substituting Plan B annexed to this decision for the plan attached to the enforcement notice and; (ii) deleting the allegation in para.3 in its entirety and substituting the following allegation: *"Change of use of the Land, within the marina of the approved Hotel and Leisure Centre, from a use for the mooring of canal cruising vessels to a mixed use for the mooring of canal cruising vessels and use for the mooring of floating timber-clad structures on pontoons used as holiday accommodation".*

36. Subject thereto, I allow the appeal, quash the enforcement notice as corrected and grant planning permission for the change of use of the Land, within the marina of the approved Hotel and Leisure Centre, from a use for the mooring of canal cruising vessels to a mixed use for the mooring of canal cruising vessels and use for the mooring of floating timber clad structures on pontoons used as holiday accommodation, on land known as Barton Turns Marina, Barton under Needwood, Burton upon Trent, Staffordshire DE13 8DZ, subject to the following conditions:

(i) The use hereby permitted shall be limited to the mooring of 3 floating timber clad structures used solely for holiday accommodation.

(ii) The holiday accommodation hereby permitted shall not be let for periods in excess of 4 weeks at any one time or for more than 51 weeks in any calendar year.

(iii) The floating timber clad structures hereby permitted shall be sited in the berths marked A, B, & C and edged and hatched in black, as shown on Plan C annexed to this decision and, if moved thereafter, only within the area hatched in greyl.

John H Martin

Inspector

12285

Department of the Environment

Room 310A
Tollgate House
Houlton Street
Bristol BS2 9DJ

Direct Line 01179 878798
Divisional Enquiries 01179
Fax Number 01179 878639
GTN Code 1374 8798

Council's ref CE/PJO/TP/7/1/1368
Your ref EEF/ST.13/JMC/CPM
Our ref APP/C/95/J1535/638871
Date APP/J1535/A/94/246744

20 AUG 1996

James Clifton Esq
Environmental Planner
British Waterways
Brindley House
Corner Hall
Hemel Hempstead
Hertfordshire
HP3 9YT

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990 - SECTIONS 78 AND 174
PLANNING AND COMPENSATION ACT 1991
APPEALS BY BRITISH WATERWAYS
LAND AT SHEERING MILL MOORINGS, SHEERING MILL LANE, SHEERING

1. I am directed by the Secretary of State for the Environment to refer to the report of the Inspector, Mrs V Harris BA(Hons) DipTP MRTPI, who held a local inquiry into your appeals against:

i) Epping Forest District Council's enforcement notice, issued on 18 May 1995, alleging an unauthorised material change of use of land at Sheering Mill Moorings from use as a landing stage, including the mooring of navigating boats, to use as permanent residential moorings; and

ii) the same Council's refusal to grant planning permission for the use of the land for permanent residential moorings and related facilities, including access path and main services.

2. The appeal against the enforcement notice was made on grounds (a) and (f) in section 174(2) of the 1990 Act, as amended by the Planning and Compensation Act 1991. Appeals under grounds (d) and (g) were withdrawn before the Inquiry

3. A copy of the Inspector's report of the inquiry is annexed to this letter. Her conclusions are in paragraphs 41 to 54 and her recommendations in paragraph 55. The report has been carefully considered and the Inspector's findings of fact, in paragraph 40, are all accepted.

4. These appeals involve development on the operational land of British Waterways, a statutory undertaker, and, therefore, fall to be determined by the Secretary of State in accordance with Section 266 of the Town and Country Planning Act 1990.

recycled paper

UNDER LICENCE FROM HMSO
Tel: 01452-310566

SUMMARY OF THE DECISION

5. The formal decision is set out in paragraphs 13 and 14 of this letter. The enforcement notice is being varied and upheld, and planning permission is not being granted for the use of the land for permanent residential moorings and related facilities, including access path and main services.

REASONS FOR THE DECISION

6. The appeal sites and their surroundings, as described in paragraphs 8 to 11 of the Inspector's report, lie within the Metropolitan Green Belt, which at this point is a narrow strip of land between Sawbridgeworth and Sheering. The site to the south-west of Sheering Mill Lane is subject to a Tree Preservation Order. The planning history of the sites is summarised in paragraphs 12 and 13. In particular it is noted that an application for permanent residential moorings and related facilities, including access path and main services, on the current section 78 appeal site was refused in July 1993. The reasons given for refusal included one relating to traffic hazard. An amended application submitted in February 1994 was refused and this is the subject of the current section 78 appeal. An enforcement notice was served in December 1993 but was later withdrawn. A second notice was served in May 1995 and this is the subject of the section 174 appeal.

7. At the inquiry, witnesses were called in evidence, documentary evidence was produced and submissions made in support of the appeal. This evidence is summarised in paragraphs 17 to 28 of the Inspector's report. The Council's evidence is summarised in paragraphs 29 to 37. The case for the interested persons is summarised in paragraphs 38 and 39.

<u>The enforcement notice appeal on ground (a), the deemed planning application and the Section 78 appeal</u>

8. The Inspector's conclusions on the planning merits of the development are set out in paragraphs 41 to 54 of the conclusions section of her report, the whole of which is reproduced as an annex to, and forms part of, this letter. The appeals have been considered in the light of relevant development plan policies in the Essex Structure Plan (2nd Alteration) adopted in 1995, the Epping and Ongar Local Plan adopted in 1989, the emerging Epping Forest District Local Plan, and the national policy guidance on development in the Green Belt in PPG2. On this basis, the Inspector recommended that the appeals be dismissed and that planning permission be not granted. The Inspector's conclusions and recommendations are accepted, for the reasons she gives.

9. The main issue the Inspector identifies is whether the use of the appeals sites as permanent residential moorings would be appropriate in the Green Belt, and, if not, whether there are very special circumstances to overcome the strong presumption, in both local and national planning policies, against inappropriate development in the Green Belt. On the first point, a use for permanent residential moorings clearly does not fall within any of the categories of development which are specified in paragraph 3.4 of PPG2 as being appropriate in the Green Belt. The Development Plan policies,

referred to in paragraphs 14 to 16 of the Inspector's report, reflect the very strong presumption against inappropriate forms of development in the Green Belt set out in PPG2. The Secretary of State takes the view that these relevant and up to date policies should be given considerable weight in determining the appeals. Against this background, it is concluded, in agreement with the Inspector and for the reasons she gives, that the use of the land for permanent residential moorings would seriously conflict with planning policies aimed at protecting the Green Belt, preserving its amenities and conserving the appearance and character of the landscape.

10. In view of this conclusion, it is necessary to consider whether there are very special circumstances to outweigh these strong objections to the use on local and national policy grounds. You contended that there was a significant need for permanent residential moorings in the British Waterways southern region, with a demand for 26 moorings on the Lee and Stort navigations unmet; that the creation of these residential moorings could go towards meeting that need and the target for provision of affordable housing in the Local Plan; and that the appearance of the appeal sites would be improved by the proposed landscaping and removal of gardens and sheds. There was a remarkable degree of public support in favour of the moorings remaining on a permanent residential basis. It was also contended that the proposed structures and car parking could be provided under the appellants' GPDO rights, both for operational purposes and for use by navigating craft.

11. The Inspector's conclusions on the question of special circumstances are at paragraphs 47 to 50 of her report. The need for permanent residential moorings and the difficulties of finding suitable sites is acknowledged subject to the consideration that an over-riding need for such moorings at the appeal site had not been established. The need for affordable housing in the district and the fact that the boats are people's homes are also acknowledged, as are potential benefits of the landscaping proposed for the northern site which could, if carried out sympathetically, screen the development and improve the appearance of the site. However, the Inspector concludes that none of these matters is sufficient to affect her overall conclusion, in paragraph 9 above, that the use of the appeals sites for permanent residential moorings, as opposed to moorings in the course of navigation, would result in unacceptable harm to the aims and objectives of the green belt, damage to the visual amenities of the area and impact on the amenities of nearby households. Neither is it accepted that the imposition of the conditions canvassed at the inquiry on any permission granted would be sufficient to overcome the strong planning objections to the development. Your appeals against the enforcement notice on ground (a) and against the refusal of planning permission both fail accordingly.

<u>The enforcement appeal on ground (f)</u>

12. You argued that the requirement at paragraph 5(2) of the notice duplicated the provisions of the GPDO Part 4, Class B, but the term "residential boats" was too wide, since it could refer to navigating boats used for residential purposes. This part of the requirement should be amended to refer to "residential mooring". This alteration was also necessary since the notice only identified the land on which the moorings were made and not the land over which the boats were

floating. The Council explained that this requirement was necessary so that it could prosecute if any boat were moored at the site for longer than 28 days. No objection was however raised to the substitution of the word "moorings" for "boats". The Inspector concludes, for the reasons given at paragraph 54 of her report, that the requirement should be retained and recommends that the wording be varied by the substitution for the word "boat" of the word "mooring". Her conclusions are accepted and it is agreed that the wording of the requirement should be amended. However, as the parties agreed that the provisions of the GPDO Part 4, Class B apply, and in order to remove any ambiguity, it is concluded that the requirement should be varied to read "Restrict the period of any residential mooring use of the land to not more than 28 days in any calendar year". The appeal on ground (f) succeeds to that extent, and the wording of the requirement will be varied accordingly.

FORMAL DECISIONS

The enforcement notice appeal

13. For the reasons given in paragraphs 9 to 12 of this letter, the Secretary of State, in exercise of his powers under section 176(1) of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, hereby directs that the enforcement notice be varied at section 5(2) (WHAT YOU ARE REQUIRED TO DO) by the deletion of the original wording and the substitution therefor of the words "Restrict the period of any residential mooring use of the land to not more than 28 days in any calendar year". Subject thereto, he dismisses the appeal, upholds the notice as varied and refuses to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

The section 78 appeal

14. For the reasons given in paragraph 9 to 12 of this letter, the Secretary of State hereby dismisses your clients' appeal.

RIGHT OF APPEAL AGAINST THE DECISION

15. This letter is issued as the Secretary of State's determination of the appeals. Leaflet C, enclosed for those concerned, sets out the rights of appeal to the High Court against the decisions, and the arrangements for inspection of the documents appended to the Inspector's report.

Yours faithfully

A J WRIGHT
Authorised by the Secretary of State
to sign on that behalf

Appeal Decision

The Planning Inspectorate
Tollgate House,
Houlton Street
Bristol BS2 9DJ
☎ 0117 987 8927

inquiry held on Tuesday, October 12, 1999

by Ian Currie BA MPhil ARICS MRTPI

an Inspector appointed by the Secretary of State for the Environment, Transport and the Regions

25 OCT 1999

Appeal 1: T/APP/E9505/C/98/1014232

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice.
- The appeal is brought by Accorde Technology Ltd against the Broads Authority.
- The site is located at Riverside Moorings, Riverside Road, Hoveton, Norwich.
- The Authority's reference is jcb/mt-notices hoveton.doc.
- The notice was issued on 23 November 1998.
- The breach of planning control as alleged in the notice is the use of motor cruisers moored on the Land for the purpose of permanent residential accommodation.
- The requirements of the notice are:-
  - (i) cease the use of motor cruisers moored on the Land for permanent residential accommodation;
  - (ii) remove from the Land all goods and chattels used in connection with the residential use of the motor cruisers.
- The period for compliance with the requirements is 12 months.
- The appeal was made on the grounds set out in section 174(2)(c) and (d) of the 1990 Act as amended.

CASE COPIED BY COPYCLASS UNDER LICENCE FROM HMSO Tel: 01432-310566

Decision: The appeal is allowed and I direct that the enforcement notice be quashed.

Appeals 2: T/APP/E9505/C/98/1014374 & 76

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice.
- The appeals are brought by Mr K King and Mrs E E King against the Broads Authority.
- The site is located at Riverside Moorings, Riverside Road, Hoveton, Norwich.
- The Authority's reference is jcb/mt-notices hoveton.doc.
- The notice was issued on 23 November 1998.
- The breach of planning control as alleged in the notice is the use of motor cruisers moored on the Land for the purpose of permanent residential accommodation.
- The requirements of the notice are:-
  - (i) cease the use of motor cruisers moored on the Land for permanent residential accommodation;
  - (ii) remove from the Land all goods and chattels used in connection with the residential use of the motor cruisers.
- The period for compliance with the requirements is 12 months.
- The appeals were made on the ground set out in section 174(2)(c) of the 1990 Act as amended.

Decision: The appeals are allowed and I direct that the enforcement notice be quashed.

Procedural matters

1. The prescribed fees under the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989-93 have not been paid by any of the appellants to the Secretary of State and the Local Planning Authority within the period specified. Therefore, the deemed application for planning permission on the enforcement notice appeal under section 177(5) of the 1990 Act as amended does not fall to be considered. The evidence to the inquiry was given on oath.

The appeals on ground (c) – Inspector's reasons

2. The area delineated on the plan attached to the enforcement notice (Plan A) is a basin off the River Bure at Hoveton, designed for the mooring of boats. It was in existence in 1938 (Plan B) and therefore its origins predate the appointed day for the Town and Country Planning Act 1947, 1 July 1948. Various planning permissions have been subsequently granted for buildings and other works (See for instance Document 4) but none of these have restricted the manner in which the basin can be used in planning terms ie by means of conditions attached to the grant of those planning permissions. Indeed, it would have been improper if they had. In those circumstances, the overall use of the whole basin is for the mooring of boats. It is not subject to any seasonal restrictions or to any limitations, in terms of planning legislation, as to the number of boats that can be kept there, the times at which they can come or go, noise limits or how the boats moored in the basin are to be occupied.

3. The primary reason for mooring boats is to provide them with a secure base attached to the land when they are not being navigated. The boats at these particular moorings are privately owned by individual owners, rather than hired out to holidaymakers. In addition, being Broads Cruisers they are fully equipped as floating homes with their own living, sleeping, cooking and sanitary arrangements. Consequently, in planning terms boats kept at these moorings can be occupied residentially by their owners for long periods of time, even if those boat owners have permanent homes elsewhere on dry land. At the time of my inspection of the site, many of these boats, which were tied up at their moorings, were occupied by their owners, even though the inquiry was held in the middle of the week in the autumn ie well outside peak holiday periods for The Broads.

4. The Broads Authority's allegation is that occupation of motor cruisers, moored at this basin, as permanent residential accommodation constitutes a material change of use requiring planning permission. However, the allegation does not appear to extend to all occupiers of boats at the appeal site, as copies of the enforcement notice have only been served on the owners of the site (Mr and Mrs Ashton and Accorde Technology Ltd) and two sets of boat owners who live on their vessels all of the time, Mr and Mrs King and Mr and Mrs Le Moignon. Since no other copies of the notice have been served it must be assumed that none of the other boat owners are adjudged to be in breach of planning control. The Broads Authority accepts that two non-motorised houseboats have been *in situ* for more than ten years and their permanent mooring is apparently considered to be lawful. The question therefore arises whether the use of two motor cruisers as full-time residential accommodation, in contrast to others occupied for lengthy periods, is material and therefore constitutes a breach of control requiring planning permission.

5. I could find no difference in the manner in which the two permanently occupied motor cruisers differ from any of their neighbours. They are not segregated into a particular section of the basin. Their berths are no larger or more lavishly equipped than those of their

neighbours. The boats do not look outwardly different in size and scale from their neighbours. They regularly leave the moorings and cruise The Broads, in common with their neighbours (Photos 1 and 2). They can be linked to a metered electricity supply when moored, but so can all of the adjoining motor vessels. Only one of the two allegedly offending boats was occupied on the day of the inquiry, in contrast to several in some form of residential use at that time by persons who are not subject to enforcement action. The Authority argues that permanent occupation of the two vessels brings with it the accoutrements of shore life, such as cars, rubbish, smoking fires and washing lines, but so do the other boats when they are occupied. The only criterion by which the two vessels, said to be in breach of planning control, seem to be differentiated from other boats kept at the moorings, is that their owners have no other permanent address and have therefore been singled out for special attention. It may be that the wholesale use of all the moorings for boats in permanent residential occupation could constitute a material change of use but that is not the scale of the operation against which the Broads Authority has taken enforcement action. As a matter of fact and degree, I find that the use of two motor cruisers among many, moored as permanent residential accommodation, does not amount to a material change of use. I therefore conclude that no breach of control has occurred.

6. The Broads Authority relies upon various documents, verbal statements, Statutory Declarations, analogies, legal authorities and previous planning appeals for arguing to the contrary. The principal document upon which it places reliance is an agreement/licence entered into by the owners of boats moored at the basin with its then proprietors, Moore & Co, in the early and mid 1990's (Document 5). Clause 2 of the Schedule to the licence states that the craft must not be used for permanent habitation, which shall be deemed to mean use on more than 14 consecutive days or nights or more than 60 days and nights in any period of 12 months. It is not clear for how long licences couched in these terms were issued. Certainly letters were sent warning boat owners of the penalties for breaching the agreements (Document 6). The evidence of Mr Trafford and the Statutory Declarations of Mr Ponder (Document 15) and Mr Main (Document 22) indicate that breaches of this clause were brought to offenders' attention, as does the telephone conversation of 6 October 1999 between Mr G L Smith, the Authority's planning enforcement officer and Mrs Vivien Howard, a former employee of Moore & Co. However, the usage of these contracts only commenced in the late 1980's at the earliest when the uneconomic use of the basin for overnight stops ceased, according to Mr Ponder's evidence. I have no evidence before me that any equivalent agreements/licences were in place before then. In any event, non-compliance with clauses of private contracts between boat owners and the operator of a boat yard cannot be construed as being the equivalent of breaches of planning conditions in determining whether or not a contravention of planning control has taken place.

7. The authority argues that boat moorings are directly comparable to caravan storage, in contrast to use of caravan sites for human habitation. It also cites the case of *Forest of Dean District Council v Secretary of State for the Environment* [1994] EGCS 138, where it was held that an Inspector was wrong to find that occupation of caravans on a holiday caravan park for permanent residential accommodation did not constitute a material change of use. I do not find any of the analogies of this mooring basin with caravan sites to be particularly illuminating. It is widely accepted that caravan storage is different in character from residential occupation of caravans and that permanent residential occupation can be different from holiday caravan parks, which are frequently restricted to seasonal occupation, involving in some instances the removal of caravans from the land. There are also further differences between caravan sites for static caravans and tourers. All of these variations are

governed, not only by various types of planning permission, but also by the added complication, in most instances that require planning permission for any form of residential occupation, of a statutory system of site licensing under the Caravan Sites and Control of Development Act 1960.

8. In contrast, this basin was in existence on 1 July 1948 and I have no evidence before me that its undifferentiated usage for the mooring of boats was fettered in any way in statutory land-use planning terms at that time or on any subsequent occasion. Provided the primary function of the basin remains the mooring of boats then I am convinced that no material change of use requiring planning permission has taken place. I am satisfied that is the case, even if two of the motor cruisers moored at the basin are occupied residentially throughout the year. In my judgement, such an approach satisfies the two tests, set out by Lord Bridge of Harwich in the House of Lords decision of *Westminster City Council v British Waterways Board* (Document 23), to determine whether activities on a site lie beyond the reach of enforcement procedures. The lawful use of the appeal site is the mooring of boats. Moreover, within the range of uses similar in character to the mooring of boats, used for significant periods each year for residential occupation apparently without breaching planning control, is the use of two motor cruisers as permanent residential accommodation.

9. Finally, the Broads Authority cites three previous appeal decisions in favour of its approach. The two older ones in Suffolk (Documents 24 & 25) can be fairly summarily differentiated. The mooring of a former lightship for use as a yacht club clubhouse is an obvious change of use of the vessel and the land to which it is attached, while the placing of a caravan on a pontoon for residential occupation in a dock is clearly an adaptation for residential use of a chattel which was never designed or capable of movement under its own power on water. The recent decision at Zouch, Nottinghamshire (Document 26), where it was held that permanent residential occupation of a boat moored alongside the River Soar required planning permission, has far more relevance to these appeals. However, it differs from the current appeals in two significant respects. There were only two narrow boats moored at this particular wharf, one of which was used as a permanent home. More importantly, the adjoining area of land had been turned into a garden area with sheds containing a lawn mower, bicycle and motor vehicle parts. This clearly had the effect of creating a residential curtilage attached to the boat. In contrast, as described in paragraph 5 above, I could find no way in which the boats at the appeal site used for permanent residential occupation differed in appearance or overall usage in any material respect from their neighbours, which are not subject to enforcement action. Consequently, I conclude that the use of two motor cruisers moored as permanent residential accommodation, within a basin designed for the mooring of boats, does not, in the particular circumstances of this case, constitute a breach of control for which planning permission is required. The appeals on ground (c) succeed.

Conclusions

10. For the reasons given above I consider that, on balance, the appeals should succeed on ground (c). I shall exercise the powers transferred to me accordingly and the enforcement notice will be quashed. The remaining appeal by Accorde Technology Ltd on ground (d) does not therefore need to be considered.

G. Currie

Appeal Decision

Inquiry held on 12, 13 & 14 December 2006
Site visit made on 14 December 2006

by Christopher J Craig MA(Oxon) MPhil MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372
e-mail: enquiries@planning-inspectorate.gsi.gov.uk

Date
23 Jan 2007

Appeal Ref: APP/E3905/C/06/2019638
Canal Bank, West of Ladies Bridge, Wilcot, Pewsey, Wiltshire SN9 5DP

- The appeal is made under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by British Waterways against an enforcement notice issued by Kennet District Council.
- The Council's reference is 2004/162.
- The notice was issued on 26 May 2006.
- The breach of planning control as alleged in the notice is the unauthorised use of the land for the mooring of residential barges/boats not in the course of navigation.
- The requirements of the notice are to permanently cease the use of the land for the mooring of residential barges/boats not in the course of navigation and allow the use of the land to revert to its authorised use as navigable canal and/or temporary moorings for barges/boats in the course of navigation.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in Section 174(2)(a), (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.

Procedural Matters

1. At the inquiry applications were made by British Waterways for a full award of costs against Kennet District Council and by the Council for a partial award of costs, relating to the appeal on ground (a), against British Waterways. These applications are the subject of a separate decision.

2. Also at the inquiry the Council substituted an amended 1:2500 plan (Plan A) that more accurately represented the 300m length of the mooring.

Reasons

The Appeal on Ground (e)

3. The appellant contends that the notice was not properly served on everyone with an interest in the land, in particular, the individual owners of boats at Ladies Bridge moorings were not served. British Waterways (BW), as the landowner, and Ladies Bridge Moorings Ltd (LBML), as the leaseholder, clearly have an interest in the land and were duly served. However, s172(2) of the 1990 Act also requires a copy of the enforcement notice to be served on the occupier. The individual boat owners do not have an interest, but they are

OT100-046-813
Case copied by COMPASS under click-use licence

occupiers under their licences and, as such, should have been served, as indeed the officer's report to the Committee advised.

4. The Council points out that in the response to its s330 Requisition for Information, only BW and the leaseholder were identified as having an interest and it did not know the identity of the individual boat owners. While it could presumably have found this out, I note that on 29 May 2006 a copy of the notice was fixed to a post by the small entrance gate to the site and that subsequently, on 3 November, a further copy was attached to this post, and individual copies were fixed to each boat moored at the site and also sent to a list of persons supplied by the leaseholder Mr Poole and said by him to be the boat owners. I recognise therefore that the Council made reasonable efforts to identify all the parties affected. Furthermore, in addition to the evidence presented by BW which also served the interests of the occupiers, a substantial number of the 17 boat owners attended the inquiry and 5 gave individual oral evidence. In these circumstances, I conclude that their interests have not been significantly prejudiced by the Council's initial failure to serve them individually with a copy of the notice and that this failure can therefore be disregarded. The ground (e) appeal accordingly fails.

The Appeal on Ground (c)

5. The appellant's contention is that no breach of control has occurred because the mooring of boats at Ladies Bridge is incidental and ancillary to the use of the canal and not therefore a material change of use as alleged.

6. The enforcement notice alleges "the unauthorised use of the land for the mooring of residential barges/boats not in the course of navigation" and requires the "cessation of the use of the land for the permanent mooring of residential barges/boats not in the course of navigation ..." This, and the first reason given for issuing the notice, namely, that the use conflicted with Policy HC26 of the Kennet Local Plan under which there is a presumption against residential development in the countryside, reflected the Council's view, expressed in the officer's report to the Regulatory Committee on 16 February 2006, that the boats were moored on a more permanent basis involving their use as dwellings or holiday homes.

7. However, while there was for a period residential use of a security boat, at the inquiry the Council accepted, in the light of the evidence now available, that the predominant use is not residential and that its concern focussed on the unauthorised home mooring of boats, a mooring that constitutes their permanent base. Its planning officer stated in response to cross-examination that any occasional use for overnight accommodation would be incidental to an overall storage use. In this context, and with the agreement of the parties, I consider that the notice should be corrected so as to more accurately state the alleged breach of planning control. While most canal boats used for cruising contain at least basic living accommodation, the term "residential barges/boats" is in my view misleading and can be taken to imply actual use for residential purposes. It should therefore be changed to use for "the home mooring of barges/boats". A commensurate change should be made to the requirement of the notice in paragraph 5 and the first reason for the issuing of the notice should be deleted as the Council accepts that it is no longer relevant. These corrections can be made without causing injustice and I shall deal with the appeal on this amended basis.

8. I note also that the enforcement notice alleges only an unauthorised change of use and makes no mention of any operational development, which at Ladies Bridge appeared to be

limited to simple landing platforms, mooring posts, a small wooden shed and a limited number of electrical link-up points. No evidence has been presented in respect of these and there is no requirement for them to be removed. Whether or not they could be viewed as de minimis in the context of the canal and mooring, what is at issue in this appeal is solely the use for the mooring of boats.

9. BW is the statutory undertaker with responsibility for regulating navigation on the majority of waterways in Great Britain, including the Kennet and Avon Canal. Its primary duty, set out in s10 of the Transport Act 1962, is "to provide to such extent as they may think expedient – (a) services and facilities on the inland waterways owned or managed by them ...". Under s17 of the British Waterways Act 1995, and reflected in the terms of the pleasure boat licence issued by BW, any boat (with minor exceptions) used on any waterway owned or managed by BW must have a "home" mooring, i.e. "a mooring or other place where the vessel can reasonably be kept and may lawfully be left". BW has widespread powers as a statutory undertaker and as landowner to control and regulate its moorings and can impose conditions on the use of the site through any lease to any mooring company operating the site.

10. In addition to designated visitor moorings, and "casual" mooring where boats are allowed to tie up anywhere along the towpath for up to 14 days at a time whilst out cruising, there are 108 home mooring sites on the Kennet and Avon Canal accommodating a total of 1329 boats. The majority of these are on-line, i.e. along the course of the canal, as opposed to being located in off-line marinas or basins. Some 20% are directly managed by BW, with a further 33% either privately owned or, as at Ladies Bridge, leased from BW.

11. The appeal site is located on the off-side of the canal west of Ladies Bridge, approximately 1km from the village of Wilcot. In 1998 BW leased a stretch of 150m of the canal bank to Cherrycraft for the use of home moorings for leisure craft and hire boats and in 2001 the lease was taken over by LBML and extended to cover 300m of bank, together with an additional 13m of land connecting the mooring land to the public right of way. The lease is restricted to the canal bank, although the site identified on the enforcement notice plan also includes the width of canal itself where the boats are moored, reflecting the determination of the courts that "land" in planning legislation can be taken to include water. The mooring accommodates 17 narrow boats.

12. The starting point for the ground (c) appeal is to determine the planning unit. The immediate area of occupation is the leased area of canal bank, but this appears to me unsatisfactory as the planning unit in that the enforcement notice encompasses the adjoining area of water and it would be entirely artificial either to sever the canal bank from the water it contains and where the boats sit, or to sever one section of waterway from the indistinguishable canal bed to either side of it.

13. BW argue, and I agree, that the planning unit in this case comprises the Kennet & Avon Canal as an entity, including its banks. I acknowledge that this constitutes a very large planning unit and incorporates a range of local environments. However, it is a single man-made structure constructed under Acts of Parliament for the movement and incidental mooring of barges/boats and has been used for this purpose throughout its existence. It is owned and managed by BW as a statutory undertaker and the canal and its bank are operational land used for the purpose of the undertaking. The lease of land at Ladies Bridge, although creating a separate unit of occupation, provides a mooring facility that

would otherwise be provided by BW and is thus in furtherance of the statutory undertaker's purpose. The canal in its entirety is also subject to BW's general conditions, specific site conditions and pleasure boat licensing regime.

14. The physical and functional relationship between the canal and its banks is clear. The banks are necessary to contain the canal, allow the provision of services and facilities including mooring and to provide access for maintenance. The fact that the Council views the authorised use of the appeal site as navigable canal and for temporary moorings for boats in the course of navigation also argues in my view against identifying the site as a separate planning unit. It certainly cannot be a sensible approach to seek to divide the canal bed into separate planning units, depending on whether boats were tied up at "home", "visitor" or "casual" moorings or, indeed, were not moored at all. In addition, the section of canal bank constituting the appeal site is enclosed along its main southern boundary only by the hedgerow.

15. Prior to the creation of the Ladies Bridge moorings, the primary use of the appeal site, as part of a planning unit comprising the whole canal, is as a canal, i.e. a waterway for the movement of boats and canal-side land used for operational purposes, including mooring of barges/boats. If the appeal site were held to be a separate planning unit, it would not, in my view, alter the primary use, which the Council accepts includes incidental mooring. If boats are not to be in perpetual motion, some mooring is clearly an essential element.

16. Both parties refer to the judgement in *Harrods Ltd v. Secretary of State for the Environment, Transport & the Regions [2002] EWCA Civ 412*, in which Schiemann L J stated that the right approach to determining what was reasonably incidental to retail use was to consider what shops in general had as reasonably incidental activities, not what was incidental to the particular shop [Harrods]. However, in applying the principles of this judgement to the present case, the Council argue that the test is not whether the "home" mooring of canal boats is reasonably incidental to canals in general, but what would be a normal activity at Ladies Bridge and in similar situations on the canal.

17. The Council does not dispute that a subsidiary element of boat storage or parking, essentially "home" mooring, may be incidental to use as a canal on certain stretches of the canal or in conjunction with other uses, such as in a built-up area, on a wharf or adjoining a road where there is a public house, car parking or other facilities. However, it takes the view that the appeal site was an unused section of offside canal bank, geographically isolated on a long rural stretch of canal between Devizes and Hungerford, and lacking any infrastructure or access to a road, car park, pub or other facilities such that a "home" mooring could not be considered normally incidental to use of the canal. It seeks to distinguish the appeal site from 8 other home mooring sites identified by the appellant as being in rural areas, 5 of which are also in the Wesssex Downs Area of Outstanding Natural Beauty (AONB). Having viewed the home moorings at Hilperton Marsh Farm, Lower Foxhangers and Bridge Inn, Horton in the course of my inspection, I do not share the view of the Council that the appeal site is the only site in rural surroundings and without facilities for boaters; Hilperton, in particular, is in my view broadly comparable.

18. More fundamentally, I consider that the Council's approach in arguing that a home mooring can be incidental to the use of the canal in one geographic location and not in another is fundamentally flawed. In my view it seeks to define "incidental", not in relation to the primary use of the canal as the planning unit, but on the basis of what are in effect policy

criteria derived from Policy TR2 of the Local Plan, which restricts provision of facilities for boat users to a number of existing developed locations. While this policy may have merit in planning for the use and environment of the canal, neither it nor BW's environmental obligations under s22 of the British Waterways Act 1995 is in my view material to the determination of whether the moorings at the appeal site are incidental to the primary use of the canal. It seems to me that the Council's approach is not consistent with viewing the canal as a single planning unit with a primary use as a waterway, but seeks instead to argue that the use of any particular section of the canal, and what may be normally incidental to it, varies dependent on the geographical character of its surroundings, whether rural or within or adjoining a settlement or former industrial wharf. I do not consider that this approach is correct or, indeed, consistent with the test set out in the Harrods judgement.

19. The mooring of boats at places along the banks is a normal activity inherently associated with the use of the canal for the passage of boats. The Council has clearly stated its view that the authorised use of the appeal site includes any incidental mooring in the course of navigation. BW's regulations permit licensed boats to moor at any point (with exceptions) along the canal for up to 14 days at a time. It is also clear from the growth of use of the canal since its restoration that, were the Ladies Bridge site to be used as a visitor mooring, that would be an incidental use that could well involve a comparable number of boats to those currently using it as a home mooring. I do not consider that such a use could be clearly differentiated in character from the present use, bearing in mind that it is the mooring and not an individual boat that is permanent, as the Council's planning witness accepted in cross-examination. While it is likely that boats at a visitor or casual mooring would move more frequently, the evidence is that the 17 boats which have Ladies Bridge as their home mooring also move to cruise the canal, with different boats taking numbers of trips away from the mooring totalling over the course of a year anything between a few weeks and 7 months. I also note that individual boats do not have a specific reserved space within the Ladies Bridge mooring. While I accept that there would be less movement of boats in the winter, I saw on my own visits to the site that only 12 of the 17 boats were present on the Monday before the inquiry and 9 when I made my accompanied inspection on the Thursday during the inquiry.

20. I acknowledge that a mooring for 17 boats on a section of hitherto undisturbed canal bank has an impact on the appearance and character of the appeal site. However, narrow boats, whether moving or moored, are intrinsic to the character of the Kennet & Avon Canal which as an entity constitutes the planning unit. In my view a home mooring is more akin to parking than a storage use and the constant mooring of a line of boats no more amounts to a change of use of the canal than cars parked on the public highway outside dwellings, which equally could be for an extended period, result in a material change of use of the road on which they are parked.

21. I consider therefore, as a matter of fact and degree, that the on-line home mooring for 17 barges/boats at Ladies Bridge does not amount to a material change of use but is ancillary to the primary use of the canal for navigation. In my view it can be clearly differentiated from an off-line marina which is a more elaborate purpose-built facility clearly involving substantial operational development. The circumstances in the present case are also quite different to those in the Broad Farm appeal decision referred to by Mr Lovelace which involved only a ground (d) appeal and was determined on the facts of the individual case and also concerned a mooring on a river rather than a man-made canal. I further note BW's

evidence that, of the 25,000 mainly on-line "home" moorings it operates over the canal network nationally, it was aware of no other case in which it was required to obtain planning permission.

22. As the mooring is incidental to the primary use of the canal, there has been no breach of planning control. The ground (c) appeal therefore succeeds.

Conclusions

23. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (c). Accordingly the enforcement notice will be quashed. In these circumstances the appeals under grounds (a), (f) and (g) set out in Section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under Section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

24. I direct that the enforcement notice be corrected by:

    (i) the deletion in paragraph 3 and paragraph 5 of the words "mooring of residential barges/boats" and the substitution therefor of the words "home mooring of barges/boats";

    (ii) the deletion of reason (i) in paragraph 4.

    Subject thereto, I allow the appeal and quash the enforcement notice.

C.J. Craig

Christopher J Craig

Inspector

Appeal Decision

Inquiry opened on 7 September 2010
Site visit made on 9 September 2010

by John Murray LLB, Dip.Plan.Env, DMS, Solicitor

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:
24 September 2010

Appeal Ref: APP/E2001/C/10/2122441
Land at the Driffield Navigation Canal and its East and West banks, North and South of Bethell's Bridge, Hemphoime, Brandesburton.

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Dennis Arthur Norris against an enforcement notice issued by East Riding of Yorkshire Council.
- The Council's reference is 10/00031/ENFORC.
- The notice was issued on 16 December 2009.
- The breach of planning control as alleged in the notice is without planning permission use of the land for the stationing of boats "Tanamara" and "Raleigh" used for human habitation purposes and not being in the course of navigation or mooring incidental to navigation.
- The requirements of the notice are to permanently cease the use of the land for the stationing of boats used for human habitation purposes and remove them from the land.
- The period for compliance with the requirements is one year from when the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d), (e) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed following correction and variation of the enforcement notice in the terms set out below in the Formal Decision.

Procedural matters

1. The Inquiry sat for 3 days from 7 September 2010. I visited the site unaccompanied on the evening of 6 September and I made an accompanied site visit on 9 September, before the close of the Inquiry.

2. Ground (c) was not originally pleaded but, when proofs of evidence were submitted, the appellant sought to add that ground and the Council did not object. The appellant had originally included ground (g), but this was withdrawn during the Inquiry.

The enforcement notice

3. The allegation in the notice refers to the use of the land for the stationing of two particular boats, "Tanamara" and "Raleigh", for the purposes of human habitation. I consider that it is the use of the land, rather than the specific identity of the boats that is relevant in planning terms. However, to correct the allegation to refer to boats generally would broaden its scope and could cause injustice. In particular, Mr and Mrs Taylor have been served with a separate notice alleging occupation of their boat "Mary Grace" for human habitation

purposes. They have appealed against that notice, which appeal will be determined separately through the written representations procedure, but they have not appealed against the notice that is the subject of this Inquiry. If the reference to "Tanamara" and "Raleigh" were deleted from the allegation and this notice were upheld, Mr and Mrs Taylor could be caught by it. As they have not pursued ground (a) in their appeal and their deemed application for planning permission has lapsed, the decision on their appeal would be rendered academic.

4. Section 176(1) of the 1990 Act provides that I may correct or vary the notice if this would not cause injustice to the appellant or the local planning authority. Whilst Mr and Mrs Taylor are neither, paragraph 2.11 of Circular 10/97 suggests that consideration should also be given to whether injustice would be caused to other "relevant occupiers", as defined in section 174(6). I am satisfied that Mr and Mrs Taylor are relevant occupiers and that deleting reference to specific boats would cause serious injustice to them. In the interests of natural justice, I will not therefore exercise the power to correct the notice by deleting the reference to specific boats.

5. However, whilst I consider that an allegation concerning boats generally would be more logical, the allegation as it stands is capable of being understood. It does identify a use of land and is not so ambiguous or uncertain that the notice is a nullity or invalid. Leaving the allegation specific to the two boats mentioned does however have implications for the extent of the requirements under section 5 of the notice, which refer to boats generally. If the allegation is specific to "Tanamara" and "Raleigh", the requirements should be equally specific. That variation can be made without injustice, especially given that the Council could serve new notices, if they deem it appropriate.

6. There was some debate during the Inquiry over whether the reference to "human habitation" in the allegation is sufficiently precise, given that short term occupation or holiday use could still constitute human habitation and the Council has no objection to such use. However, that expression is qualified by the use of the words "not being in the course of navigation or mooring incidental to navigation." I consider that this ensures reasonable precision, but that the matter can nevertheless be made clearer by inserting the word "permanent". Furthermore, the Council explained that the use of the phrase "human habitation" was inspired by another recent appeal decision concerning a mobile home and that phrase appears in the Caravan Sites Act 1968. To my mind, the expression permanent residential use is more straightforward and appropriate and neither party disagreed. I will vary the allegation accordingly, being satisfied that this will cause no injustice. This will also necessitate a further, consequential variation to the requirements in section 5.

7. The Council also accepted that the allegation should refer to a mixed use, as use for permanent residential purposes, is not the sole, or primary use of the land. Together the parties suggested that, in addition, the land was already used for navigation (albeit largely for leisure, rather than commercial purposes), as well as the mooring of boats in the course of or incidental to navigation.

8. The evidence also indicates, and the Council accepts, that there are boats which are left at the appeal site for long periods, when they are not cruising on

this canal and other waterways and there is no suggestion that such use is unlawful. Indeed, the evidence is that such mooring has taken place at least as long as the Bethell's Boat Club has been in existence, which is more than 30 years. Whilst many of those boats may be capable of permanent occupation, their owners do not actually live aboard them permanently, though they may spend some time on them, especially during the holiday periods and at weekends, including sleeping on them overnight. In short, this is the place where those boats are kept and this was described throughout the Inquiry as "home mooring". That term is used in another appeal decision Ref APP/E3905/C/06/2019638 (the Wilcot appeal) and appears to come from the British Waterways Act 1995. Being under the jurisdiction of the Driffield Navigation Trust, the canal of which the appeal site forms part, is not governed by that legislation, and the meaning of the term "home mooring" may not be immediately apparent. However, the Wilcot appeal decision indicates that it means *"a mooring or other place where the vessel can reasonably be kept and may lawfully be left."*

9. To my mind the mooring of boats in the course of or incidental to navigation is clearly ancillary to the primary navigation use, much as kerbside parking is ancillary or incidental to the use of a highway and such use does not need to be identified as an additional primary component of the mixed use. As stated by the Inspector in the Wilcot appeal decision: *"If boats are not to be in perpetual motion, some mooring is clearly an essential element".*

10. I note that the Inspector in the Wilcot appeal also concluded that on-line[1] "home mooring" of 17 boats on a section of the canal was ancillary to the primary use of the canal for navigation. His rationale was that boats, whether moving or moored, were intrinsic to the character of the canal. Furthermore, he said that *"home mooring is more akin to parking than a storage use, such that the constant mooring of a line of boats no more amounts to a change of use of the canal than cars parked on the public highway outside dwellings, which equally could be for an extended period, result in a material change of use of the road on which they are parked."*

11. I respectfully take a different view and consider that "home mooring" is not truly ancillary to navigation. I am reinforced in this view by another Inspector's decision Ref APP/X5990/C/07/2038830 & 2038821 (the Temple Pier appeal), referred to by the appellant, in which he made reference to *Crown Estate Commissioners v Fairlie Yacht Slip [1979] SC 156.* He said that, in that case it was held that "navigation" did not include *"the permanent or quasi-permanent mooring of a ship between voyages and that navigation began with preparations for a voyage and ended when the ship is left unmanned at the end of the voyage."* Furthermore, keeping a boat at a home mooring, as its main base when it is not cruising, is likely to attract activity such as trips by car to and from the site before and after cruising, or to carry out repairs, maintenance and routine checks on the boat, or simply to spend time on it. It is not therefore truly akin to parking a car outside a dwelling and may have an appreciable environmental impact over and above casual mooring in the course of navigation. In my opinion, given the scale on which it takes place across the appeal site, mooring in this category should therefore be specifically identified as a component of the mixed use.

[1] I.e. mooring along the course of the canal, as opposed to in an off-line marina or basin.

12. On the evidence and for the reasons given, it seems to me that the allegation should be corrected to refer to a mix of uses. These should include the pre-existing uses of navigation and the keeping of boats whilst not in use for either navigation or permanent residential use, as well as the use alleged, but corrected to read the stationing of boats "Tanamara" and "Raleigh" for permanent residential use and not being in the course of navigation or mooring incidental to navigation. Furthermore, it is only a material change of use which constitutes development under the 1990 Act and those words should be incorporated in the allegation. I am satisfied that these corrections would not cause any injustice.

Ground (e)

13. As set out in his Statement of Case, the main substance of the appellant's argument on this ground was that the planning unit is larger than the area edged in red on the enforcement notice plan. He contended that the notice probably should have identified the entire Driffield Navigation and should therefore have been served on all those parties with an interest in boats in residential use along the whole canal. During the course of the Inquiry, the appellant altered his view on the extent of the planning unit, which I discuss below in relation to ground (c). In any event, whilst it is essential to identify the planning unit in order to determine whether there has been a material change of use, a notice does not have to be directed at the whole unit, nor indeed does it need to identify it[2]. As drafted, the notice related to one section of the canal and section 172(2) of the 1990 Act only requires it to be served on owners or occupiers of the land to which it relates and those with an interest which is materially affected by the notice. Accordingly, the appellant's contention was flawed, whatever the correct extent of the planning unit.

14. With reference to the area actually edged in red on the notice plan, it is not clear from the appellant's case who was not served but should have been. Clearly the appellant was, as a copy of the notice was attached to the main door of his boat and he received it. The owners/occupiers of "Tanamara" were also served, a copy of the notice having been attached to the gate adjacent to their boat, but they have chosen to comply with it. Mr Taylor explained in cross examination that he became aware of the notice because copies were posted around the appeal site and indeed one was attached to a gate post near his boat "Mary Grace". He also indicated that Mrs Taylor probably assisted the appellant with the completion of his appeal form and of course Mr and Mrs Taylor submitted proofs of evidence and Mr Taylor gave oral evidence at the Inquiry. Those with interests in the canal land and its associated banks were identified in a Land Registry search and duly served. It appears that all known relevant persons were properly served and that, in any event, there is no indication of anyone having been substantially prejudiced by any alleged defect in the manner of service.

15. Whilst it was not formally withdrawn, ground (e) was not actively pursued by the appellant in closing submissions and, in all the circumstances that ground of appeal must fail.

[2] Hawkey and Others v Secretary of State for the Environment and Another [1971] 22 P. & C.R. 610 and Richmond Upon Thames London Borough Council v Secretary of State for the Environment et al [1987]JPL 396.

Ground (c)

16. To succeed on this ground, the appellant must show that the matter alleged does not constitute a material change of use, having regard to the appropriate planning unit. On the basis of the corrections considered above, the breach of planning control now alleged is without planning permission, the material change of use of the land to a mixed use for navigation, the keeping of boats whilst not in use either for navigation or permanent residential use and for the stationing of boats "Tanamara" and "Raleigh" for permanent residential use and not being in the course of navigation or mooring incidental to navigation.

17. In determining whether there has been a material change of use, the first step is to identify the appropriate planning unit. The judgement in *Burdle and Williams v Secretary of State for the Environment [1972] 3 All ER 240* indicates that the assessment of the planning unit is a matter of fact and degree. However, it should be generally assumed that the unit of occupation is the appropriate planning unit, unless and until some smaller unit of occupation can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

18. The Driffield Navigation as a whole, from Aike Beck in the south to Driffield in the north, is managed by the Driffield Navigation Trust, though mooring rights remain with the various riparian owners along the banks. In the appellant's written evidence it was argued that, as the Driffield Navigation is a single waterway, created by man made improvements authorised by Acts of Parliament (in 1767 and 1801) to canalise the River Hull, the entire navigation should be taken to be the planning unit. To support that contention, reference was made to the Wilcot appeal decision, in which the Inspector found that the entire Kennet and Avon canal was the planning unit.

19. However, by the close of the Inquiry, it was common ground that the area to the north and south of Bethell's Bridge and edged red on the enforcement notice plan is the correct planning unit. This is because, whilst there are other locations along the canal, such as Wansford Bridge, Brigham Bridge, North Frodingham, Snakeholme Lock, Struncheon Lock, Baswick Landing and Wilfholme, where small numbers of boats can be moored, the appeal site is the only point where moorings capable of enabling permanent residential use of boats exist. The area enforced against corresponds with the extent of the moorings to the north and south of the bridge, which are some considerable distance from any other moorings.

20. The moorings themselves comprise in the main wooden mooring poles, many with decks or pontoons of varying sizes and they provide electricity and drinking water connections. The site also has highway access to enable the disposal of sewage and refuse off site. There are some 70 to 80 moorings in the appeal site area. I visited the site on the evening before the Inquiry opened and once during the Inquiry and, on both occasions, there were boats stationed at the majority of the moorings.

21. In my view, whilst the entire canal under the management of the Driffield Navigation Trust may be regarded as a single unit of occupation, the area identified in the enforcement notice and extending to approximately 0.6km in length can be readily identified as a physically distinct section of the canal

where, functionally, the stationing of boats in significant numbers, and potentially for long periods, is possible through the provision of mooring facilities and this routinely occurs. Accordingly, I consider that, as a matter of fact and degree, that area is the appropriate planning unit against which to consider the materiality of any change of use in this case.

22. It is important to note that the size of the planning unit may have a bearing on the materiality of any change. The commentary in the Encyclopedia of Planning Law and Practice states at P55.44 that the larger the unit *"the less likely is a change in the use of part of it liable to constitute a material change in the whole."* Furthermore, in the Temple Pier appeal decision, the Inspector made reference to *Sussex Investments Ltd v Secretary of State for the Environment [1998] PLCR 172 CA.* He said this upheld enforcement action against a change of use on the Thames at Spelthorne where there was no suggestion that the planning unit was a larger unit than the moorings and a change of use would have been de minimis in the context of the Thames as a whole.

23. Whether the matters alleged constitute a material change of use of the planning unit is also a question of fact and degree. There must be some significant difference in the character of the activities from what has gone on before. In *Thames Heliports Plc v London Borough of Tower Hamlets [1997] 74 P. & C.R. 164* it was held that one must ask: *"has anything changed on the land which is capable of being material from an environmental point of view?"* It was further held that one must look at the question of whether there has been a material change in use *"from the point of view of human beings likely to be affected by the change which has occurred."*

24. The Council accepts that the use enforced against does not have any adverse impact on the character or appearance of the area. Indeed, its evidence is that, where a boat is large enough and otherwise suitable for permanent residential use, it will be very difficult to detect whether it is being so used. Raleigh is large in comparison to most of the boats in the area, but it is nevertheless a barge and not unexpected on a canal and there are many other substantial boats within the site, which are likely to be capable of residential occupation for long periods. Furthermore, whilst permanent residential use could give rise to the provision of domestic paraphernalia on the canal bank, so could "home mooring" or holiday use.

25. The Council's objection to the use is based solely on sustainability considerations. As well as needing to access shops and other facilities, the Council contends that those residing permanently on their boats at the site will place demands on services such as welfare provision, education services, refuse collection, medical and emergency services. However, it was accepted in cross examination that refuse collection services are provided at the site regardless of the payment of Council Tax or permanent occupation and that holiday users may equally require emergency service provision. They may also need to visit doctors locally, though it is possible that they would choose to do so nearer home.

26. The Council accepted that people take longer and longer holidays and some owners might legitimately spend several months on their boats at the site, particularly in the summer, without the boats then becoming their permanent

residences. Mr Middleton had some difficulty in drawing the line beyond which permanent residential use would be established and merely said that it would be going too far to claim that you were on holiday for 364 days in the year. He placed great emphasis on whether an individual has another place to live. I am not convinced that this is relevant to establishing whether the use is materially different from the point of view of human beings likely to be affected by the change. It is undoubtedly difficult to identify the point at which the use of any particular boat becomes permanent residential use but, as discussed at paragraph 11 above, the "home mooring" element of the mixed use of the planning unit as a whole will attract vehicle movements to and from the site. Furthermore, mooring in the course of navigation will generate activity on and around the site. I heard no evidence to the effect that, in the context of the whole planning unit, the permanent residential use of 2 boats as alleged would materially add to that traffic and general activity, even though it might necessitate trips to and from work and so on.

27. Sustainability considerations identified by the Council relate to accessibility to services and the consequent need for travel by car and implications for climate change. Where a change of use is material, such considerations will undoubtedly be relevant in determining whether planning permission should be granted and they are the subject of government policy. In broad terms, I consider that such environmental considerations are also capable in principle of being relevant in determining whether a change of use is material in the first place, even though the effect on human beings may not be immediately perceptible. However, on the evidence, it seems that, in the context of up to 80 or so boats moored along a stretch of canal some 0.6km in length, many of which may be occupied for extended periods, the only change from an environmental point of view, resulting from the use of 2 boats as permanent residences would be some potential additional demand for welfare, education and perhaps non-emergency medical care.

28. If all the moorings, or a significant number of them, were used for the stationing of boats for permanent residential occupation then that may constitute a material change of use. If such circumstances arise, the Council may have to make a judgement in the future. However, as a matter of fact and degree, I conclude that the use of the land for the stationing of just 2 boats "Tanamara" and "Raleigh" for permanent residential use and not being in the course of navigation or mooring incidental to navigation does not amount to a material change of use, in the particular circumstances of this case.

29. In reaching this view, I have taken account of the fact that the Inspector in the Wilcot appeal drew a distinction between "home mooring" and use for residential purposes. However, that does not mean that, in the particular circumstances of this case, I am bound to conclude that any element of permanent residential use necessarily amounts to a material change of use of the whole planning unit, as a matter of fact and degree. Furthermore, I have come to a different view on the question of whether "home mooring" is ancillary to navigation and this has affected my judgement on the materiality of the alleged change. The residential use alleged is not use in the course of navigation, but neither, in my view, is "home mooring", which was already an element of the pre-existing mixed use.

Conclusion

30. For the reasons given, and having regard to all other matters raised, I conclude that the appeal should succeed on ground (c) and the notice should be quashed, following necessary corrections and variations. Grounds (a), (d) and (f) need not therefore be considered.

Formal Decision

31. I direct that the enforcement notice be:

    (a) corrected by the deletion in their entirety of the words in section 3 and the substitution of the words "Without planning permission, the material change of use of the land to a mixed use for navigation, the keeping of boats whilst not in use either for navigation or permanent residential use and for the stationing of boats "Tanamara" and "Raleigh" for permanent residential use and not being in the course of navigation or mooring incidental to navigation"; and

    (b) varied in section 5 by the deletion of "used for human habitation purposes" and substitution of the words " "Tanamara" and "Raleigh" for permanent residential use and not being in the course of navigation or mooring incidental to navigation";

32. Subject to these corrections I allow the appeal, and direct that the enforcement notice be quashed.

J A Murray

INSPECTOR