Development Management - Delegated Officer Report

Application Number: **Recommendation – REFUSE**
AWDM/1421/13

Site: **Houseboat Myrtle, 2 Riverbank, Shoreham-By-Sea**

Proposal: **Application for a Lawful Development Certificate for the use of Mooring 1 for the stationing of a houseboat**

Date of site visit: Various, including 13 November

Neighbours checked: N/A

Additional neighbour notifications: N

Proposal, Site and Surroundings

This application seeks a Lawful Development Certificate for the Mooring 1 for the stationing of a houseboat.

The mooring is directly to the west of the existing houseboat 'Myrtle' and a second houseboat 'Redwood' that is the subject of a separate Certificate application (AWDM/1103/13). This is the westernmost houseboat of those that are situated to the south of the river. Norfolk Bridge is to the west.

Residential properties in Beach Green and Ormonde Way are to the south of the site.

Relevant site history

Temporary planning permission until March 2013 was granted under reference AWDM/0099/12 for the mooring of Redwood which remains in situ at present, pending the determination of this application and that submitted under reference AWDM/1103/13.

Consultations

The Senior Solicitor commented :

<u>The Application- Mooring 1</u>

Firstly, I would point out the discrepancy between application title and the application form with regards what we are being asked to determine in respect of Mooring 1. The application is described as "Application for a Lawful Development Certificate for the use of Mooring 1 for the stationing of a houseboat" although the application form states that that the certificate is sought in respect of an existing operation. The description of the Use, Operation or activity outlined in the application form appears ambiguous and reads:-

This ambiguity is not cleared up in the supporting statement and I have concerns that the certificate being sought is not covered by the legislation. I understand however, that if the applicants are unsuccessful in their parallel application to site two houseboats on mooring 2, then they will seek to use Mooring 1 to house 'Redwood' boat which they argue is ancillary to houseboat 'Myrtle' and accordingly to do this the applicants would require a certificate in the terms described in the application title and I will therefore advise on this basis.

I would add my further concern that Mooring 1 is not delineated in the plan submitted with the application.

Extracts form the Supporting Statement – Mooring 1

(extract from applicant's supporting statement in italics below)

4.0 LAWFULNESS OF MOORING 1

4.1 Section 191 of The Town and Country Planning Act 1990 allows applicant to submit an Application to ascertain whether (a) any existing use of buildings or other land is lawful;

(b) Any operations that have been carried out in, on or under land are lawful. However in planning law a houseboat is not a building. It does not fall within the definition of development according to Section 55 (1) of the Town and Country Planning Act 1990.

Houseboats are chattels. Having the legal status of a 'chattel' a houseboat cannot therefore be considered as a building for purposes of the 1990 Act, Section 55 (2) (d) and the need to justify the presence of a houseboat would not be the subject of a Certificate of Lawful Existing Development. In this case it is the need to justify the existence of Mooring 1.

Under S.191, we are required to determine whether the use of land within the remit of the application is lawful. If the intended purpose is to site a residential houseboat on Mooring 1, then the use would need to be described as more than just a mooring; This because the use of a plot of land to site a residential houseboat involves more than just mooring. It necessarily encompasses some form of residential curtilage and more equipment than would be involved than an average boat mooring.

The Oxford Dictionary definition of the word 'Mooring' is

- *a place where a boat or ship is moored:*
- *the ropes, chains, or anchors by or to which a boat, ship, or buoy is moored:*

To my mind, a Mooring is the description of place where a boat is moored, or the physical act by which a boat is attached to something, rather than describing a 'use' of land in itself.

Accordingly, for a certificate to cover the use of the land for stationing a house boat, the description of a certificate would have to cover this. i.e. the use of land for siting a residential houseboat,

(extract from applicant's supporting statement in italics below)

4.2 It has been argued that the use of the riverbank as a mooring falls under the control of planning law as it constitutes a material change of use under Section 55 (1) of the Town and Country Planning Act 1990. For that matter, if a boat uses a removable gangway to access land, then it cannot be said that the placing of a gangway which is a removable walkway, normally comprising an arrangement of planks for crossing from a boat to land, falls within the definition of development. It has however been argued that if a boat is continually in one position that this also constitutes a change of use but this is not contended to be correct in case law.

I am not quite clear what is being argued here.

(extract from applicant's supporting statement in italics below)

4.3 Under normal circumstances an Applicant would be required to present evidence of a change of use having occurred for a period of 10 years prior to the date of the submission of the formal application of lawfulness, Section 171B (3) of 1990 Act refers.

4.4 Resolute was and has been in its present position since the 1920s through to the present day – apart a possible occasion as referred to in 'Retired on the River – The Houseboats of Shoreham'. The RAF images clearly show Resolute in position then it can only be that this comment was in relation to other boats.

4.5 Therefore, it is our contention that the whether Resolute is a wreck or not, it exists and has been in existence in this location for a considerable length of time. It would therefore follow that the mooring has been in use well beyond the minimum requirement of 10 years. It is therefore permanent and thus there can be no dispute that the Mooring is lawful and has not been abandoned. A mooring does not need to include a jetty to constitute a mooring and a wreckage of a boat once moored does not mean that the mooring no longer exists. It cannot therefore be contended that it has been 'abandoned'.

I do not consider it logical to argue that a wreck is capable of being moored. A wreck just exists. The boat was obviously moored once, but this was a significant time ago. The planning use over a vast number of years would best be described as a 'nil' use. The Law on abandonment is important to consider here as a Lawful use remains if it was commenced before the "appointed day" (July 1, 1948) and has continued without abandonment or extinguishment:

The Planning Encyclopaedia helpfully sets out the position and the tests to apply:-

> *It has been held that a use is abandoned if the use has ceased with no intention that it should be resumed, and accordingly an inference may be drawn that the rights have been abandoned, perhaps leaving the site with a "nil" use.*
>
> *Permission would then be required for the resumption of the former use. In Young v Secretary of State for the Environment [1983] J.P.L. 465 (subsequently upheld by the House of Lords [1983] J.P.L. 677), the Court of Appeal observed that there was "ample and powerful authority" for the proposition in this Encyclopaedia that, when land ceases to be used for a lawful purpose for a period of time, it is a question of fact whether the right to use the land for that purpose has been abandoned so that resumption of that use amounted to development requiring planning permission.*

In the Hartley case, Lord Denning M.R. suggested that the test of abandonment of use rights should be based on the drawing of inferences from the fact of land having "remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned"

In Castell-y-Mynach Estate (Trustees of) v Secretary of State for Wales [1985] J.P.L. 40, the court could find no error of law in the Secretary of State's decision which had taken into account the expressed intention of the owners not to abandon the residential use of their property, but was influenced by the extreme state of disrepair of the property which, he had concluded, would "lead to a reasonable person making the assumption that the residential use had been abandoned."

The doctrine has been endorsed in Northavon DC v Secretary of State for the Environment [1990] J.P.L. 579; and in Hughes v Secretary of State for the Environment, Transport and the Regions (2000) 80 P. & C. R. 397, where the Court of Appeal held that in determining whether residential use of a site had been abandoned, the test was an objective one.

The owner's subjective intention, though a relevant factor when investigating the facts, was not decisive.

The court should have regard to four factors: the physical condition of the building; the period of non-use; whether there had been any other use; and the owner's intentions. What mattered was what a reasonable person would conclude in the circumstances.

In response to this the Appellant would be able to argue that there is no evidence of any incompatible acts have been carried out, incompatible with continuance of the use as a Mooring. This in itself would not defeat an argument that the use has been abandoned and that the current use is one of 'nil use'.

One decision to remain mindful of however, is R. (on the application of Alpha Plus Group Ltd) v Kensington and Chelsea RLBC [2007] EWHC 2840 (Admin) where the court held that the grant of an unnecessary planning permission did not have the consequence of destroying existing use rights.

(extract from applicant's supporting statement in italics below)

4.6 Prior to the towpath being raised, a gangplank was used with an extra 6'6" (2 metres) to allow for the highest tides. After raising of the towpath about 20 years ago, the gangplank would only have abutted it. A jetty cannot be ruled out as there are raised mounds of vegetation, parallel and on each side of Resolute which more than often are associated with some form of structure.

If a jetty were to be installed here, separate consideration would have to be given as to whether this constitutes operational development.

(extract from applicant's supporting statement in italics below)

4.7 The Fische case (APP/Y3805/C/04/1146607) is quite important as it was found that the lawful use of a site is as a houseboat mooring. Therefore and having regard to the fact that the entire stretch of the riverbank within Jessica Aidley's plot is a mooring it is contended that with the evidence of Resolute being present that Mooring 1 is therefore lawful. Evidence shows that Rev'd Jessica Aidleys plot contains two moorings.

The actual wording of the Fische decision (at para 100) reads "the lawful use of the plot is as a houseboat mooring" and I would respectfully suggest that the history to this matter points to there being two separate planning units.

(extract from applicant's supporting statement in italics below)

4.8 In the application relating to the ancillary nature of Redwood, reference was made to the Appeal Ref: T/APP/E9505/C/98/1014232; 1014373 & 76 - Riverside Moorings, Riverside, Hoveton, Norwich. It is considered that this appeal decision is also relevant to the existence of Mooring 1. In the Hoveton case, the Inspector acknowledged the fact that moorings at the River Bure had been in existence since 1938, predating the appointed day for the Town and Country Planning Act 1947, 1st July 1948. This fact corresponds with the situation as Lower Beach but there are indications of an earlier presence. As with Hoveton, there was no restrictions, seasonally, or limitations relating to the use of the riverbank. It is of note that in Paragraph 3 of the decision letter, it is acknowledged that 'the primary reason for mooring boats it to provide them with a secure base attached to the land when they are not being navigated.' Resolute, a wreck of not, has and is attached to the riverbank. In paragraph 8, the Inspector repeats reference to the existence of moorings on 1 July 1948 and the fact that as the primary function of the River Bure basin remained for the mooring of boots then the lawful use of the site is for the mooring of boats.

The Hoveton Appeal decision dealt with the permanent residential use of a barge boat. This decision however can be distinguished from this 'houseboat' case as the barges subject to the enforcement action regularly left their moorings in order to cruise the Broads and by way of appearance did not differ from any of the other barge boats moored in the vicinity. The only identifiable difference from the boats not subject to Enforcement Notice was that the owners of the boats subject to the appeal did not have a separate permanent address. The Inspector referred to the significant difference between the case before him and a case where the permanent residential use of a narrow boat required planning permission as it was part of a residential curtilage. Given the size of Plot 1 riverside, if it were used to locate a boat, it would necessarily include a residential curtilage.

(extract from applicant's supporting statement in italics below)

4.9 The case of Canal Bank, West of Ladies Bridge, Wilcott, Pewsey, Wiltshire SN9 5DP, Appeal Reference APP/E3905/C/06/20199613 is also relevant. An inspector quashed an enforcement notice against the alleged breach for 'the unauthorised use of the land for the mooring of residential barges/boats not in the course of navigation'. The Inspector agreed with British Waterways that the entire length of the Kennett and Avon canal should be considered as a single planning unit in determining whether the siting of houseboats along its length constituted a material change in the use of the site. In his opinion the mooring of boats along its length was a normal activity inherently associated with the primary use involving the passage of boats. He held that the mooring of 17 canal boats on the bank was more akin to parking a car on the public highway outside a dwellinghouse.

This Appeal however, decision, did not deal with boats used for residential purposes as the following paragraph makes clear. As such, I do not consider that conclusions reached are applicable here.

(extract from applicant's supporting statement in italics below)

4.10 It cannot be disputed that the use of this section of the riverbank in Shoreham has a long association with the mooring of both navigable and non-navigable

houseboats prior to the first planning act. And the given the fact that the aerial images show that there was a consistent return of boats and houseboats to the riverbank after the 2nd WW. Resolute did not leave, apart from on one or two occasions. Whether it was occupied or not, intact or in a ruinous state, it existed and could be compared to a car in car parking space – the difference being that motor vehicles on the highway are controlled in so far as they are required to be taxed and insurance. Another way of considering the comparison between car parking spaces and moorings is when consideration if a car park ceases to be an area for the parking of cars if there are no parked cars.

4.11 To illustrate this point further, attention is drawn to 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?" The Inspector considered vessels (houseboats) are the equivalent of helicopters. From this it can be deduced that moorings are equivalent to a helipad. And it would follow that a helipad would not lose it use should there be no helicopter sitting on it.

Not Immediately, no. However, but if the helipad or car park remained unused for more than 50 years without any evidence of intention to resume the use, if could perhaps be safely presumed that the use had been abandoned.

The Thames Heliports case was a friendly appeal which sought, inter alia, a declaration as to whether use of the River Thames to site a floating helipad constituted a material change of use. *The Court of Appeal* held it was capable of constituting a change of use of land but did not make any actual determination on the facts in this case as this was considered to be a value judgment entrusted to the planning authorities and not to the court

In reaching this decision, the Court considered some planning appeal decisions concerning houseboats which although not binding on the Court, were of interest:-

> *In a decision reported in [1969] J.P.L. 521 at 524, the Minister decided as follows:*
>
> *"The Inspector found that the houseboats had been stationed and used permanently for residential occupation since they were first moored on the site. It is considered that this is an entirely different use from mooring for the purposes of navigation, and that their stationing for use of permanent residential occupation in a particular place constituted a material change in the use of land covered with water affected by such stationing involving development for which planning permission is required. The fact that the River Thames is a natural and not an artificial waterway does not alter the fact that there has been a material change of use, and the use of land which is covered by water may be changed as well as that of land which is not."*
>
> *In another decision reported in [1964] J.P.L. 207 at 208, the Minister found that:*
>
> *"... the mooring of the houseboats is for their use on particular sites or stations for residential occupation and not for navigation. Such mooring is not transient but is intended to continue for substantial periods.... The Minister finds, as a matter of fact and degree, that the stationing of houseboats, on their present sites by the use of moorings, constitutes a material change of use of the land (covered by water)*

The Court of Appeal in the Helipad case also re-affirmed the established position determination of the boundaries of the planning unit is initially for the planning authority, and is essentially a matter of fact and degree.

As such, it is clear that if the Council find the use to be abandoned, the re-positioning of a houseboat on Plot 1, would be a change of use requiring planning permission

(extract from applicant's supporting statement in italics below)

5.0 CONCLUSION

5.1 Bearing in mind that the entire extent of the riverbank falling within the ownership of Rev'd Jessica Aidley is a mooring, it is contended that sufficient evidence and facts have been presented to prove beyond any doubt that the Mooring 1 exists and has always existed. The fact that Resolute is wreck does not remove the presence of the Mooring when one considers that the rationale that a helipad does not cease to be a helipad if there is no helicopter sitting on it or for that matter, a car parking does not cease to be a car park if not cars are parked in it. As the entirety of the riverbank between the footbridge and the Flood Arch has been used pre the enactment of the Town and Country Act 1947, there can be no doubt that Mooring 1 is lawful whether there is a fully functioning houseboat or wreck of a boat occupying it.

As stated in the helipad case, it is necessary to consider the environmental impacts in considering a change of use and therefore in relation to plot 1, it falls to be considered whether the change from the siting a wreck to that of a fully functioning houseboat, would be a material change of use requiring planning permission.

Representations

None received

Relevant Planning Policies

Adopted Adur District Local Plan 1993-2006 (ADC 1996) (saved policies):

National Planning Policy Framework (CLG 2012)

Planning Practice Guidance (CLG 2014)

Planning Assessment

It is considered that the key issue in the determination of this Certificate is whether the use is considered to be abandoned. It is quite clear that the mooring has not been used for a significant period of time and it is not accepted that the existence of a wreck could indicate that the use has not been abandoned. Indeed, the fact that the boat which formerly occupied the mooring has become a wreck indicates abandonment in itself.

On site, there is little more than mud and vegetation covering what could be construed to be the outline of the former boat and the evidence submitted by the applicant states that only the very lowest parts of the boat remain and the wreck cannot be relied upon to dimensions of the boat itself. As the Senior Solicitor advises, a wreck is not capable of being moored and in the absence of any jetty, it is not considered that any evidence exists to contradict the view that the use has been abandoned.

Accordingly, it is considered that the Certificate be refused.

Recommendation

REFUSE for the reason:

The use of Mooring 1 for the stationing of a houseboat is considered to have been abandoned by virtue of the length of time since it has last been used, which is considered to be a nil use in planning terms. The existence of a wreck which in any case is largely below the surface, consists primarily of mud and vegetation and is impossible to dimension along with the absence of a jetty further demonstrates that the use has been abandoned.

Is recommendation contrary to letter(s) of representation?

Case Officer: Gary Peck Date: 12 September 2014

Authorised by: Date: 12th September 2014