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

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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

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.

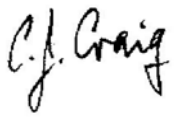
Formal Decision

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.



Christopher J Craig

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Michael Humphries	QC, instructed by Clarke Willmott, 1 Georges Square, Bath Street, Bristol BS1 6BA
He called:	
Mr Nigel Johnson	Solicitor and Legal Director & Secretary, British Railways Board
Ms Madge Bailey, BSc(Econ)	Project Manager, British Waterways
Mr Richard Poole	Director, Ladies Bridge Moorings Ltd
Mr Julian Cooper, BSc, DipLD, FLI	Managing Director, Cooper Partnership Ltd, Landscape Architects & Environmental Planning Consultants
Mr Andre Renshaw, MA EnvPlg, MRTPI	Senior Associate Town Planner, Stride Treglown Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Mr David Forsdick	Of Counsel, instructed by Borough Solicitor, Kennet DC, Browfort, Bath Road, Devizes, Wilts SN10 2AT
He called:	
Mr Will Harley, BSc, MLI	Landscape & Countryside Officer, Kennet DC
Mr Andrew Guest, BA, Dip TP, MRTPI	North Area Team Leader, Kennet DC

INTERESTED PERSONS:

Mr Phil Daybell	Owner of boat “Ratty”
Mr Mark Lovelace	Cocklebury Farm, Wilcot, Wilts SN9 5PD
Mr William Torrens	Chairman, Wilcot & Huish (with Oare) Parish Council, of West Stowell Farm, Nr Marlborough, Wilts SN8 4JU
Mr D Chorley	Owner of boat “Arcona”
M A J Austin	Owner of boat “Jus Manatees”
Mr Colin Robinson	Owner of boat “Gaia”
Mr R Best	Owner of boat “Daydream”
Mr Tom Maidment	Wilcot Parish Council, of Manor Farm, Wilcot SN9 5NS
Mr Jim Broomham	85 Broadfields, Pewsey; Vice-chairman, Pewsey Anglers Association
Mrs Laura Harris	Paradise Cottage, Wilcot, Wilts SN9 5NS
Mrs Bridget Lanyon	Abbots House, Manningford Abbots, Wilts SN9 5PB
Mr Andrew Rae	Walbrook House, Wilcot, Wilts SN9 5NS

DOCUMENTS

1 Record of Attendance at the inquiry.
2 Council’s notification letter.
3 Petition (28 signatures) objecting to Ladies Bridge moorings.
4 Two letters of objections to moorings.

5 Proof of evidence of Nigel Johnson, with appendices NJ1 & NJ2.
6 Proof of evidence of Madge Bailey, with Appendices MB1 – MB11.
7 Proof of evidence of Richard Poole, with Appendices RP1 – RP3.
8 Proof of evidence of Julian Cooper, with plans, photographs & appendices.
9 Proof of evidence of Andrew Renshaw.
10 Appendices to Mr Renshaw's proof.
11 Statement of John Ellis re fishing matters.
12 Statement of Caroline Tandy re habitat change.
13 Report of Planning Services Manager to Regulatory Committee, 16/2/06.
14 Schedule & 12 maps of other rural mooring sites.
15 The Kennet & Avon Canal, C & H Hackford 2001.
16 Kennet & Avon Canal Conservation Plan (extracts), Kennet & Avon Canal Partnership.
17 Waterways for Tomorrow, DETR.
18 Proof of evidence of Will Harley, with appendices 1 & 2.
19 Proof of evidence of Andrew Guest.
20 Appendices 1-15 to Mr Guest's proof.
21 Statement of Mark Lovelace, with appendices A – W.
22 Conditions suggested by the Council.

PLANS
A Enforcement notice plan (corrected).