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

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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, Hempholme, 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 The appellant had originally included ground (g), but this was withdrawn during the Inquiry.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

APPEARANCES

FOR THE APPELLANT:

Ned Westaway of counsel	Instructed via the Bar Pro Bono Unit
He called	
Dr A J Fouracre	Bethell's Bridge Boat Club member
Dennis Arthur Norris	Appellant
Richard Borrows BSc Dip TP MRTPI	Planning Aid Volunteer
John William Jackson	Bethell's Bridge Boat Club member
Gordon Taylor	Bethell's Bridge Boat Club member
Captain Martin Cadman	Bethell's Bridge Boat Club member
Roger Gooch FICE	Driffield Navigation Trust Commissioner and Trustee (giving evidence as an individual and not on behalf of the Trust)

FOR THE LOCAL PLANNING AUTHORITY:

Giles Atkinson of counsel	Instructed by the Head of Legal and Democratic Services, East Riding of Yorkshire Council
He called	
Andrew Broughton BA	Housing Management Officer, East Riding of Yorkshire Council
Stephen John Watson	Enforcement Officer, East Riding of Yorkshire Council
Jonathan Middleton BA Dip TP	Development Control Team Leader, East Riding of Yorkshire Council

INTERESTED PERSONS:

Amanda Callaway	Bethell's Bridge Boat Club member

DOCUMENTS SUBMITTED AT THE INQUIRY

1 Notice of Inquiry and list of persons served
2 Letter from Alan R M Kelly dated 5 September 2010 enclosing the text of the introduction to his website entitled 'Carr Landscapes of the River Hull'
3 Letter from the Government Office for Yorkshire and the Humber dated 17 September 2007 re the saved policies of the East Yorkshire Borough Wide Local Plan, adopted June 1997
4 Written opening statement on behalf of the appellant
5 Boat Safety Scheme Certificate for Raleigh dated 30 July 2008
6 Extract from 'Ramblings of a Boatman' by L Hill
7 Letter from J F Darlow dated 20 March 2010
8 Letter from Mike and Ben Southwell dated 23 August 2010
9 Letters to Mr Watson of the Council from M Southwell and Mr and Mrs Tullock dated 3 June 2008 and 26 May 2008 respectively, together with a copy of the Southwell's 'Rules and Regulations' relating to the Hunt Hill Moorings
10 Development Strategy chapter of the Joint Structure Plan for

Kingston upon Hull and the East Riding of Yorkshire (JSP), adopted June 2005
11 Housing Growth and Renewal chapter of the JSP
12 Sense of Place chapter of the JSP
13 Introduction section of the Holderness District Wide Local Plan (HDWLP), adopted April 1999
14 Environment chapter of the HDWLP
15 General Principles of development section of the HDWLP
16 Environment Chapter of the East Yorkshire Borough Wide Local Plan, adopted June 1997
17 Ordnance Survey extract
18 Photographs showing Raleigh and Tanamara and copies of the enforcement notice affixed to Raleigh and around the site
19 Copy enforcement notice issued 23 March 2005 concerning Rosewood
20 Map of the Driffield Navigation from Struncheon Hill Lock to Riverhead Great Driffield
21 Undated photograph entitled 'Houseboats, Wansford'
22 Act of 1801 for improving and extending the navigation of the River Hull
23 Letter from the Council to Mr and Mrs Taylor, dated 16 May 2008
24 Extract from the Council's enforcement guidelines
25 Plan showing parts of the site to which the Holderness District Wide Local Plan and the East Yorkshire Borough Wide Local Plan apply
26 Letter from the Driffield Navigation Trust, dated 8 September 2010
27 Transcript of The Queen on the application of Rydale District Council v (1) Secretary of State for Communities and Local Government and (2) Douglas Sleightholme [2010] EWHC 2140 (Admin)
28 E-mail exchange between the Council and the appellant's representatives concerning suggested conditions
29 Thames Heliports Plc v London Borough of Tower Hamlets 74 P. & C.R. 164
30 Closing statement on behalf of the Council
31 Mayes et al. v Secretary of State for Wales and Dinefwr Borough Council [1989] J.P.L. 848
32 Closing statement on behalf of the appellant