

**Thorpe Island: Report on High Court Judgement**  
Report by Head of Planning

<b>Summary:</b>	Members will be aware of a long standing enforcement matter at Thorpe Island; this case has been the subject of a recent High Court challenge to a decision made by the Planning Inspectorate. The High Court dismissed all of the challenges and upheld the decision of the Planning Inspectorate. Members will need to consider the options for taking the matter forward and these are set out in the report.
<b>Recommendation:</b>	That Members consider the enforcement options available to the Authority along with the recommended use of a Planning injunction.

## **1 Introduction**

- 1.1 Members will be aware of a long standing enforcement case at Thorpe Island in Thorpe St Andrew, Norwich. This matter relates to an Enforcement Notice which was served in November 2011 and which has been the subject of one planning inquiry (the decision on which was successfully challenged in the High Court as a result of an error made by the Planning Inspector) and one planning hearing (following the success of the first High Court challenge). The challenge to the Inspector's decision in respect of the second decision has recently been heard in the High Court. In his decision handed down on 6 August 2015 Justice Lindblom dismissed all of the challenges to the Planning Inspector's decision following the planning hearing and upheld that decision.
- 1.2 The purpose of this report is to outline for Members the background to the matter, explain the decision, its implications and set out the options following the decision of the High Court.

## **2 Background and Enforcement History**

- 2.1 In the mid 1960's various planning permissions were granted at the Jenners boatyard in Thorpe St Andrew. These included permission for the construction of a mooring basin, wet and dry boatsheds and other development on Thorpe Island to support a hire boat facility. The basin was dug and the wet boatshed constructed, but then the business went into administration and in the early 1970's the wet boatshed was demolished and the site closed. No further activities took place. In the mid 1980's planning permission was granted for development on an adjacent site at Thorpe Hall and a section 52 agreement was entered into limiting any mooring on the Island to private mooring only. No activities took place on the site and over

time it became 'abandoned' in planning terms. In 2006 the site was purchased by the current landowner.

- 2.2 The current landowner and his agent were advised that the previous permissions and use had been abandoned and that any resumption of the use would require planning permission. Moreover, they were advised that the current planning policies did not support such a use and that planning permission would, therefore, be unlikely to be granted. The key issues in this case were the impact upon the character of the conservation area and impact upon the amenity of adjoining neighbours. A planning application was submitted in March 2008 for the repair of quayheading to facilitate a mooring use, but the application was refused on the grounds of lack of information. A repeat application was submitted in July 2009, but was withdrawn in March 2010 prior to determination.
- 2.3 Around 2009 an unauthorised mooring use commenced in the basin and over the subsequent years an increasing number of boats were moored on the site. There were other unauthorised activities including the construction of jetties/pontoons, the unauthorised standing of vehicle engines and the unauthorised standing of a container. The site has been the subject of considerable local interest and numerous complaints from local residents about the use and appearance of the site.
- 2.4 Following Member agreement, on 7 November 2011 Enforcement Notices were served in respect of the unauthorised uses, including the mooring of vessels. The Enforcement Notice required the landowner:
  - (a) to cease the use of the basin for the mooring of boats and remove the boats from the basin; and
  - (b) to remove all the jetties and to restore the land to its condition as prior to the development; and
  - (c) to remove the motor engines and to restore the land to its condition as prior to the development
  - (d) to remove the green metal storage container and to restore the land to its condition as prior to the development

### **3 The Appeals and Challenges**

- 3.1 In December 2011 the landowner appealed against the Enforcement Notice and the appeal was heard at Public Inquiry on 1 and 2 May 2012. As well as hearing from the Broads Authority and the appellant the Inspector also heard evidence from local residents as "interested third parties". It should be noted that the motor engines referred to in (c) above have been removed but that the green metal storage container remains in situ (with the later addition of solar panels on the roof). This was despite an assurance given by the appellant to the first Planning Inspector during his site visit that this would be removed.

- 3.2 On 15 June 2012 the appeal decision was received. The decision was a split decision - ie part was allowed and part was not. The Inspector agreed with the Broads Authority and concluded that the mooring of vessels is development for which planning permission is required, that the use of the mooring basin had been abandoned, that the unauthorised operation which was taking place did have a significant and adverse effect on the character and appearance of the Conservation Area and on the visual amenity of the area and did have a detrimental effect on the living conditions of the neighbours.
- 3.3 The Inspector did decide, however, that this was a mooring basin and some limited and controlled use of it for mooring would not be unacceptable. He allowed for up to 12 boats to be moored but with no residential use. The permission he granted was subject to strict conditions and the landowner was required to provide schemes dealing with landscaping, ecological enhancement, waste and refuse and access, parking and treatment of the bridge. These were to be provided within 3 months and if the LPA do not agree it within 11 months an appeal should be made to the Secretary of State.
- 3.4 On 16 July 2012 the landowner issued a challenge to the appeal decision in the High Court. This was on two grounds – firstly that the permission issued (in effect) by the Inspector was unlawful and secondly that the Inspector had erred in law. Both challenges were technical legal challenges against the decision of the Planning Inspectorate.
- 3.5 In April 2013 the Planning Inspectorate reviewed the decision, agreed that it was flawed – as the inspector had gone beyond his powers in this case - and agreed for it to be formally quashed. On 24 June 2013 the High Court quashed the decision, by way of a Consent Order and remitted the appeal back to the Planning Inspectorate for redetermination.
- 3.6 On 8 July 2014 the re-heard appeal was considered at an Informal Hearing. Local residents again participated in the proceedings and attended with their legal and planning representatives. The Inspector identified three main matters for consideration:
- (i) Whether the mooring that is taking place in the basin constitutes development requiring planning permission;
  - (ii) If permission is required, whether the various permissions granted from 1967 onwards should be construed as granting it; and
  - (iii) If not, and it therefore becomes necessary to consider the planning merits of the development, the main issues would be the effects, if any, on the character and appearance of the Thorpe St Andrew Conservation Area; the setting of nearby listed buildings; and the living conditions of local residents
- 3.7 On 20 October 2014 the decision on the re-heard appeal was received. Again, the decision was a split decision - ie part was allowed and part was not. Again, the Inspector agreed with the Broads Authority and concluded the following:

- (i) that the mooring of vessels is development for which planning permission is required (point (i) above);
- (ii) that the various permissions granted in the 1960's did not authorise the existing use and, separately, the use of the mooring basin had been abandoned (point (ii) above); and
- (iii) that the unauthorised operation which was taking place did have a significant and adverse effect on the character and appearance of the Conservation Area and on the visual amenity of the area and did have a detrimental effect on the living conditions of the neighbours (point (iii) above).

3.8 Again, however, the Inspector did decide that this was a mooring basin and some limited and controlled use of it for mooring would not be unacceptable. In this case he allowed for up to 25 vessels, but imposed strict conditions on these in including that they should all be tolled, capable of moving under their own propulsion and that there should be no residential mooring. Conditions were also imposed, as in the first decision, requiring the landowner to submit schemes dealing with landscaping, ecological enhancement, waste and refuse and access, parking and treatment of the bridge. These were to be provided within 3 months, otherwise the permission would lapse.

3.9 On 28 November 2014 the landowner issued a challenge to the appeal decision in the High Court. The challenge was submitted by the landowner himself, rather than by legal advisers, so there was some initial confusion around the grounds of the challenge, but effectively the challenges were as previously – that is, firstly that the permission issued (in effect) by the Inspector was unlawful and secondly that the Inspector had erred in law.

3.10 On 19 May 2015 the matter was considered in the High Court at a hearing before Justice Lindblom. Both the Planning Inspectorate and the Local Planning Authority attended and gave evidence.

#### **4 The High Court Decision**

4.1 In considering the decision made by the Inspector, the Court had three issues to decide:

- (1) Whether the Inspector erred in law in his conclusions on the ground (c) appeal (ground 1) – ie that there has not been a breach of planning control;
- (2) Whether the Inspector was wrong to limit the mooring use of the basin to 25 vessels (ground 2); and
- (3) Whether the Inspector's decision was irrational (ground 3).

4.2 Details of the decision on these three points are set out below, but in summary, the Court concluded:

- (1) That the Inspector had not erred in law in his conclusions on the ground (c) appeal;

- (2) The Inspector was entitled to restrict the number of vessels using the mooring basin when he was considering the planning merits of the scheme; and
- (3) That there was nothing irrational in the Inspector's conclusions here. They were both logical and in the circumstances entirely reasonable.

Did the Inspector err in law in his conclusions on the ground (c) appeal?

- 4.3 The basis of the ground (c) appeal by the appellant was that, firstly, the various planning permissions issued in the 1960's (see 2.1 above) granted planning permission for the construction of the mooring basin and its use for any type of mooring, and that secondly the Section 52 Agreement in 1985 (see 2.1 above) in any case also authorised the use for private moorings. It was also argued by the appellant that the planning permissions issued in the 1960's had not been abandoned.
- 4.4 Justice Lindblom approached these matters as follows. In considering the decision of the Inspector, he first of all reviewed the approach taken by the Inspector to the historic permissions. He noted that the Inspector had considered all of the various permissions, the supporting documentation and plans and the sequence of the development of the site, referring to the latter two sets of information as 'extrinsic evidence'. With reference to case law, he concluded that the Inspector was entitled to consider this extrinsic evidence and supported the approach taken by the Inspector, stating "... in my view, he adopted the right approach to the construction of a grant of full planning permission. His interpretation of the relevant permission was, I think, accurate" (para 39) and "... an entirely legitimate exercise of the kind envisaged in the relevant case law..." (para 45). It is worth noting here that the conclusion reached by the Inspector, on consideration of the historic permissions and the extrinsic evidence, was that the basin was not a stand-alone facility, but part of the wider scheme.
- 4.5 Subsequent to the consideration of all the historic information, the Inspector had then also considered the purpose for which the basin had been designed, as this would have a bearing on its lawful use. The conclusion reached by the Inspector on this was that the lawful use of the basin – ie the purpose for which it had been designed – was not for private moorings (the current use), but to provide a facility that was an integral part of the commercial boatyard – ie hire boat or commercial moorings. Justice Lindblom agreed with this conclusion, and commenting on the way in which this had been reached, stated "... There are five salient findings in the Inspector's consideration of the relevant permissions ... Those five findings make perfectly good sense, and, in my view, they are beyond criticism in these proceedings ..." (paras 54 and 55).
- 4.6 This is an important part of this judgement because Justice Lindblom is in effect stating that the current use is not that which was previously permitted and could not therefore benefit from any planning permission which had been issued as part of the previous scheme.

- 4.7 It is also worth noting that the conclusion that the basin formed part of a larger scheme reinforces that reached in respect of the historic permission. This is important, inherently and cumulatively, because it leads to the arguments around abandonment and whether the continued existence of the basin as a remnant of the former more comprehensive development benefits from a planning permission in its own right.
- 4.8 In considering how the Inspector had approached the issue of abandonment, Justice Lindblom noted that the consequence of the conclusion around the purpose for which the basin had been designed (and the material differences between a commercial and a private use) meant that the current use could not be authorised even if the permission had not been abandoned, because the current use is materially different from the permitted use; he further notes that the Inspector explicitly and deliberately referenced this within his decision. He concludes by noting that the Inspector’s decision “... did not rest on the concept of abandonment in planning law” and that he was able to determine the ground (c) appeal without resolving this matter because, in effect, it had been superseded by other events.
- 4.9 Justice Lindblom also deals with the matter of the S52 Agreement, which has been a central tenet of the appellant’s case. The S52 Agreement, signed in connection with the redevelopment of the site to the north of the river in 1985, limited the use of the site to private moorings only and the appellant has consistently argued that this effectively permits private moorings. This is dealt with definitively in the judgement. At para 65, it is explained that after the relevant planning permission(s) for the commercial boatyard had been issued and implemented, two supervening events occurred – firstly the commercial boatyard physically ceased to exist when Jenners went into administration and the site was vacated and, secondly, any vestige commercial use legally ceased when the S52 Agreement was signed which prevented any commercial mooring. Given that the lawful mooring accruing from the historic permissions were commercial moorings associated only with the commercial use, the cessation of that commercial use (physically and legally) signalled the end of those moorings. The current private mooring use is in any case materially different to the earlier commercial use and would therefore need a separate planning permission. Attention is drawn to the Inspector decision that “ ... the section 52 agreement did not itself, and could not, have the effect of granting planning permission for a private mooring use “ (para 66).
- 4.10 Overall, on the question of whether the Inspector erred in law, Justice Lindblom concludes “There is no error of law in the path the inspector took to that conclusion and his consequent decision on the ground (c) appeal” (para 68).

#### The restriction of the mooring use

- 4.11 The second ground of challenge was a largely technical one, and it was related to the first ground. The second challenge said, in effect, that the Inspector erred in law in concluding that there was no planning permission (i.e. the ground 1 challenge) and there was instead a planning permission which was unrestricted. If there was an unrestricted planning permission,

then clearly the Inspector cannot issue a permission with a restriction – i.e. the restriction to 25 boats.

- 4.12 It is useful to remember at this point that when considering an appeal against an Enforcement Notice, as the Inspector was doing, one of the things that an Inspector will usually do is consider whether planning permission should be granted for the unauthorised development – this is the standard ground (a) appeal. Clearly, he will not do this if he concludes that there is already a permission.
- 4.13 In this case, the Inspector concluded that there was no extant planning permission and then went on to grant a permission for up to 25 boats. Justice Lindblom states that “ ... He was right to conclude that the material change of use at which the enforcement notice was directed was indeed a material change of use without the benefit of planning permission and, in particular, that it was not permitted by the planning permissions granted for the construction of the basin. It was therefore necessary for him to consider Mr Wood’s appeal on ground (a)” (para 72 and 73). He is satisfied that the Inspector was wholly entitled to consider the planning merits and decide whether or not a planning permission should be granted.
- 4.14 Overall, on the question of whether the Inspector was correct to restrict the mooring use in the permission he granted, Justice Lindblom is satisfied that the Inspector’s exercise of his planning judgement “ ... cannot be criticised or undone in these proceedings” (para 74) and he dismisses this challenge.

#### Irrationality

- 4.15 The third ground of challenge relates to the way in which the Inspector treated the s52 Agreement, with the appellant arguing that the purpose of this was to prevent commercial moorings but allow private moorings. The Inspector treated the S52 Agreement as part of the evidence that the use overall had been abandoned and the appellant argues that this was irrational.
- 4.16 Justice Lindblom dismisses this argument as “untenable” (para 77), agreeing with the Inspector’s conclusion that the agreement was “intended to ensure the permanent cessation of all commercial activity on the appeal site ..” , which it effectively did. He concludes that “I see nothing irrational in the Inspector’s conclusions here. They were, in my view, both logical and in the circumstances entirely reasonable”. He dismisses this challenge.

### **5 The Effect of the High Court Decision**

- 5.1 The decision by the High Court to dismiss the challenges means that the decision of the Planning Inspectorate is upheld.
- 5.2 The decision of the Planning Inspector was to uphold the Enforcement Notice in part, but to amend it to allow the mooring of up to 25 vessels, subject to compliance with certain conditions. These conditions included the requirement for the submission of information including details of layout, landscaping, ecological enhancements and a number of other matters within 3

months of the date of the decision (ie 20 October 2014). To ensure that this information was submitted, the Inspector added a further condition as follows:

20. The mooring use hereby permitted shall cease and all boats and pontoons shall be removed from the basin within 3 months of the failure to meet any one of the following requirements:

- (i) the submission of details in compliance with conditions nos. 3, 4, 6, 9 and 11;
- (ii) if within 11 months of the date of this decision the Local Planning Authority refuse to approve any of the submitted details relating to conditions 3, 4, 6, 9 and 11 or fail to give a decision within the prescribed period, an appeal shall be made to the Secretary of State and accepted as valid;
- (iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted details relating to conditions 3, 4, 6, 9 and 11 shall have been approved.

The effect of condition 20 was such that if the information was not submitted within the three months, or if it was not acceptable and therefore not approved by the LPA within 11 months and if no appeal had been submitted in respect of the LPA's refusal to approve, then the permission would lapse.

- 5.3 The landowner did not submit any of the information required within the three month period. This means that, in accordance with condition 20 of the appeal decision, the permission for up to 25 vessels which was granted by the Inspector has lapsed. There is nothing in the recent judgment that extends or can extend the period for compliance. All of the development in the basin is therefore unauthorised.
- 5.4 Members may also recall that the landowner did submit an application to the Broads Authority to vary 19 of the 20 conditions. This Broads Authority declined to validate this application (on legal advice because of the outstanding High Court Challenge) and the landowner subsequently appealed to the Planning Inspectorate against non-determination. The Planning Inspectorate declined to validate the application as the matter was to be dealt through the High Court challenge
- 5.5 It is the case that the Enforcement Notice, and hence the appeal decision, related only to the basin, however there are matters within the appeal decision which are pertinent to the remainder of the site. The Inspector determined in the appeal decision that the use of land (including land which was covered by water) for private mooring did constitute a material change of use for which planning permission is required (para 36) and this is relevant to activities outwith the ambit of the Enforcement Notice.

## **6 Current Situation on Site**

- 6.1 It is worth noting that since the initial Enforcement Notice was served in November 2011 and during the process of the various appeals and challenges, the landowner has continued to undertake further development on

the site. No planning applications have been submitted to cover any of this additional development and therefore it is unauthorised. Some of this is within the area covered by the 2011 Enforcement Notice (although not covered by it) and some is on other parts of the site. The Broads Authority has continued to receive regular complaints from local residents about this additional development throughout the duration of this case. No action to date has been taken in respect of these additional breaches pending the outcome of the Enforcement Case relating to the basin.

- 6.2 The most significant of these further breaches is the clearance of the riverbank on the Yare frontage adjacent to the opening to the basin, works and repairs to the dilapidated quayheading to facilitate mooring. These works commenced in early August 2012 and whilst the number of boats moored along the riverbank in this location varies, overall it has been increasing and residential mooring has also been taking place. There has also been the creation of rudimentary decked areas on the adjacent land, which is used to store domestic paraphernalia or create an outdoor sitting area. The landowner has indicated his intention to continue these works in order to 'improve safety' and provide more spaces for mooring. These particular breaches are within the area covered by the original Enforcement Notice, but is not covered by it. There is no planning permission for mooring in this location.
- 6.3 At the western end of the site, land is being used for the parking of vehicles, (including a converted ambulance) some of which are being used for residential purposes. There are also a number of tents which appear to be permanently occupied, although it is anticipated that this use is likely to be seasonal. Various structures have also been erected in this area in connection with the habitation use, including storage sheds and decked areas. These particular breaches are within the area covered by the original Enforcement Notice, but are not specifically covered by it.
- 6.4 There have been repeated complaints from local residents, and interest shown by the local MP and the Town Council about these additional activities and an expectation that further action will be taken by the Broads Authority. When considering if and what further action might be appropriate, it will be necessary to consider how to address these further breaches.
- 6.5 For clarity, it is useful at this point to identify which breaches are covered by the original Enforcement Notice, which are within the area but not covered and which are entirely outwith the Enforcement Notice and this is as follows:

a	Covered by Enforcement Notice	<ul style="list-style-type: none"> <li>• Mooring of boats in the basin</li> <li>• Retention of pontoons and jetties in the basin</li> <li>• Standing of green metal storage container</li> </ul>
b	Within area of Enforcement Notice, but not covered by it	<ul style="list-style-type: none"> <li>• Mooring of houseboats in the basin</li> <li>• Operational development to replace remnant quayheading</li> </ul>

		<ul style="list-style-type: none"> <li>• Construction and use of various decked areas and other structures associated with mooring berths</li> <li>• Use of land for standing of vehicles and other structures, including for residential purposes</li> <li>• Horsiculture (intermittent)</li> </ul>
c	Outside Enforcement Notice area and scope	<ul style="list-style-type: none"> <li>• Mooring of boats along the river frontage</li> <li>• Operational development to replace remnant quayheading</li> <li>• Construction and use of various decked areas and other structures associated with mooring use</li> </ul>

## 7 Potential Options for Further Action (if required)

- 7.1 The LPA has a number of options in how it approaches securing compliance with the Enforcement Notice, as upheld by both the Inspector and the High Court. It will also need to decide whether simply to enforce the requirements of the Enforcement Notice, or to address also the additional breaches.
- 7.2 It should be noted at the outset that the appellant has the right to appeal the High Court decision and that he has indicated informally that he plans to do so. This appeal would need to be submitted within 21 days of the date of the High Court Judgment (ie by 27 August 2015) and if such a challenge is submitted then this may well preclude the Broads Authority from being able to take further action in respect of this site pending the outcome of that specific appeal.
- 7.3 Were the LPA to be in a position to take further action, the approaches it could take are set out in some detail below. For clarity, the report indicates to which set of breaches (ie covered by the original Enforcement Notice etc as set out at 6.5 above) they potentially apply. In summary these approaches include
- (i) Take no action;
  - (ii) Seek to negotiate a mutually acceptable solution with the landowner;
  - (iii) Serve further Enforcement Notices in respect of the new breaches;
  - (iv) Prosecute the landowner for non-compliance with the Enforcement Notice;
  - (v) Apply to the High Court for an Injunction.
- 7.4 It is noted that the LPA could use a combination of the listed approaches.

### Take no action

- 7.5 Whilst this is technically an option, given the resources that the LPA and local residents have so far committed to this process, plus the expectation from residents and others that the Authority will uphold and defend its planning decisions, plus, most importantly, the need to protect the area from

unacceptable development, this is not a preferred option. Were the Authority to not enforce following the High Court decision, it would be open to significant local criticism and reputational damage.

- 7.6 It is noted that the LPA could decide to take no action on any or all of the breaches – ie those covered by the original Enforcement Notice, those within area of Enforcement Notice, but not covered by it and/or those outside the Enforcement Notice area and scope.

#### Negotiation with the landowner

- 7.7 Government advice, and best practice in enforcement, is to seek to negotiate and mediate a mutually acceptable compromise and to avoid, where possible, recourse to formal action. In this case, unfortunately, the landowner has consistently refused to engage constructively with the LPA and has, instead, sought to challenge every decision. He has also made it clear through his challenges to decisions which have given him firstly 12 boats and then up to 25, that what he seeks here in effect is an unrestricted permission. He has also undertaken further development in breach of planning controls (see 6.2 and 6.3 above) and indicated that he intends to challenge the decision of the High Court in the Court of Appeal. Given this context, the realistic prospect of constructive engagement is likely to be limited.. This approach is also likely to be unpopular with local residents.
- 7.8 Nonetheless, this is an approach which could be taken. Were Members minded to negotiate, the decision of the second Inspector to grant permission for up to 25 boats (albeit heavily conditioned) would be a strong material consideration and Members might seek to encourage the submission of a formal application framed in the terms of the Inspector's decision. If successful, this would achieve a negotiated solution, however, based on previous experience, there is a strong risk that this approach would be likely to result in more delay in achieving a resolution on site.
- 7.9 As at 7.6 above, the LPA could decide to negotiate with the landowner on any or all of the breaches. There may be an issue of consistency, however, around negotiating on the matters covered by the Enforcement Notice given that this has been upheld by the High Court.

#### Further Enforcement Notices

- 7.10 It is the case that the LPA could serve further Enforcement Notices in respect of the new breaches itemised in the table at 6.5 above. Section 172 (1) of the Town and Country Planning Act 1990 provides that an LPA may issue an Enforcement Notice where it appears to them that (a) there has been a breach of planning control and (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations. In this case, it is clear that there has been a breach. With respect to (b), as detailed above, the breaches are having an adverse impact on the area and are contrary to development plan policies, particularly adopted Core Strategy (2007) Policies CS1, CS4, CS5 and CS24 and

adopted Development Management (2011) Policies DP2, DP4, DP5, DP16, DP25 and DP28. It would be expedient to issue further Enforcement Notices.

- 7.11 Given the history here, however, it is likely that appeals would be lodged against these and compliance would then be suspended pending the outcome of those appeals – in effect perpetuating the current situation for local residents. The breaches would then continue for that period. Based on the previous history of this landowner in circumstances where compliance is suspended (for example, whilst pending the outcome of the legal challenge), it is also difficult to have confidence that there would be no further new breaches. On this basis, it is not considered that the serving of further Enforcement Notices in respect of the new breaches would be likely to achieve timely compliance; moreover, the service of further Enforcement Notices would not protect against new breaches.

#### Prosecution for non-compliance with the Enforcement Notice

- 7.12 There is an option to prosecute the landowner for non-compliance with the Enforcement Notice. Non-compliance with an Enforcement Notice is a criminal offence under s179(2) of the Town and Country Planning Act 1990 and the landowner would suffer the consequence of this; in addition he would be likely to receive a fine. It is also an offence under s179(5) of the same Act for a person who has control of or an interest in the land to which an enforcement notice relates (who is not the owner) to carry on any activity which is required by the notice to cease or to cause or permit such an activity to be carried on, so a penalty would also apply to the owners of the boats which are unlawfully moored.
- 7.13 These matters can be heard in the Magistrates' Court and in the Crown Court. The penalty in both these circumstances is a fine of up to £20,000 if the matter is disposed of in the Magistrates' Court to an unlimited fine if the matter is disposed of in the Crown Court. In considering the level of the fine the court is obliged to have regard to the financial benefit which has accrued or which appears likely to accrue to the defendant in consequence of the offence though will also need to take account of the defendant's means.
- 7.14 Whilst prosecution is an option, it would only apply to the matters covered by the Enforcement Notice. It should also be noted that a successful prosecution would still not actually achieve compliance and the LPA would need to pursue the landowner further to achieve this.
- 7.15 Prosecution can sometimes be a useful tool to prompt compliance, although it is rarely a swift remedy as the Court processes can be slow. Given the history here, it is also likely that the landowner would be unlikely to assist the process possibly, introducing the maximum delay, and the unacceptable situation on site would persist for the period of the process.
- 7.16 It should be noted that the LPA could only prosecute in respect of those matters where there has been non-compliance with the original Enforcement Notice. This remedy could not be used in respect of those breaches within

area of Enforcement Notice, but not covered by it and those outside the Enforcement Notice area and scope.

### Injunction

- 7.17 Finally, there is an option to pursue an injunction. Section 187B of the Town and Country Planning Act 1990 provides for an LPA to use an Injunction to restrain breaches of planning control. This may be used for any actual or apprehended breach of planning control and may be used whether or not other means of enforcement have been used and/or failed. The guidance on Injunctions is clear, however, that this should be a remedy of last resort.
- 7.18 In applying to the Court for an Injunction, the LPA will need to demonstrate why this is “necessary or expedient”. It is noted that the tests of “necessary or expedient” applies to the Injunction, not the breach. In this case, the LPA could argue that the test of necessity is met by the fact that the breach is having an adverse impact locally and that previous remedies – ie the earlier Enforcement Notices – have been disregarded and that there is no confidence that further Enforcement Notices would be complied with. In respect of the test of expediency, this requires consideration of the advantages and disadvantages of taking one or other or none of the available steps. As stated above, it is not appropriate in this case to take no action; similarly the probability of success of further Enforcement Notices on this site is doubted. It is acknowledged that there would be a cost associated with an application for an Injunction, but the LPA could argue that this could be justified taking into account the benefit of protecting from harm, both existing and apprehended, and area which is designated as of National Park status and of protecting local amenity.
- 7.19 Members should be aware that the Planning Committee previously considered the expediency of Injunctive action at the meeting on 1 March 2013 when they considered a report on the further development which had taken place on the site since the first decision of the Planning Inspectorate and pending the hearing on the first High Court challenge. They had at this time unanimously resolved to authorise injunctive action, however the rate of new unauthorised development then slowed, so this action was not taken. Subsequent to this, the first decision of the Planning Inspectorate was quashed and the appeal heard for the second time; action was suspended whilst this process was underway.
- 7.20 It should also be noted that the use of an Injunction can sometimes be a useful tool to prompt negotiation, as well as prompt compliance.
- 7.21 It should be noted that it is understood that a number of the vessels in the former mooring basin are being used for residential purposes. Clearly, if any Injunction were to require to cessation of this use these persons would, potentially (if the residential use is taking place), need either to relocate to an authorised residential mooring or find alternative accommodation. The impact on these persons would, therefore, potentially be severe and the LPA would need to consider this, whilst noting that any such use (if it is taking place) is without planning permission and the landowner is aware of this. The LPA has

no duty to provide alternative residential moorings for persons who are required to move from unauthorised moorings.

- 7.22 It is noted that the LPA could use an Injunction to address all of the breaches identified above – ie those covered by the original Enforcement Notice, those within area of Enforcement Notice, but not covered by it and those outside the Enforcement Notice area and scope. It can also be used to prevent further breaches (an apprehended breach) and this is one of its strengths.

## **8 Conclusion and Recommendation**

- 8.1 This is a clear and useful Judgement from the High Court, and one which builds on the previous decisions of the Planning Inspectorate in respect of the legal position, which has been consistently disputed by the landowner. Members will need to consider the decision carefully as well as what the LPA is seeking to achieve in deciding how to take this matter forward. There are number of options, and each has its own benefits and disadvantages
- 8.2 Members could take a collaborative approach and seek to negotiate a solution comparable to that which either Inspector was prepared to allow – ie a scheme of up to 12 or 25 boats, subject to careful conditioning. This approach is likely to prolong the situation on site whilst an application is being processed and a permission implemented; it would also need careful monitoring post-implementation. There may be some support for this approach.
- 8.3 In terms, however, of bringing the matter to a swift conclusion, the injunctive route is likely to be the most successful. It can be argued, given the history here, that this action is necessary and expedient; an Injunction has the added advantage of covering existing breaches and preventing any future (apprehended) breaches. This would be the recommendation to Planning Committee.

Background papers: Case file and High Court decision

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Appendices: Nil