

**Enforcement of Planning Control
Enforcement Item for Consideration:
Use of Former Mooring Basin for Mooring of Vessels**
Report by Head of Development Management

Summary: This report concerns unauthorised use of a former mooring basin.

Recommendation: That enforcement action be taken as appropriate.

Location: Land at western end of Thorpe Island, Thorpe St Andrew

Breach of Planning Control: Unauthorised mooring of vessels, use of vessels for residential purposes

1 Background and Enforcement History

- 1.1 Members will recall that on 7 November 2011 Enforcement Notices were served in respect of the unauthorised mooring of vessels at the western end of Thorpe Island in the former Jenners basin. In addition to the mooring the Enforcement Notices also covered the unauthorised construction of jetties/pontoons, the unauthorised standing of a vehicle engines and the unauthorised standing of a container. 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; and
 - (d) to remove the green metal storage container and to restore the land to its condition as prior to the development.
- 1.2 An appeal was submitted against the Enforcement Notice and the appeal was heard at Public Inquiry on 1 and 2 May 2012. The motor engines were removed prior to the appeal being heard and therefore this aspect of the breach was resolved.

- 1.3 The appeal decision was received on 15 June 2012. The decision was a split decision - ie part was allowed and part was not.
- 1.4 The Inspector agreed with the Broads Authority and concluded that the mooring of vessels is development for which planning permission is required; he also concluded that the use of the mooring basin had been abandoned and planning permission was therefore required for the resumption of that use. He considered that the unauthorised operation which was taking place did have a significant and adverse effect on the character and appearance of the Conservation Area, did have a significant and adverse effect on the visual amenity of the area and did have a detrimental effect on the living conditions of the neighbours.
- 1.5 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 with no residential mooring. The permission he granted was, however, 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 shall be made to the Secretary of State.
- 1.6 On 19 June 2012 the LPA wrote to the appellant to explain precisely what the appeal decision said and what this meant – ie what was and what was not authorised – and what he was required to do and by when. This included:
- (a) the removal of vessels to give a maximum number of 12 within one month (i.e. by 15 July 2012);
 - (b) the removal of the pontoons within six weeks (i.e. by 27 July 2012);
 - (c) the removal of the engines within one month (i.e. by 15 July 2012); and
 - (d) the removal of the storage container within one month (i.e. by 15 July 2012).

2 The Appellant's Challenge to the Appeal Decision

- 2.1 On 16 July 2012 the landowner issued a challenge to the appeal decision in the High Court. Two challenges have been submitted, one under section 289 of the Town and Country Planning Act 1990 (appeals to the High Court relating to enforcement notices) and one under section 289 of the Town and Country Planning Act 1990 (proceedings for questioning the validity of decisions).
- 2.2 The grounds of appeal under section 288 are:
- that the permission granted by the Inspector contains unlawful conditions [unlawful because there is no right of appeal];

- that the permission granted by the Inspector contains unlawful and excessive conditions [in that they seek to restrict the lawful use of the land];
- the planning permission granted by the Inspector is unlawful as it is outside the scope of the relevant legislation.

2.3 The grounds of appeal under section 289 are:

- that the Inspector erred in law in finding the basin to be abandoned;
- that the Inspector gave inadequate reasons for his decision,
- a repetition of the grounds for the section 288 appeal.

2.4 In practical terms, the immediate consequence of the challenge is that the provisions of the appeal decision and, critically, the requirements outlined at 1.6 above are suspended pending the outcome of the challenge.

2.5 On 6 November 2012 the hearing date was set for 26 and 27 June 2013.

2.6 The challenge is to the decision of the Planning Inspectorate (Secretary of State for Communities and Local Government). However the Broads Authority is involved as second respondent and is to be represented at the hearing in June 2013 due to the significance of case for the Broads Authority.

2.7 The effect of the challenge is to hold the requirements of the appeal decision in abeyance. The only mechanism by which an LPA could seek to apply the provisions of the Enforcement Notice would be to apply to the Court for an Interim Order empowering it to enforce the provisions of the Notice pending the High Court Hearing. An application for an Interim Order would be held in the High Court and in order to obtain this the LPA would need to satisfy the Court that there were public interest grounds, for example on the basis of harm to local amenity.

2.8 It is useful to note that whilst the effect of the challenge is to suspend the implementation of the appeal decision, it does not authorise further development.

3 Current Position on Site and Further Breaches

3.1 Since the challenge to the Inspector's appeal decision was lodged in July 2012, the landowner has undertaken further development on the site. 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. These further breaches are detailed below.

3.2 In early August 2012 the landowner began clearing an area of riverbank immediately upstream of the access bridge and undertook repairs to the

dilapidated quayheading. These works in themselves did not constitute development. On 28 August 2012 a vessel arrived and commenced mooring. In October the LPA wrote to the owner of the vessel, advising that the mooring was unauthorised, and the owner responded that they had rented it in good faith from the landowner of the bank adjacent to the river who would deal with the matter. Some days later a further boat arrived and, in January 2013, a third. There are now 2 or 3 boats moored on a permanent basis in this location.

3.3 In the appeal decision the Inspector states at para 15:

“Although the mooring of a vessel for limited periods is normally incidental to any right of navigation, the ‘mooring’ is still a use of the ‘land’ and the ‘land below water’. The continuous stationing of a vessel in one location for residential use, commercial use or a permanent stay (at a ‘base-mooring’) is also such a use and would normally be different in character from a transient mooring use. Depending on the facts of the case this character of usage will normally differ materially from the transient activity of mooring a vessel which is in the course of navigating the waterway. Therefore, long-term or permanent mooring (at a ‘base-mooring’) may constitute, as a matter of fact and degree, a material change of use of land and the submerged (albeit sometimes periodically where tidal) land”.

It is considered that the facts of this particular case are such that the mooring of the vessels in this location upstream of the access bridge constitutes development. There is no permission for this use and the development is therefore unauthorised.

- 3.4 This particular breach is part within the area covered by the original Enforcement Notice, but is not covered by it. That area of the land, which is outside the area of the original Enforcement Notice, includes the area of the river which sits under the moored vessels. This land is within the ownership of Norwich City Council and they have been approached in respect of their using their powers as landowners to enforce against trespass moorings. Members will be updated as to the progress on these discussions.
- 3.5 In October 2012 solar panels were installed on top of the green shed which sits to the south of the site. Whilst householders have permitted development rights (in certain circumstances and subject to conditions) for the installation of solar panels, there are no such rights at commercial premises. The solar panels are therefore unauthorised.
- 3.6 This particular breach is within the area covered by the original Enforcement Notice, but is not covered by it. It is noted that the original Enforcement Notice required the removal of the structure.
- 3.7 In December 2012, the landowner brought onto the site a 4.5m square structure which appeared to be a horse shelter. Inspections showed that the structure is set on to wooden skids, meaning it is moveable and may benefit from an exemption from the need for planning permission on the basis that it

is not a fixed structure and does not, therefore, constitute development. In January 2013 a horse was brought on to the site and the structure began to be used as a horse shelter. The case law covering 'horsiculture' is complicated, but, as a general rule, concludes that if a horse is maintained primarily through grazing on a site then it can be treated as an agricultural operation which does not require planning permission, however if it is primarily fed from feed brought to the site and only supplements its feed with grazing then planning permission is required for a change of use as this arguably does not constitute an 'agricultural' use. In this case, the horse is primarily fed from feed brought onto the site (for a number of reasons – one being a medical condition that the horse suffers from) meaning that there has been a change of use of the land to a mixed use including the use of the land for the keeping of a horse for something other than an agricultural use. Subsequent to the horse being brought on site, fencing has been erected to contain the horse. This fencing may also constitute development.

- 3.8 This particular breach is within the area covered by the original Enforcement Notice, but is not covered by it.
- 3.9 In late January 2013 reports were received that tree felling was taking place at the site. The site is within a Conservation Area therefore permission is required for any works to trees. Various officers of the LPA have visited the site on a number of occasions previously in connection with tree and brush clearance and advised the landowner on the management of the trees on his land and of the need for consent. In this case, a site visit was immediately undertaken and the landowner, who was supervising the clearance, was advised again of the need for consent. Works were ceased following the visit.
- 3.10 This particular breach is within the area covered by the original Enforcement Notice, however unauthorised works to trees is covered by separate legislation and is a criminal offence. There is no mechanism to serve an Enforcement Notice and the only available response in a case where action is justified is prosecution.
- 3.11 When the Enforcement Notices were served in November 2011 there were 16 vessels in the basin, plus a boat belonging to the landowner and 2 tenders. At the Inspector's site visit on 3 May 2012 there were 22 boats in the basin. At the most recent site visit on 6 February there were 23, plus a number of dinghies. The number of vessels is not decreasing.
- 3.12 The LPA understands that a number of the boats are being lived on permanently and is investigating this matter. In the appeal decision the Inspector states at para 61:

"The section 52 agreement [relating to an earlier planning permission on adjacent land] restricts the type of mooring within the basin to 'private' moorings and I consider that any permission now granted should be similarly restricted. Without such a restriction I consider that the character and intensity of mooring and the use of the land associated with a commercial use or permanent residential use would lead to a situation whereby further harm

would be caused to the character and appearance of the conservation area and to residential amenity.”

No residential use is permitted under the previous (original) planning permission, or under any subsequent permission or in the appeal decision. It is therefore unauthorised.

- 3.13 This particular breach is within the area covered by the original Enforcement Notice, but is not covered by it.

4 Options for Action

- 4.1 This is a site where there is a history of breaches of planning control. Whilst it is not unexpected that the landowner would continue the unauthorised operations pending the outcome of the High Court challenge, since the challenge was lodged there have been further breaches as detailed above.
- 4.2 The LPA has a number of options in respect of addressing these breaches, either in total or individually. These include:
- (i) Take no action
 - (ii) Serve further Enforcement Notices
 - (iii) Apply to the High Court for an Injunction
- 4.3 In terms of the first option, complaints have been received about the breaches of planning control and the LPA has a statutory duty to investigate and respond to these. Having investigated them, it is concluded that whilst individually the breaches are minor, cumulatively they have an adverse impact on the area. This includes an adverse impact on the character and appearance of the Conservation Area, and this impact is added on to the already adverse impact of the existing breaches which were the subject of the 2011 Enforcement Notice. It is not considered that it is appropriate to take no action here.
- 4.4 In terms of the second option, the LPA could serve further Enforcement Notices in respect of the breaches listed at 3.2, 3.5, 3.7 and 3.12 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.
- 4.5 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. 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. It is likely that the further breaches would persist and would exacerbate an already unacceptable situation where it is already acknowledged that the previous breaches have had an adverse impact locally.

- 4.6 Given that the LPA is not confident, based on previous history and the continued lack of regard for the planning process shown by the landowner, that Enforcement Notices would achieve the required ends it is appropriate to consider an alternative approach. 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.
- 4.7 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, it is considered 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 this would 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.
- 4.8 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 and the LPA is currently investigating this. Clearly, if any Injunction (or Interim Order to apply the provisions of the Inspectors appeal decision) 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. Whilst this is regrettable, any such use (if it is taking place) is without planning permission and the landowner is aware of this, because not only was the Inspectors decision clear on the matter, but it was outlined in the LPA’s letter to him of 19 June 2012. The LPA has no duty to

provide alternative residential moorings for persons who are required to move from unauthorised moorings.

5 Action Proposed

- 5.1 Taking all the above into account, it is considered that it is necessary and expedient to make an application for an Injunction in the High Court. It would be necessary for the Injunction to include that land in the ownership of Norwich City Council which is the subject of the recent unauthorised moorings.
- 5.2 Any application for an injunction in the High Court will be costly to prepare and the successful party will be in a position to recover their costs (depending on the means of the other party). If the Broads Authority loses then it will face an application for costs by the successful party.
- 5.3 In addition to the Injunction, which will bring to an end the new actual breaches detailed at 3.2, 3.5, 3.7 and 3.12 above and prevent any future (apprehended) breaches, it would also be appropriate to seek an Interim Order to enforce the requirements of the appeal decision pending the outcome of the challenge.
- 5.4 In respect of the tree felling which has taken place as detailed at 3.6 above, it is implausible that the landowner is unaware of the implications of the Conservation Area designation and his consequent responsibilities. These matters have been drawn to his attention previously and, indeed, he has previously sought consent for works to trees elsewhere on Thorpe Island. It would therefore be appropriate to issue prosecution proceedings in respect of the tree clearance detailed at 3.6 above.

6 Financial implications

- 6.1 There will be legal costs associated with this action

7 Recommendations

- 7.1 That an Injunction be sought to as proposed above.
- 7.2 That a prosecution is pursued against the landowner in respect of the tree felling.

Background Papers: None

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Appendices: None