



Appeal Decision

Inquiry held on 1 and 2 May 2012

Site visits made on 30 April 2012 and 3 May 2012

by **Anthony J Wharton BArch RIBA RIAS MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 15 June 2012

Appeal Ref: APP/E9505/C/11/2165163

**Land at west side of Thorpe Island (The Island) Yarmouth Road,
Norwich NR7 0HE**

- 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 Mr Roger Wood against an enforcement notice issued by The Broads Authority.
- The Authority's reference is BA/2011/0006/ENF.
- The notice was issued on 7 November 2011.
- The breach of planning control as alleged in the notice is: *the construction and installation of two jetties in the approximate position marked with cross A on the attached plan, the erection or standing of a green metal storage container in the approximate position marked with cross B on the attached plan, the use of part of the land for the standing of motor engines in the approximate position marked with C on the attached plan and the change of use of the site for the mooring of boats.*
- The requirements of the notice are:
 - (a) *Cease the use of the basin for the mooring of boats and remove the boats from the basin.*
 - (b) *Remove all the jetties and restore the land to its condition as prior to the development.*
 - (c) *Remove the motor engines and restore the land to its condition as prior to the development.*
 - (d) *Remove the green metal storage container and restore the land to its condition as prior to the development.*
- The period for compliance with each requirements is as follows:
 - (a) 2 weeks; (b) 3 weeks; (c) 1 week and (d) 2 weeks.
- The appeal was initially made on grounds (a), (b), (c), (d), (f) and (g) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. However, grounds (b) and (f) were subsequently withdrawn in relation to all of the allegations and the appeal now proceeds on grounds (a), (c), (d) and (g).

Summary of Decision

The notice is corrected and varied and the appeal is allowed in part on ground (a), insofar as it relates to the use of the basin for the mooring of boats. The appeal is also allowed in part in relation to ground (g). The appeal is dismissed in so far as it relates to the jetties (pontoons); the storage container and the motor engines and the enforcement notice is upheld as corrected and varied (see formal decision below).

Introduction

1. At the start of the Inquiry it was confirmed on behalf of the appellants that the appeal under grounds (c) and (d), in relation to the jetties (pontoons); the metal storage container and the motor engines were not being pursued. In effect this was a withdrawal of these grounds in relation to these alleged breaches. I have, therefore, considered the appeal in relation to the allegations in the notice as follows: First the

construction and installation of two jetties (pontoons) under grounds (a) and (g); second, the standing of a metal container under ground (g); thirdly the standing of motor engines under ground (g) and lastly the change of use for the mooring of boats under grounds (a);(c); (d) and (g). I shall also correct the notice by omitting the word 'jetties' and adding the word 'pontoons'.

2. Following the withdrawal of the grounds of appeal (as above) and clarification at the start of the Inquiry, the main disagreements between the parties are as follows:
(a) Whether or not the mooring of boats within the basin constitutes development for the purposes of Section 55 of the Town and Country Planning Act 1990. (Part of the ground (c) appeal).

(b) Whether or not the previous 1967 mooring use has been spent or abandoned.

(c) If a mooring use is found to require planning permission and the previous permission is abandoned, whether or not planning permission should be granted for the mooring use as being carried out and the retention of the pontoons.

3. At the start of the Inquiry the 'red-line' boundary of the appeal site was clarified and the Broads Authority (BA) confirmed that the area of the riverbed is excluded from the notice area and that at the time the notice was issued there was no breach of planning control along the river. I have, therefore, dealt with the notice on the basis that it only covers the area within the 'red-line' boundary which includes the entrance to the basin, the basin itself and the rest of the land as shown. It is agreed that the 'red-line' area includes the quay heading fronting on to the river.

Background information

4. The site is located within the Broads Authority area at the western end of Thorpe Island, in Thorpe St Andrew, to the east of Norwich. The island is approximately 860m long and 135m in width. The island was formed when the railway line to the south was constructed and a stretch of water, known as the New Cut, was required in order that larger vessels could continue to navigate the river. The island lies within the Thorpe and St Andrew Conservation Area and there is a conservation area appraisal which was adopted by Broadland District Council in December 2007.

5. The appeal site includes a channel from the river, the mooring basin itself and the immediate surrounding land. This part of the island is accessed via a single track road and bridge from the end of Thorpe Hall Close, on the northern bank of the river. The formation and construction of the mooring basin was granted planning permission in 1967 following outline permission for a boatyard granted in 1965. The housing development was granted permission in 1985 on land which was formerly part of the site of the Grade 2* listed building Thorpe Hall. This lies on the northern bank of the river, opposite the appeal site. There are other dwellings on this bank with gardens running down to the river. To the south, on the other side of the New Cut, lies Whittlingham Country Park. The east side of the island comprises boatyards and various moorings, some which are residential. The Yare Boat Club is located between the east and west parts of the island and there are various other individual moorings to the west of the boat club on the north bank of the river.

6. A final agreed Statement of Common ground was submitted with the written Legal and Closing submissions following the close of the Inquiry. With regard to the site itself, although most points are agreed, there are disagreements relating to its character; the provision and existence of services and its use as a marina. It is clear, however, that there is still a sewer connection via the pipe under the bridge and the points of entry for electricity and water were shown to me during my site visit. The relevant planning history is now agreed, as is most of the planning policy context which is set out in the authority's case. The appellants consider that additional

policies are relevant (see below). There is agreement that Drawing A770-15A is relevant but the appellant also relies upon other drawings relating to the previous planning history. It is agreed that there are no highways objections to the proposals (the matters covered by the notice) and that there are no objections from the Environment Agency.

7. It is agreed that the site includes the mooring basin, its surrounding land and the lengths (edges) of the river bank all as shown on the enforcement notice plan. It is also agreed that the basin is 'off-river'; that visitor/short stay mooring is not affected; that the use of the basin does not obstruct navigation and that the site is not subject to any designations in respect of its ecological interest.

8. It is further agreed that the 1967 permission (BF8095) was not rescinded or voluntarily surrendered; that there has been no other change of use granted for the appeal site since 1967; that the S.52 legal agreement (dated 5 March 1985) was entered into in connection with permission 84/0477; that the agreement remains in force and remains as a legal charge on the appeal land; that the mooring use as alleged operates in accordance with the terms of the agreement and that the agreement did not restrict the number of boats that can be moored at the appeal site. It is agreed that Council Tax was paid in respect of the vessel known as 'Puma' between 1993 and 1996. In respect of the ground (g) appeal, the times for compliance as set out in the BA letter dated 23 March 2012 are agreed.

Relevant policy and case-law references

9. The development plan comprises the adopted Development Management Policies DPD (2011) (DPD); the adopted Core Strategy (2007) (CS) and saved policies of The Broads Local Plan (1997) (BLP). The relevant DPD policies are DP4 (Design); DP5 (Historic Environment); DP16 (Moorings) and DP28 (Amenity). The relevant CS policies are CS1 (Landscape protection and Enhancement) and CS5 (Historic and Cultural Environments). I agree with the appellant that policy DP12 of the DPD and policy CS4 of the CS are also relevant. The most relevant saved policy of the BLP is TSA2 which relates specifically to Thorpe Island and the authority has commenced a review of this policy and others in the BLP which were site specific. The policy restricts any new development to the eastern side of the island.

10. Since the appeal was made the National Planning Policy Framework (NPPF) has been introduced. The policies of the NPPF carry significant weight as material considerations and there is a presumption in favour of sustainable development.

11. In reaching my conclusions and decision in this appeal I have taken into account all of the statements, submissions and evidence given to the Inquiry; the written legal submissions; the written closing submissions and the written submission on behalf of the appellant in relation to the closing submissions of the authority. I have taken into account relevant case-law and all of the parties' references to the following cases: *Hartley v Minister of Housing and Local Government (1970) 1QB 413*; *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment (1985) AC 132*; *The Trustees of the Castell-y-Mynach Estate v Secretary of State for Wales (1985) JPL 40*; *Hughes v Secretary of State for the Environment, Transport and the Regions and another (2000) JPL 826 CA*; *Bramall v Secretary of State for Communities and Local Government (2011) EWHC 1531 (Admin)*; *Thames Heliports plc v London Borough of Tower Hamlets (1997) 74 P&CR*; *Pilkington v Secretary of State for the Environment and others (1973) 1 WLR 1527*. I have also taken into account the references to the Norfolk and Suffolk Broads Act 1988 and to the *British Waterways/Kennett Avon* Appeal decision.

Whether or not mooring within the basin constitutes development

12. This relates to part of the ground (c) appeal in relation to the mooring use. It is accepted by the parties that whether or not there has been a change of use of land is primarily a matter of fact and degree. The courts have also held that a distinction should be drawn between a 'primary' use and an 'ancillary' use; that a change of use need not necessarily be to a different kind of use altogether and that a material use can occur due to intensification. In order to address the materiality of any change the 'planning unit' is the starting point. I deal with this later.

13. Where a 'mooring' use takes place, the 'land' to which it relates can be either or both, the river bank (to which a vessel is usually physically moored) and the bed of the river (over which the vessel is located). In relation to the statutory controls over the use of land, 'land covered by water' has been held to come within such controls. The right to 'moor', however, is incidental to the right of navigation on any particular stretch of water and I accept the Appellant's case that *'the mooring of a boat is part of the ordinary suite of uses that are ancillary to navigating boats along a river'*. However, there can be significant differences in the types of mooring and the character of usage of moorings. Boats are moored on the Broads and other waterways for a variety of reasons and uses. These include mooring as part of the navigation of the waterways; commercial uses in relation to hire vessels; commercial uses in relation to repairs; the servicing of boats; the residential use of boats and the permanent mooring of private vessels. The private mooring of vessels can relate to a particular dwelling along the river (as is the case for some properties close to the appeal site) or to specific places where boats are moored at a 'base-mooring'. In the latter case, boat owners usually leave their vessels at the mooring permanently and use the 'base-mooring' as a starting and finishing point for their navigations around the waterway.

14. It is common ground that boats can be moored temporarily along a river as part of the normal navigational use of the waterway. Normally the right to moor in such a situation applies to the temporary cessation of movement of craft. On the Broads this is quite common as vessels navigate from one area to another. It was confirmed during the course of the inquiry that, even though the basin is 'private', boats have moored along the river frontage of the appeal site as well as trespassing into and mooring within the basin itself. Clearly in situations such as this and where the mooring remains of a temporary nature, the character of the land, (both on shore and underwater) is unlikely to be materially affected.

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.

16. In the *Thames Heliport* case it was held that one can make a material change in the use of the land by carrying out activities on that land even though nothing physical is done to the land itself. This applies to 'land covered by water' and the mooring of a vessel is a use of the land which lies below the vessel, whether it is moored by a land line or an anchor which is dropped into the water and attached to the river bed. Clearly, every mooring of a vessel along a waterway does not materially change the

use of the 'land covered by water' but, depending on the character of usage it can, as a matter of fact and degree, result in a material change in use of the land to which the vessel is moored as well as to the submerged land.

17. Depending, therefore, on the particular circumstances the mooring of a vessel on a waterway can constitute a material change in use and that whether or not it does is a matter of fact and degree. In my view this conclusion is not in conflict with the decision in the *British Waterways/Kennet and Avon* decision. I acknowledge that the mooring of a vessel on a canal or a river can be compared to the parking of a car on a highway in that the primary use is for navigational purposes and mooring is incidental to that use. However, the permanent parking, garaging or storage of vehicles on a public highway would, as a matter of fact and degree, alter the character of usage and would constitute a material change in use. In certain areas and situations there are necessary controls relating to the parking of vehicles on the highway and similar controls in relation to unauthorised mooring, including the necessary removal of vessels which are affecting navigation, exist on the waterways controlled by the BA.

18. I acknowledge the points made by the main parties about the differences between this case and the *Kennet and Avon* decision. However, it is a matter of fact that the riverbed and the banks are not in a single ownership or occupation. One only has to inspect the site and the immediate surroundings to be able to identify many different planning units along the river including the private houses; the public houses and hotels and the commercial boatyard uses to the east. I do not accept, therefore, that the whole of the River Yare constitutes a single 'planning unit' and nor do I accept that any materiality of change in this case should be assessed on that basis. In my view, the contention that the river forms one planning unit does not meet the established tests in case law for determining what constitutes an appropriate planning unit. I consider that the planning unit in this case is the 'red-line' appeal land and I now turn to the specific details of the appeal site.

19. In 1965 outline planning permission was granted for the development of a boatyard at the western end of the island. A further permission was granted in 1967 for the formation and construction of the mooring basin and the access into it from the river. It is agreed that the use of the basin for mooring purposes was implicit in this permission. It was also confirmed by the BA that the mooring use was not restricted. The basin was used for commercial moorings although it seems that it could also have been used for other forms of mooring. However, at that time I consider that the primary use of the 'land' and the 'land covered by water' was for the mooring of boats for commercial purposes. The commercial mooring was not an 'ancillary use' of the basin; it was linked to the primary use of the basin and the land as a boatyard.

20. The basin was part of a commercial 'boatyard' and other permissions (dry boathouse, wet boathouse, fuel pumps and tanks) were granted permission. These buildings and works all facilitated the use of the land and the basin as a commercial boatyard. There may well have been other ancillary uses of the land but '*the view objectively to be taken by a reasonable man with the knowledge of all the relevant circumstances*' would have been that this was a commercial boatyard and that the basin provided an integral and necessary constituent of the boatyard use. Other users of the river would not have expected unfettered access to the basin for mooring purposes in connection with their navigation of this part of the river. The primary purpose of the basin was as a major part of Jenner's boatyard for the purposes of mooring their fleet. The character of usage of the appeal land, both on shore and in the water at that time was, therefore, significantly different to a transient mooring use; a residential mooring use or a private permanent mooring use. Planning

permission was clearly required for the boatyard, the basin and its implicit associated mooring uses.

21. The basin is still privately owned today. I noted the signage which confirmed this to be the case and which seeks to keep other river users from trespassing into the basin. Some vessels, in the course of navigation, have clearly trespassed into the basin over recent years but, in my view, this private status in theory, if not in practice, must contribute to its preclusion as not being perceived by the ordinary river user as an open part of the river which is free for all to navigate. My view in this respect is reinforced by the authority's confirmation that had the basin been part of the navigational river then the abandoned, grounded hulks (Morning Flight and Puma) would have been removed.

22. The enforcement notice relates to an alleged unauthorised use of the basin for the purposes of mooring and it is accepted that the pontoons require planning permission. I have already outlined above why I do not consider that the current mooring use is incidental to the navigation of this part of the river. In any case, from the evidence to the Inquiry and from my visit it is clear that most of the vessels within the basin are not there simply for a transient use which is ancillary to the navigation of the river. They are there on a permanent basis and are moored either to the land/quay heading or to one of the pontoons. The private owners of most of the vessels now pay a mooring fee to the appellant and use the basin as their home 'base-mooring'. The two pontoons, which have been installed, although floating, rely for their stability and operation on the former piles of the Jenner's building.

23. The alleged unauthorised use of the basin for mooring purposes is significantly different in its character of usage (even along the quay heading itself) than a normal transient mooring use carried out in the process of navigating the waterway. It is also different in character and intensity to the former Jenner's use. The vessels are moored either to the pontoons or the quay heading and the pontoons and the quay heading are linked to the land which surrounds the basin. The moorings therefore have resulted in the use of the land ashore, as well as the 'land below water' in the basin. This use of the land (both above and below water) has brought with it the paraphernalia associated with the mooring of boats and equipment and machinery required in order to maintain the boats, the basin and the land. These items including timber walkways, various pieces of equipment owned by the boat owners (including a bicycle); a sewage disposal vehicle; a workbench; timber sections; a JCB and the container and engines (although now removed) which are subject of the notice.

24. Some of the equipment might ordinarily be necessary to facilitate a temporary mooring use of the basin. However, I consider that the mooring use enforced against is of a character and intensity that goes far beyond the character of a temporary or transient mooring, irrespective of whether or not the mooring could be considered as incidental to the navigation of the river or basin. A simple 'mooring' or tying up of a few vessels for short periods would not alter the character of the basin in my view. However, the level of the current permanent moorings; the comings and goings of boat owners and the necessary parking of any vehicles on a regular basis in close proximity to the basin, does have a significant effect on the character of the use of the land. In my view the materiality of the change in use of the 'land' and the 'land covered by water' (that is, the difference between the original 1967 mooring use and the current use as opposed to mooring uses which are simply incidental to navigation) is such that it constitutes development.

25. In conclusion on this point I do not accept the contention that the current permanent mooring of boats within the basin has been, or continues to be, ancillary to the primary use of the river for navigational purposes. In my view, the mooring of

vessels within the basin on a permanent basis constituted development as a material change of use in 1967 and a different type of permanent mooring use (as a base-mooring) constitutes development today. I now turn, therefore, to the question of whether or not the previous implicit 1967 permission for mooring within the basin has been abandoned.

Whether the previous permission for mooring has been spent or abandoned

26. It is common ground, from *Pioneer Aggregates* that there is no principle in planning law that a valid planning permission, capable of being implemented according to its terms, can be abandoned. However, the judgement considered a second question, namely whether or not a development which was permitted by the relevant planning permission had been completed? In the *Pioneer* case it was found that a quarrying permission had not been completed but the principle was established whereby, if what was permitted had been completed, a resumption of the same type of operation or use would not be the resumption of the earlier development but a new development requiring a fresh planning permission.

27. The various permissions from 1965 to 1969 established a right to carry out development relating to the construction and use of a commercial boatyard. The 1967 permission, in particular, established the right to construct the mooring basin and to moor vessels in association with the boatyard use. I agree with Counsel for the BA that there is a long and mature body of case law; including factors to be taken into account and circumstances, that can lead to a finding that an 'existing lawful use' can be abandoned. In this case I consider that the rights of carrying out operations and the uses implicit and associated with the boatyard (particularly mooring) are capable of being abandoned such that the re-use of the land for a new mooring use could constitute a material change of use requiring a new permission. Whether the use was abandoned is reliant upon the particular circumstances surrounding this case.

28. The starting point must be the permissions granted and in particular, the 1965 outline permission for the boatyard; the 1967 permission for the basin and the later permissions for the sheds and infrastructure. These permissions were inextricably linked in that the boatyard use could not be fully implemented until there was access from the river; a mooring basin for the vessels and the other infrastructure works necessary for the operation of the boatyard. The implicit use of the basin for mooring was clearly a fundamental part of facilitating the use of the land as a boatyard.

29. By the late 1960s, following completion of the other boatsheds and associated works, all of the permissions relating to operational development had been implemented and the 'land' and the 'land below' water was in use as a boatyard with its associated mooring uses. The development as a whole (on land and water) had a particular character, typical of a commercial boatyard on this part of the Broads. When Jenners went bankrupt, the commercial boatyard use ceased and the operational developments were all removed with the exception of the basin itself; a few of the supporting piles of the former boatshed and the disconnected service pipes.

30. This was in 1971 after the boatyard had ceased to function. Not only were all of the buildings and infrastructure removed: all mooring associated with the commercial boatyard use also ceased. It is contended on behalf of the appellant that the implicit mooring use, granted by the 1967 permission has not been abandoned or spent and that there is still an established right to moor vessels in the basin over and above any right to mooring which might be incidental to navigating the waterway. It is clear that the appellant does not seek to use the basin in the same way that Jenners used it as a boatyard for commercial hire vessels but, in any case the 1985 Section 52 agreement would preclude such a use. This agreement cannot form part of the 1985 planning

permission but it does place a legal charge on the development of the land and restricted the use of mooring in the basin to private moorings.

31. In 1985, therefore, it must have been considered by the BA that a continued use of the land, for purposes including mooring (and one which had the characteristics of a commercial boatyard), would have a harmful effect on the living conditions of residents living close to the basin. Although the Section 52 agreement cannot form part of the planning permission, it is a material consideration and a factor which must be taken into consideration in relation to any future use of the basin for mooring purposes.

32. It follows that any future mooring use would be likely to be different in character to the previous boatyard and commercial mooring use. Furthermore, whilst accepting that the interpretation of the planning permissions is a matter of law, I do not consider that part of one of the permissions (the implicit mooring use) can remain alive when the primary use (use as a boatyard for commercial moorings) has ceased and the buildings which facilitated that use have been demolished and removed. In my view this constituted the cessation and loss of any existing mooring use rights granted by the 1967 permission and the start of a new chapter in the planning history of the basin.

33. It was stressed on behalf of the appellant that where a planning permission is granted for operational development and the operational development remains in existence and capable of further use without further works requiring planning permission then the original permission cannot be abandoned. On the basis of *Pioneer*, I accept that this must be the case. There is no dispute that the basin and the entrance from the river remain in existence. Although now in a semi-derelict state, the entrance from the river and the basin itself are still in place. However, the question now is whether or not the basin is capable of further use (for what was granted planning permission) without requiring a further planning permission.

34. After considering all of the legal submissions; the relevant case law and the submissions and evidence given at the Inquiry on abandonment, I agree with Counsel's opinion on behalf of the authority that the former boatyard use has been abandoned. Although the opinion did not refer specifically to the recognised tests for abandonment identified in case law, these were referred to in detail by both parties during the course of the Inquiry.

35. In my view, the '*physical condition*' of the basin itself at this stage is that it is semi-derelict. The quay heading is rotten in many places and it is evident that the basin has not been properly dredged, repaired or maintained for many years. The only recent and noticeable works carried out relate to the positioning of the pontoons. Although the sewage connection and the electricity and water service entry points are still there, they were not connected or working at the time of my visit and there was no evidence to suggest when they were all last functioning. The grounded and abandoned hulks of 'Morning Flight' and 'Puma' reinforce the perception of abandonment. It is stretching the imagination to suggest that these two vessels are 'moored'. They are not tied to the basin quay heading or anchored to the land which is below water. They are simply lying and rotting on the bed of the basin and have, more or less, reverted to a natural rotten state and now provide a nesting base for swans. The reasonable man, in my view, could only conclude that these former boats, have long since been abandoned by their owners and that they are 'dead' and not simply 'resting' with a view to being used again. I do not question the evidence given on behalf of the appellant relating to the history of these vessels and others which have used the basin over the years. However I do not find this evidence to be persuasive

or conclusive that the former established mooring use had not been abandoned or that these vessels could have kept alive the former mooring use.

36. I acknowledge and accept all of the evidence from Mr Knight, Mr Ashby and others which indicates that since Jenner's boatyard went into liquidation and the buildings were removed, various vessels have been moored within the basin over the years. This includes some mooring by Hearts Cruisers (between 1984 and 1989) referred to by Mr Ashby. However, none of this evidence is conclusive in my view on the types or intensity of the mooring uses and some of the later evidence is in conflict with submitted aerial photographs and the evidence of Mr Warren. There is no dispute that the boatyard buildings and the supporting infrastructure were removed in 1971. After that the evidence indicates that there was an *extensive period of non use* as a boatyard. I accept that the mooring uses referred to may have included the mooring of some hire vessels for a short time and for a variety of reasons. However, in my view, the evidence does not indicate that these uses were of such a character or intensity that, on the balance of probabilities, they could have kept alive the former mooring use carried out by Jenners. Neither is the evidence given on behalf of the appellant in my view, sufficient to indicate that these various mooring activities constituted any significant material change in use of the appeal land.

37. Between 1971 and 1992, therefore, I accept that some mooring activities were carried out within the basin. However, *the intentions of the owners* are far from clear and do not, in my view, indicate a definite intention to continue with the previously permitted development. The 1976 permission, which included housing around the basin, was not implemented and there was no significant mooring use of the basin by the owners following the Section 52 agreement in 1985. Between 1985 and 1992 other owners did not appear to carry out any works to the basin. Although Richardsons may have shown some intention to reinstate a boatyard use of the basin following their acquisition of the land in 1992, a CLEUD application around that time was not pursued. Since 1971 there has been no other authorised *intervening use* of the basin and I agree with the authority that this must be a neutral point in this instance when considering the question of abandonment.

38. Taking all of these facts and circumstances into account, I consider that the boatyard use has ceased along with any implicit mooring rights. In my view, the use has been abandoned and I agree with Counsel for the authority that any resumption of boatyard use or commercial or repairing use would now be, *'not the resumption of the earlier development, but a new development requiring a fresh planning permission'*.

39. If the boatyard use is abandoned, any mooring use that was implicit in the use of the basin, in my view, must also have been abandoned. The implicit mooring use linked to the boatyard must have ceased if the primary use of the 'land' and the 'land below water' had been abandoned. This initial mooring use would have demonstrated characteristics relevant to a boatyard use. Any other type of mooring such as residential or permanent mooring at a 'base mooring' would have different characteristics and effects on the land. Once the implicit mooring use ceased (whether that was commercial, residential or any other type of mooring associated with the boatyard use) the particular character of the usage of the basin and its surrounding land must have changed. This chapter of the planning history of the basin was completed in my view and any further chapter for a mooring use which constitutes a material change of use now requires a new planning permission.

40. Because the buildings had been removed, any resumption of the boatyard or mooring use would have a different effect on the basin and the land. This would constitute a material change of use and a planning application would be required. It follows therefore that a new use for permanent private moorings is required because

this too would constitute a material change of use and would not be a resumption of the same type of operations or use granted by the 1967 permission. I conclude that any previous mooring use has been abandoned and the mooring use which is now taking place within the basin cannot benefit from the 1967 permission or any other previous mooring use.

The ground (c) appeal: the mooring use

41. To be successful on this ground it must be shown that there has not been a breach of planning control. On behalf of the appellants it was accepted at the Inquiry that the pontoons constituted development and that planning permission would be required for their construction and use. In relation to the mooring use currently being carried out within the basin, I have concluded above that the use constitutes development for which planning permission is required. I have also concluded that the former boatyard and mooring use has been abandoned and that a resumption of the same type of operations would not be the resumption of the boatyard and mooring uses but a new development. The mooring currently being carried out is also new development which requires a fresh planning permission.

42. There are no permitted development rights in this case and, therefore in the absence of any planning permission for the mooring use now taking place, a breach of planning control has occurred. The appeal fails on ground (c). For the avoidance of doubt this relates to all of the matters in the notice which are alleged to be a breach of planning control.

The ground (d) appeal: the mooring use

43. To be successful on this ground of appeal the onus is on the appellant to prove that at the time the notice was issued it was too late to take enforcement action against the matters stated in the notice.

44. With regard to the pontoons; the stationing of the container and the storage of the engines on the land it was accepted by the appellants that they could not show that it was too late for the authority to take action. There was no evidence to indicate that the pontoons had been constructed 4 years prior to the issuing of the notice and none to indicate that the storage container or engine storage on the land had been carried out 10 years prior to issue. The appeal fails, therefore in relation to these matters.

45. With regard to the alleged unauthorised Mooring use, I have found above that the established mooring use associated with the 1967 permission has been abandoned and that the nature of the mooring use which has been enforced against constitutes development as a material change in use of the land. To be successful, therefore, on ground (d) the onus is on the appellant to show that the unauthorised development enforced against has been taking place continuously for 10 years prior to the date the notice was issued. The relevant date starts on 7 November 2001.

46. The evidence from both parties indicates that the use of the basin for mooring has been sporadic rather than continuous between 2001 and 2011. There is conflicting evidence relating to whether or not the basin was empty for periods and there is no significant documentary evidence that the owners, between 2001 and 2007 (when it was purchased by the appellant), used the boatyard for any significant periods for a mooring use. Again, whilst not questioning the evidence of witnesses or Mr Ashby, relating to the mooring of some vessels within the basin, this cannot support a contention that there has been a continuous use of the land for mooring (which would have required planning permission) from the relevant date until 7 November 2011.

47. The only relevant documents submitted in support of the contention that such a use took place were the invoice from Richardsons in 2007 and some of Mr Wood's recent accounts relating to his charges for the current private moorings within the basin. In my view, neither of these assists in proving that any appropriate level of material mooring use took place during this period. Nor does any of the evidence relating to 'Morning Flight', 'Puma' or 'Braveheart' (or Brave Hart?) assist. Council Tax was paid for 'Puma' between 1993 and 1996 but by 2001 it was a wreck. There is no evidence of any other vessels paying Council Tax or any other statutory or service charges over the relevant period and the authority did not consider it expedient to issue an enforcement notice until 2011 when the mooring use had reached a particular intensity. From the evidence, this intensity had only built up over the years during which the basin was in the appellant's ownership.

48. From all of the evidence I can only conclude that, on the balance of probabilities, the mooring use enforced against has not persisted or been continuous from 7 November 2001 to the date the notice was issued. It was not too late for the authority to take enforcement action and the appeal fails on ground (d). Again for the avoidance of doubt, this applies to all of the matters enforced against.

The ground (a) appeal: the mooring use and the pontoons

49. The main issues are the effects that the current mooring use and the construction and use of the pontoons have had, firstly on the character and appearance of the Thorpe St Andrew Conservation Area and the surrounding landscape and, secondly, on the living conditions of residents who live close to the appeal site.

50. Section 72 of The Planning (Listed Building and Conservation Areas) Act 1990 requires that special attention must also be paid to the desirability of preserving or enhancing the character or appearance of the conservation area.

51. Having visited the site, the surrounding area and the more open countryside further to the east along the river, I do not consider that the site is generally 'rural' in character. It is certainly more naturally landscaped, wilder and more open than the land at the eastern end of the island, but it is also very closely related, both physically and visually, with the residential and commercial uses on the north bank of the river in this part of the conservation area. In my view, the island as a whole is an attractive part of the conservation area which is characterised here by the river itself; the variety of these other uses and, in particular the boating and mooring uses. The different parts of the island contribute positively to the overall character and appearance of this part of the conservation along the riverside and the New Cut in Thorpe St Andrew.

52. However, although not openly 'rural' in itself, the island does relate visually to the wilder open and rural landscape to the south of the New Cut. The island is split into two visually distinctive parts. The eastern end is characterised by the buildings, gardens and other developments associated with the commercial boatyards. Although still relatively green and open in places the boatyard developments and infrastructure, along with the regimented moorings of vessels on pontoons, result in an appearance that is significantly different in character to the western end of the island.

53. This western part is characterised by a more open and wild landscape. The only built form comprises the basin itself and the bridge across to Thorpe Hall Close. Because of the lack of development and activity since the commercial boatyard closed, the appeal site is much wilder and naturally landscaped than the eastern end of the island. It has almost reverted to nature in places and particularly in the south west corner and along the northern bank of the New Cut. The mooring uses, along this part of the river, west of the boat club, are mainly on the northern bank. These are significantly different in character to the commercial moorings to the east. These

western moorings comprise sporadic, scattered private moorings which are in no way as regimented or formal as the moorings to the east. The differences in the types and character of mooring, from the eastern end of the island, to those at the western end, are distinctly noticeable and the overall result in appearance adds to the charm and the positive characteristics of this part of the conservation area. The busy and bustling nature of the commercial end of the island, therefore, contrasts markedly with the quieter western end but both have a part to play in the overall perception of the island itself, this part of the conservation area and the locality in general.

54. Having seen the mooring uses now taking place within the basin, as well as the associated operations and activities which have occurred on the appeal land, I consider that neither the character nor the appearance of this part of the conservation area has been enhanced or preserved. In my view the character of the western part of the island has been significantly harmed by the intensity of this mooring use; by the introduction, through the pontoons, of a regimented pattern of mooring and by the associated boating and other paraphernalia which has been placed on the land. The overall effect is that the quieter, greener and more open western end has started to look more like an untidy version of the commercial eastern end and the existing balance, formed by the contrasts of the different mooring uses, has been lost. I also consider that the landscaped backdrop to the south has also been detrimentally affected by the intensity and character of the uses on the appeal land. Despite the fact that one would expect to see some boats within the basin, the visual effect of so many vessels, together with the pontoons and the associated boating paraphernalia has resulted in the perception and introduction of alien and obtrusive elements into this more natural part of the island and the conservation area.

55. I find that the level of mooring and the particular manner in which it is being carried out is harmful to the character and appearance of this part of the conservation area. In my view it is contrary to development plan policies DP4 and DP5 of the DPD and policies CS1 and CS4 of the CS. The other material considerations, including the relevant policies in the NPPF do not outweigh the harm which, in my opinion would be caused by the retention of this level of mooring use; with pontoons of this type which would facilitate that use and with the associated activities and use of the land. I have taken into account the fact that the NPPF sets out a presumption in favour of sustainable development. However, even having taken into account the sustainability arguments put forward on behalf of the appellant, I do not accept that the mooring use and the pontoons are sustainable in relation to the protection of the conservation area and the surrounding landscape. I do not consider, therefore, that planning permission ought to be granted for the current level of mooring use together with the pontoons and other matters as set out in the enforcement notice

56. On the second issue relating to the effect on living conditions, the residents on the north bank do not have any right to specific views from their properties towards and beyond the appeal site. This is a recognised and accepted concept in planning terms. They may well have purchased their properties with an understanding that the land would not be developed and may have relied upon Policy TSA2 of the BLP. However, irrespective of this policy they are not entitled to expect that the views from their properties would remain unchanged if a development, which was acceptable in planning terms, was granted permission on the site. However, what they are entitled to, in my opinion, is a legitimate expectation that they should not be required to look out over what has been described by Mr Clarke as a scrap yard, the overall appearance of which is significantly harmful to visual amenity.

57. From all of the evidence and my comprehensive site visit, (which included viewing the site from the properties of Mr and Mrs Warren and Mr Clarke), I share the

concerns of the authority and residents. I consider that the living conditions of people living close to, and overlooking, the appeal site have been detrimentally affected by the scale and nature of the unauthorised developments which have taken place. I do not consider that loss of privacy or overlooking is an issue and nor did the evidence convince me that the use of the basin and the associated activities had led to, or was likely to result in, any undue levels of noise and disturbance. However, the harmful impact on visual amenity linked to the effect on the character and appearance of this part of the island convinces me that the appeal fails on this second issue and that planning permission for the basin and the pontoons as currently being used should be withheld.

58. I have concluded above that the intensity of the current mooring use, in conjunction with the unauthorised pontoons, is harmful to both the character and appearance of the conservation area and to residential amenity in the locality. However, I do not consider that a limited private mooring use within the basin, in itself, would be harmful. In my view, the principle of a private mooring use within the basin is acceptable. Irrespective of Policy TSA2 of the BLP, (which in any case will be tested as part of the Local Plan process), I consider that a reasonable man would expect boats to be moored within the basin and along the river frontage. Nor should it come as a surprise to anyone purchasing a house on this part of the riverside to see mooring uses taking place. The Section 52 agreement restricts the use to private moorings and I consider that, within certain limitations and with appropriate mitigation measures, the appellant should reasonably be entitled to make use of and maintain some form of mooring facility as long as no harm is caused to the character and appearance of this part of the island or to the living conditions of nearby residents.

59. In my view, a lower level of private mooring than that which has built up over the last few years and which is similar in character to the sporadic and scattered moorings along this part of the river, would preserve the character and appearance of this part of the conservation area. It would also accord with the aims and objectives of policies DP12 of the DPD and policy CS4 of the CS. Also a lower level of usage would not have such a visual impact on amenity since, if the mooring numbers are limited, the comings and goings of boat owners and their associated paraphernalia on the land would be also be likely to be reduced. Having seen other mooring areas along the river; having taken into account the physical size of the basin; the sporadic and scattered private moorings on the north bank of the river and the discussions relating to the imposition of conditions on any mooring use, I consider it appropriate and reasonable to grant permission for some private mooring within the basin as long as it preserves the character and appearance of the conservation area and does not cause harm to residential amenity. I now turn to the question of an acceptable level of use.

60. At the time of my visit there was a total of 21 moored boats; two tenders and the abandoned grounded hulks of 'Puma' and 'Morning Flight' within the basin. Of the 21 moored boats it would appear, from the accounts submitted by Mr Wood, that 14 of the owners of these boats paid mooring charges. Most of the boats were using the pontoon moorings and it was these particular moorings that resulted in the regimented appearance which I referred to above and which I consider resulted in visual harm being caused to the character and appearance of this part of the island. However, in my view, the boats (6 or thereabouts) which were moored against the quay heading were less visually intrusive and more characteristic of moorings to the west of the boat club and along this part of the river. I consider that this relatively large basin could take at least another 6 moored vessels (to the quay heading) without resulting in a regimented, overcrowded and visually harmful development. I do not consider that the pontoons should remain for the reasons set out above but I do consider that the basin could take up to 12 vessels at any one time and that this

would preserve the character and appearance of the western part of Thorpe Island within the conservation area.

61. The section 52 agreement 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.

62. The appeal succeeds in part on ground (a) therefore in relation to the mooring use only and planning permission will be granted on the deemed application for a private mooring use subject to conditions (see below). The appeal on ground (a) in relation to all other matters fails.

The ground (g) appeal: the mooring use; pontoons; container and engines

63. The periods for compliance with the requirements of the notice are agreed and set out in paragraph 6.4 of the final Statement of Common Ground. I agree with the parties that the times put forward are reasonable and appropriate. The notice will be varied accordingly.

Conditions

64. Towards the end of the Inquiry the Broads Authority produced a list of suggested conditions. These were discussed in a round table session. I found that some were inappropriate, some did not meet all of the tests in Circular 11/95 and others were not agreed between the parties. I have considered all of the suggested conditions in relation to the relevant tests in the circular and with regard to what is before me in this enforcement appeal.

65. There were several conditions relating to the details and construction of the quay heading together with the back-filling of soil adjacent to the quay heading. However, the allegation in the notice does not relate to unauthorised construction of the quay heading. The allegation related to the construction of pontoons and the unauthorised mooring use. With regard to the granting of planning permission in a ground (a) appeal, the scope of the Secretary of State's jurisdiction and, therefore, mine is set out in Section 177 of The Town and Country Planning Act 1990 as amended. This limits any granting of permission to the terms of the enforcement notice and there is no power to grant permission for development which is different from that alleged to constitute the breach of planning control.

66. I do not consider, therefore, that in these particular circumstances any permission granted for the private mooring use can include conditions relating to the timber piling, capping and any other works in relation to the reconstruction of the quay heading. These works, as a matter of fact and degree, may well need a separate planning permission if they go beyond the simple replacement or repair of like for like works. Any future works to the quay heading are, therefore, a matter between the authority and the appellant.

67. Other conditions referred to matters which, in my view, might require separate planning permissions, including the installation of external lighting and the placing or storing on the land of equipment or machinery.

68. With regard to the remaining suggested conditions I consider that those relating to the removal of any permitted development rights; access (including the bridge) and parking; waste and refuse disposal; landscaping; site maintenance operations and ecological enhancements are all necessary and appropriate in relation to a private

mooring use being granted permission. I consider, however, that it is reasonable to allow the appellant more time to submit details following the issue of this decision. The conditions are all necessary and appropriate in my view in order to ensure that the character and appearance of this part of the conservation area is preserved and that residential amenity, particularly visual amenity is protected.

69. In reaching my conclusions in this appeal I have taken into account all other matters raised by the main parties and others. However, none carries sufficient weight to change or alter my decision. I conclude that the enforcement notice should be upheld as corrected and varied and that the only element which should be granted planning permission is a conditional private mooring use within the basin.

Formal Decision

70. The enforcement notice is corrected by:

the deletion of the word '*jetties*' in Parts 3, 4 and 5(b) of the notice and the substitution therefor of the word '*pontoons*' .

71. The appeal is allowed in part and planning permission is granted in so far as it relates to the '*change of use of the site for the mooring of boats*', on the application deemed to have been made under section 177(5) of the 1990 Act as amended subject to the following conditions:

1. The mooring use hereby permitted shall be restricted to private moorings only and for the mooring of no more than 12 vessels within the basin at any one time. For the avoidance of doubt this permission does not relate to any other mooring or storage use of vessels within the basin or its access channel.
2. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995, (or any order revoking, amending or re-enacting that Order) no gate, fence wall or other means of enclosure shall be erected within or around the boundaries of the site of the development hereby permitted.
3. Within 3 months of the date of this decision details of the proposed means of waste and refuse disposal, including a timetable for implementation, shall be submitted to and approved in writing by the Broads Authority and shall, thereafter, be provided and undertaken in accordance with the approved details.
4. Within 3 months of the date of this decision a landscaping scheme, including a timetable for implementation shall be submitted to and approved in writing by the Broads Authority. The scheme shall indicate the species, number and sizes of new trees and shrubs at the time of their planting. The scheme shall also include indications of all existing trees and hedgerows on the land, with details of any to be retained (which shall include details of species and canopy spread) together with measures for their protection during the course of development. The scheme as approved shall be carried out not later than the next available planting season following approval or such further period as the authority may allow in writing.
5. Any new tree or shrub which, within a period of five years from the date of planting dies, is removed or becomes damaged or diseased shall be replaced during the next planting season with another of similar size and species to the Broads Authority's satisfaction, unless prior agreement is given to any variation.
6. Within 3 months of the date of this decision a scheme detailing ecological enhancements, (including a timetable for implementation), for the site shall be submitted to and approved in writing by the Broads Authority. The scheme as agreed shall then be carried out in full and retained throughout the lifetime of the development hereby permitted.
7. Site maintenance operations shall only be carried out at the site subject of this permission between the hours of 08.00 and 18.00 on weekdays and 09.00 and 13.00 on

Saturdays. No site maintenance or other works shall be carried out on Sundays, Bank Holidays or Public Holidays or any times outside of these specified hours.

8. Within 3 months of the date of this decision a scheme detailing improvements and works relating to access, parking and the bridge to the site shall be submitted to and approved in writing by the Broads Authority. The scheme shall include details of proposed improvements and identify timescales in which the works shall be carried out. The works shall include details of the parking for boat owners and service vehicles within the site together with turning arrangements. The parking and turning areas shall be laid out, demarcated, levelled, surfaced and drained in accordance with the approved details and retained thereafter for that specific use.

9. Vehicular means of access/egress across the bridge serving the site for users of the private moorings hereby permitted shall be maintained and be available at all times.

10. The mooring use hereby permitted shall cease and all boats 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 and 8.
- (ii) If within 11 months of the date of this decision the Broads Authority refuse to approve any of the submitted details relating to conditions 3, 4, 6 and 8 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 and 8 shall have been approved by The Secretary of State.

72. The enforcement notice is varied by:

(1) The removal of the requirement 5(a) *'to cease the use of the basin for the mooring of boats and remove the boats from the basin'* and the substitution therefor of the following requirement *'cease the use of the basin for the mooring of any more than 12 boats for private mooring use at any one time and remove from the basin any boats in excess of 12, including any which are not moored in the basin for the purposes of a private mooring.*

(2) The deletion of the figures and words *'2 weeks'; 3 weeks; '1 week'* and *'2 weeks'* in Parts 6(a), 6(b), 6(c) and 6(d) respectively and the substitution therefor, the words, *'one month'; 'six weeks'; 'one month' and 'one month'* respectively.

73. Subject to the above correction and variations the appeal is dismissed in so far as it relates to: *the construction and installation of two pontoons in the approximate position marked with cross A on the plan attached to the notice; the erection or standing of a green metal storage container in the approximate position marked with cross B on the plan; the use of part of the land for the standing of motor engines in the approximate position marked with C on the plan.* Planning permission for all these items is refused in respect of the application deemed to have been made under section 177(5) of the 1990 Act as amended.

74. I have taken account of the views of local residents and other interested parties in reaching this decision.

Anthony J Wharton

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr T Ivory

Hawes Percival

He called:

Mr R Wood

Appellant

Mr P Atkinson

Lanpro Services Limited

Mr W Knight

FOR THE LOCAL PLANNING AUTHORITY:

Mr W Upton of Counsel

He called:

Ms C Smith

The Broads Authority

Mr T Warren

Mr J Clarke

INTERESTED PERSONS:

Mr D Lutkin

Mr D Haggis

DOCUMENTS (additional documents submitted following start of Inquiry)

1. Copy of Letter of Notification
2. Attendance Lists
3. Final Statement of Common Ground
4. List of cases submitted by Broads Authority
5. Pilkington case and Pt Norfolk & Suffolk Broads Act 1988 submitted on behalf of Appellant
6. Copy of bank statements and Mooring Accounts submitted by Mr Wood
7. Photographs A1 to A4 submitted by Mr Haggis
8. Aerial photographs B1 and B2 (1.10.2000 and 31.7.2005) submitted on behalf of Appellant
9. Historic Aerial imagery C1 to C4 (31.12.99, 5.9.03, 31.12.03, 10.9.06) submitted by Broads Authority
10. Port of Norwich – Vision for Norwich document
11. Letter dated 17 January 2012 from Norfolk County Council, Environment, Transport and Development Department re: parking and bridge.
11. List of proposed conditions

