

Thorpe Island: Report on Options for Action(s) at Thorpe Island
Report by Head of Planning

Summary:	Members will be aware of a long standing enforcement matter at Thorpe Island, where the High Court has recently upheld the decision of a Planning Inspector to rule that the current development is unauthorised. At their meeting on 21 August 2015 Members resolved to pursue an Injunction to stop the existing breaches. A challenge to the High Court decision has, however, now been submitted to the Court of Appeal and this introduces both delay and uncertainty. Members will need to consider the options for taking the matter forward and these are set out in the report.
Recommendation:	That an Injunction is sought covering all breaches on the site (with the exception of the green storage container) and the adjacent river frontage with those matters which are the subject of the Court of Appeal challenge suspended pending the outcome of that challenge, and that direct action be taken in respect of the green metal storage container.

1 Background

- 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 was heard in the High Court in May 2015 and 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 effect of the High Court decision was to revert the legal position on the site back to the position extant after the Enforcement Notice had come into effect, meaning that the landowner was required:
 - (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
- 1.3 At their meeting on 21 August 2015 the Planning Committee resolved unanimously to authorise the preparation of a Planning Injunction to cover the whole site, including the area and breaches outside of the original Enforcement Notice.
- 1.4 On 27 August 2015 the landowner lodged an application for leave to appeal in the Court of Appeal against the decision of the High Court.

2 The Court of Appeal Challenge

- 2.1 The grounds of the challenge submitted by the landowner are as follows:
- (a) That the Judge erred in law in finding that the planning permissions for the basin and the wet boathouse were ambiguous as to the use they permit and, therefore, allowed the consideration of extraneous information in order to interpret the permissions [judgment para 45];
 - (b) That the Judge erred in law in the extent of the extraneous evidence which was considered and that evidence could not, in any event, support the conclusion reached that the use of the basin was to be ancillary to the 'commercial mooring of a hire boat fleet as an integral part of a boatyard operation' [judgment para 34, 44, 46, 47, 54, 55 in particular];
 - (c) That the Judge erred in law in taking into account extraneous evidence when considering the purpose for which the basin was designed under the Town and Country Planning Act 1990, section 75(3).
- 2.2 In effect, these challenges cover the same material that was considered at the High Court stage, albeit in more detail. Whereas at the High Court stage the landowner was arguing, inter alia, that the Inspector had erred in law, now (at the Court of Appeal stage) he is arguing that Justice Lindblom has also erred in law by agreeing with the errors in law that the Inspector made.
- 2.3 The process of making an appeal in the Court of Appeal has two stages. In the first instance, the would-be appellant must seek leave to appeal as this is not an automatic right. The leave stage is usually dealt with by written submissions (i.e. without a hearing). In considering the leave application, the Judge must be satisfied that the appeal has some merit and a reasonable prospect of success. If the Judge is satisfied of this, leave to appeal will be granted and the matter will proceed to a Hearing; the period between the successful leave application and the Hearing might be over six months,

although this depends very much on the court listing. If the Judge is not satisfied that the challenge has some merit and a reasonable prospect of success, s/he will refuse leave to appeal and the decision of the High Court will be upheld. The Judge might also decide that further information and discussion is needed in order to consider the leave application fully and will ask for an oral hearing to assess this.

2.4 It is useful to remember that the decision which has been challenged is the decision of the High Court, and neither the Planning Inspectorate (whose decision the High Court upheld) or the Broads Authority (whose decision the Planning Inspectorate upheld in part) are the main parties. The principal Respondent is the Secretary of State for Communities and Local Government on behalf of the High Court.

2.5 The Secretary of State as Respondent has filed a response to the challenge, submitting that permission to appeal should be refused – i.e. that leave should not be granted. It argues that the grounds of challenge do not raise important points of principle or practice and concludes:

“The Appellant has now had the benefit of two decisions on the interpretation of the relevant planning permissions, both reasoned in detail: an appeal decision by an experienced planning inspector and a judgement by the lead Judge for the Planning Court (as Lindblom J was then). No further use of judicial resources in this matter is warranted”.

2.6 The application for leave to appeal will be heard in due course in the Court of Appeal; the best estimate is that this is likely to take place around the end of the year.

3 Effect of the Challenge on the Injunction Process

3.1 At their meeting on 21 August 2015 the Planning Committee resolved unanimously to authorise the preparation of a Planning Injunction. This was to cover the breaches included within the original Enforcement Notice, the breaches which are within the area of the original Enforcement Notice but not covered by it and those which are entirely outwith the Enforcement Notice. These are summarised as follows:

a	Covered by Enforcement Notice	<ul style="list-style-type: none"> • Mooring of boats in the basin • Retention of pontoons and jetties in the basin • Standing of green metal storage container
b	Within area of Enforcement Notice, but not covered by it	<ul style="list-style-type: none"> • Mooring of houseboats in the basin • Operational development to replace remnant quayheading • Construction and use of various decked areas and other structures associated with mooring berths • Use of land for standing of vehicles and

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

- 3.2 The main effect of the challenge is to introduce a further delay to the ultimate resolution of this matter. The effect of the enforcement notice is suspended pending this final determination of the appeal (under s175(4)). Whilst it might be argued that this is its purpose, it must be remembered that Mr Wood is simply exercising his normal rights of appeal. The precise length of the delay is uncertain, but is likely to be not insignificant – the decision on the leave application is unlikely to be made much before Christmas 2015 and if leave is granted the matter is unlikely to be heard before summer 2016. If leave to appeal is refused on the papers, his final opportunity will be to request that the decision is reconsidered at an oral hearing by the Court of Appeal. It is only if leave is granted, and he loses the appeal, that there is a theoretical chance that he could try to appeal to the Supreme Court. But they only accept appeals on a point of general public importance. It is therefore most likely that this current application for permission to the Court of Appeal is the last stage. However, Members will recall that the landowner has previously advised that he intends to continue to challenge decisions until he receives a decision with which he is satisfied.
- 3.3 The challenge to the decision of the High Court does not prevent the Broads Authority from actioning the resolution of the Planning Committee to pursue and implement an Injunction. However, were the challenge to be successful and the High Court decision were to be quashed (for this would be the outcome of a successful challenge), the Broads Authority might be criticised for taking action (i.e. pursuing and implementing an Injunction) when the matter was yet to be finally resolved.
- 3.4 Whilst this is the case with regard to the breaches covered by the original Enforcement Notice, no such risks apply with regard to the other breaches (i.e. those within area of Enforcement Notice, but not covered by it and those outside the area and scope of the original Enforcement Notice).
- 3.5 It is also the case that, in respect of the breaches covered by the Enforcement Notice, the Broads Authority could seek an Injunction. There is the power to ask the Court of Appeal for an order that “*the enforcement notice shall have effect, or have effect to such extent as may be specified in the order, pending the final determination of those proceedings and any re-hearing and determination by the Secretary of State.*” (s.289(4A)). The High Court itself would not consider granting an injunction for those breaches covered by the

Notice until the decision of the Court of Appeal had been made on the challenge.

- 3.6 Given the delay introduced by this latest challenge, it is appropriate to consider what action should be taken whilst the challenge is being processed.

4 Options for Interim Action

- 4.1 There are a number of approaches to securing compliance despite this latest delay and these are set out below.

Injunction for all of the breaches

- 4.2 The Broads Authority could continue to pursue an Injunction for all of the breaches, but, in making that application, it could ask the Court to adjourn the consideration of that part of the Injunction which relates to the matters under challenge pending the decision of the Court of Appeal. These matters would then be subject to the Injunction if the challenge is dismissed.
- 4.3 This approach would enable action to be taken immediately on the breaches identified under (b) and (c) in the table at 3.1 above. The matters identified at (a) in the table could be addressed immediately following the issue of the Court of Appeal decision if leave to appeal is refused or if, following a hearing, the challenge is dismissed.
- 4.4 This is likely to be the most straightforward and least costly approach, as it involves only one application to the Court.
- 4.5 This is the approach that is recommended by the Authority's legal advisers on this matter. In coming to this recommendation, the advisers are also mindful of the comments made by the landowner at the Planning Committee on 21 August 2015 where he made it clear that he is seeking an unrestricted permission.

Injunction for those breaches not covered by the Enforcement Notice

- 4.6 Alternatively, the Broads Authority could pursue an Injunction, but only to cover those breaches which are not covered by the Enforcement Notice. This would enable action to be taken immediately on the breaches identified under (b) and (c) in the table at 3.1 above. The matters identified at (a) in the table would then need to be addressed later, after the decision of the Court of Appeal.
- 4.7 This would be a straightforward approach, but would involve duplication of effort (and additional cost) in the making of the application for the second Injunction.

Compulsory Purchase Order

- 4.8 Members will be aware that Thorpe St Andrew Town Council has requested that the Broads Authority pursue a Compulsory Purchase Order in order to obtain control of the site. A similar request has been received from the solicitor acting on behalf of the local residents. The Broads Authority does not have compulsory purchase powers, so any such action would need to be undertaken by Broadland District Council.
- 4.9 There is a right of appeal against a Compulsory Purchase Order and it is likely that the landowner would exercise this right.

Direct action

- 4.10 The report to the 21 August 2015 meeting of the Planning Committee set out a range of options for action, however it did not ask the Committee to consider the option of direct action or include an appraisal of this. Legal advice has subsequently indicated that the Authority should consider what its approach would be to direct action, cautioning that an Injunction application by Hackney LBC was refused by Judge Gilbart on the basis that there was no evidence that the local authority had first considered using section 178 of the Town and Country Planning Act 1990 (the section which covers direct action) to enforce compliance.
- 4.11 At the moment, direct action is only a future possibility. It can only be used in respect of those breaches which are covered by the Enforcement Notice. This is because the role of direct action, within the suite of enforcement powers available to a Local Planning Authority, is to enforce compliance with an extant Enforcement Notice. It could therefore only be used in respect of the breaches listed at (a) in the table above – i.e. the mooring of the boats in the basin, the retention of the pontoons and jetties in the basin and the standing of green metal storage container. The effect of the Enforcement Notice is currently suspended, but the option for direct action will become available once the Notice is confirmed.
- 4.12 In this case, direct action is not considered to be a suitable remedy in respect of the boats moored in the basin for a number of reasons. Direct action would involve the removal of the boats from the basin. However the Authority has no available location where they could be legally moored (thus would potentially be forcing the owners of those vessels into a position of trespass). A number of the vessels are not river worthy and the Authority would therefore be putting unsafe craft into the navigation to the detriment of wider safety objectives. A number of the vessels are also not tolled and the Authority would therefore be putting unlicensed vessels onto the main navigation. It is also the case that the Authority's insurance would not cover its moving of unsafe and/or unlicensed vessels, so any actions in this regard would be illegal as matters currently stand. On this basis, direct action cannot currently be recommended to address this particular breach.

- 4.13 With regard to direct action to remove the pontoons and jetties in the basin, these are used to facilitate the unauthorised use of the basin and their removal would complicate the ability of boats to moor in the basin, although it would not totally preclude it. Their removal, however, might prompt some vessels to move out of the basin and this would represent compliance for those vessels. There is an argument that limited direct action in respect of the pontoons and jetties could be supported.
- 4.14 The green metal container has been on the site for over 5 years and is used to provide storage for the landowner; it is unauthorised and whilst the landowner has undertaken on a number of occasions to remove it (including during the Inspectors' site visit), this has not occurred. Its removal would be straightforward.
- 4.15 It is the case that there is a mooring post in the basin, which was installed (without planning permission) in 2008 at the same time as part of the western pontoon. On 13 November 2008 an Enforcement Notice was served requiring the removal of the mooring post and pontoons, with a compliance date of 25 December 2008, which was 14 days after the Enforcement Notice took effect. No appeal against the Enforcement Notice was submitted, but nor was there compliance and the post remains in situ to date. The mooring post does not form part of the current challenge so could be subject to direct action if Members were so minded. This would involve removing the top of the post, which is unlikely to be difficult to do. Its removal would remedy the breach, but on its own this measure would not make a material difference to the condition of the site.

5 Conclusion and Recommendation

- 5.1 The Judgement from the High Court was clear and robust. The legal advisers on behalf of the Secretary of State (as Respondent) have filed a response to the challenge, arguing that it is without merit. The legal advice to the Broads Authority concurs with this, advising that the challenge is without merit and that the Court of Appeal is unlikely to grant permission to appeal against "this carefully-considered judgement". The effect of the challenge is to delay to conclusion on this matter. Whilst it may be that this is its main purpose, we must await the outcome of the appeal process.
- 5.2 At its meeting on 21 August 2015, the Planning Committee was unanimous in its resolution to pursue an Injunction to bring to an end the on-going breaches. The submission by the landowner of the challenge to the decision of the High Court does introduce a complication, but does not prevent the Authority from pursuing actions to enforce compliance on this site.
- 5.3 It is entirely appropriate to continue to pursue an Injunction against the breaches which are not the subject of the appeal challenge, and those which are the subject of the appeal once the appeal is finally dismissed. It is appropriate at the same time, to consider applying for an order under section 289(4A) to give effect to the enforcement notice to cover those matters which are the subject of the challenge, if permission to appeal is given.

- 5.4 Members have not considered direct action on this site previously, but there would be advantages to direct action to remove the green metal container, as this would be a low cost and straightforward operation which would deal with this breach decisively. It would be possible to take direct action remove the mooring post, but the benefits of this would be primarily around establishing the principle. Given the legal challenge it is not appropriate at this time to consider direct action in respect of the pontoons and jetties.
- 5.5 A Compulsory Purchase Order would address the situation in the long term, but is unlikely to be a quick solution. It is recommended that the Broads Authority liaise with Broadland District Council to support Thorpe Town Council in their efforts to achieve this.

Background documents: case file and High Court decision

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Appendices: None