

The Broads Authority

Review of applications at Haddiscoe New Cut.

1.0 Introduction

1.1 I have been asked to review the handling of two applications at Haddiscoe New Cut in the light of complaints that have been made. I have 30 years' experience in Local Authority Development Management, 10 of which were as Development Manager at Hastings Borough Council. Since leaving the Council in 2015 I have operated as a Planning Consultant providing advice and support to over 40 Local Planning Authorities both independently and in association with the Planning Advisory Service.

1.2 In this case I am acting independently, and I was briefed verbally by the Chief Executive prior to starting work. I have viewed documents that are in the public domain and I have interviewed the Planning Officers directly involved with the applications.

1.3 My observations are based on the information available to me, and relate solely to the planning application process. I will deal with the various stages in chronological order.

2.0 Background

2.1 There is anecdotal evidence of boats mooring at Haddiscoe New Cut over the years, but in terms of planning law, there is no specific planning permission allowing mooring.

2.2 It is not uncommon for uses to exist without a clear planning history, and within the planning legislation there is the provision to apply for a Certificate of Lawfulness of Existing Use or Development (CLEUD). For such an application to be successful in relation to a particular use it is only necessary for the applicant to provide sufficient evidence to show that "on the balance of probability" the use had continued for 10 years. This is less than the more onerous burden of proof "beyond reasonable doubt" that is required in some legal cases. Where an application for a CLEUD is submitted the onus is on the applicant to provide the evidence. Where a Certificate of Lawfulness is issued the use would then be safe from potential enforcement action.

2.3 I believe that the landowner has previously been advised to submit an application for a Certificate of Lawfulness to clarify the position but has declined to do so. It is not clear to me why the landowner did not make such an application. As regards the

planning status of the land, there is no specific planning permission for mooring on the site and no certificate has been applied for or issued to confirm that the use for moorings is legal. That does not mean that a Certificate would not be issued if the owner made an application and provided sufficient evidence. Any planning application for mooring use would be considered on its merits.

2.4 Over the years the condition of the bank has deteriorated, and in 2019 the Environment Agency submitted an application for engineering works to reinforce the banks.

3.0 Application BA/2019/0167/FUL

3.1 This application for piling works along 126m of the river was submitted in 2019. No objections were received from the public.

3.2 The Norfolk and Suffolk Broads Act 1988 requires certain applications to be referred to the Navigation Committee before being determined. An extract from the Act is included in Appendix 1 and is reproduced below:

(iv) before determining any application for planning permission which may **significantly** affect the use or enjoyment of the whole or any part of the navigation area **and which materially conflicts** with any policy, plan, strategy or procedure of the Authority;

3.3 The planning team has a well-established procedure where each week the Head of Planning discusses new applications with the Senior Planning Officer, and at this meeting it is decided whether an application should be referred to the Navigation Committee. The requirements in the Act are actually quite strict: the proposal has to significantly affect the enjoyment of the navigation area and materially conflict with a policy plan or strategy. In this case the proposals were for relatively minor piling works and did not relate to any mooring activity and it was decided that there was no requirement to refer it to the Navigation Committee. Nevertheless, a courtesy email was sent to the Chair to advise them, and to give them the opportunity to confirm that they were happy with this course of action. A copy of the standard email format is included at Appendix 2. One of the complaints was that this application was not considered by the Navigation Committee but this process seems to me to be simple and robust, and the decision not to refer the application to the Navigation Committee would

seem to be appropriate when judged against the requirements of the Norfolk and Suffolk Broads Act, and was accepted by the Chair.

3.4 The application was approved by Officers in September 2019 under the powers delegated to them in the Authority's scheme of delegation.

3.5 The application was submitted by the Environment Agency and was for piling works. The application included no reference to moorings, and therefore the issue of moorings was not considered when the application was determined. The following condition was attached:

Condition

6. The planning permission hereby granted is for the installation of piling only and does not convey any mooring use. The piling shall not be used for the mooring of vessels at any time.

Reason

For the avoidance of doubt and to ensure that the width of the channel is not hindered by the mooring of vessels in this narrow section of river.

It is not uncommon for a condition to be attached to a planning permission to clarify the extent of the works approved, and in this case it was appropriate to make it clear that the issue of moorings had not been considered or approved. The sentence stating that the piling shall not be used for the mooring of vessels at any time is simply stating the planning situation at the time - there was no specific planning permission for mooring, there was no Certificate of Lawfulness in place, and the application submitted by the Environment Agency had not sought approval for mooring use.

3.6 In my view the condition does meet the 6 tests set out in the Government's Guidance:

1. It is necessary because the planning history of the site in relation to moorings is not clear and the application does not include reference to moorings.
2. It is relevant to planning for the same reasons
3. It is relevant to the case for the same reasons
4. It is enforceable
5. It is precise and
6. It is reasonable for the same reasons as in 1. above.

3.7 While it is clear from the correspondence that I have seen that some Members are unhappy about the imposition of condition 6, I concur with the Authority's legal advisor that it was reasonable and appropriate.

3.8 Looking at the reason for the imposition of the condition with the benefit of hindsight, it might have been helpful to specifically state that moorings had not formed part of the application proposal and had therefore not been considered at that time, although this does not impact on the validity of the condition.

3.9 There appears to be an error at the end of the decision notice under “Explanation of how the Authority has worked positively and proactively with the Applicant/Agent” where there are two notes - one relating to applications where there have been no amendments and one relating to applications where there have been amendments. The second note appears to be incomplete and it appears that it was included in error. In my view this has no impact on the validity of the planning process or the decision.

4.0 Application BA/2020/0045/COND

4.1 This application was submitted on behalf of the landowner and sought removal of condition 6.

4.2 This application was referred to the Navigation Committee because the issue of moorings was implicit in the application and the view was taken that the application could potentially impact on the navigation area. Planning Officers sought legal advice on this matter at the time. Having spoken to the Planning Officers their position was that the views of the Navigation Committee would guide their position on the application to remove the condition, having regard to the fact that the condition was attached simply because the issue of moorings had not been considered as part of the previous application. The Navigation Committee raised no objection to the removal of the condition.

4.3 I am aware that one of the complaints is that referring this application to the Navigation Committee caused unnecessary delay, at the same time as arguing that the previous application *should* have been referred to the Committee. I find this apparently contradictory position slightly confusing, but I feel that it was entirely appropriate to refer the second application to the Navigation Committee because the issue of the potential impact on the navigable area was a key consideration.

4.4 During the application process Officers came under a lot of pressure to refer the application to the Planning Committee and not to deal with it under the powers delegated to them. Some of the correspondence is on the Authority’s website and it could be considered by some to be inappropriate and verging on bullying or harassment.

4.5 The scheme of delegation forms part of the Authority's Constitution. An extract from the Scheme of Delegation in place in 2019 is included in Appendix 3. The default position is that all planning decisions are delegated from Members to Officers except for a specific set of applications and situations. There is a provision for Members to ask that an application be considered by Committee, but only where the Member "provides a material planning reason of significant weight for that request in writing". The scheme of delegation is similar to many in other planning authorities and takes away the power for Members to determine applications that meet the requirements of the scheme and hands that power to Officers. The provision for some applications to be considered by the Committee at the request of Members is to enable that to happen where there is a genuine planning reason to do so. In this instance, there did not appear to be any genuine planning reasons, and it is hard to understand why some Members were so anxious that the application be reported to Committee unless they were concerned that Officers might reach a different decision to one they would wish.

4.6 The confrontation over this issue will not have helped the relationship between Officers and Members, but it is the duty of the Authority's Officers to ensure that the Constitution is upheld and the procedures included within it are correctly followed. Indeed, not doing so could put the Authority at risk of challenge to the decisions made, either to the Local Government Ombudsman on an issue of procedure, or to the High Court on a matter of law. If the application had been considered by the Planning Committee, and Members involved in the exchange of emails surrounding the issue, or their close associates, had voted on it, they could have been regarded as laying themselves open to accusations of predetermination.

4.7 In this case the Authority's Planning Officers and legal advisor took the view that no material planning reason of significant weight had been provided and the application was approved under Officers' delegated powers. Given the outcome of the application it is not clear to me why Members were so anxious that the application be reported to committee, particularly as this could have potentially delayed the decision, nor is it clear what outcome the complainants are seeking at this stage.

4.8 Turning back to the planning status of the land in relation to moorings, it is important to make the point that this is still unclear. Removing the condition does not grant planning permission for moorings, and there is no Certificate of Lawfulness in place to protect the owner from potential enforcement action. The position is therefore unchanged from that set out in paragraph 2.3 above. This position was made clear in a covering letter dated 12 June 2020 sent when the decision was issued. (Appendix 4)

5.0 Conclusions

5.1 Since the applications were determined complaints have been lodged against the way they were dealt with. It is unclear to me why the complaint was made to the Police, rather than following the less confrontational, more appropriate and established process of initially going through the Authority's internal complaints process and then the Local Government Ombudsman if the complainants were unhappy about the conclusions of the internal investigation. There seems to be no disagreement that the piling works in the initial application were necessary, and since condition 6 was removed it would seem that the landowner's wishes have been met. I have to admit that it is unclear to me what outcome the complainants have been seeking, and what they want to happen, particularly having regard to the fact that they approached the Police rather than the Authority. I have, therefore, only been able to look at each stage of the planning process and take a view whether the actions were appropriate.

5.2 There was a period of about 9 months between the granting of permission for the piling works and the removal of the condition but as explained above the removal of the condition does not fully address the planning status of the land. An application either for a certificate of lawfulness or specifically for mooring use would possibly have been a better approach.

5.3 If they were unhappy about the way the applications were handled the landowner could have used the internal complaints process themselves and then gone to the Ombudsman if their complaint was not resolved to their satisfaction. If the Ombudsman found fault with the Authority and found that the landowner had been disadvantaged there would have been the potential for the Ombudsman to recommend that the Authority take appropriate action, which could potentially have included a payment.

5.4 I have looked carefully at the information available to me and it is my belief that the Authority's officers and advisors acted professionally and took the appropriate action throughout. It seems to me that it was right that the first application was not referred to the Navigation Committee because it was of a relatively small scale and did not make any reference to moorings. The Chair was happy with this. Given that the application made no reference to moorings it was appropriate to add a condition to make it clear that the permission did not include them, it was also appropriate that this application was approved under the powers delegated to Officers.

5.5 Turning to the second application it seems to me to be appropriate that this was referred to the Navigation Committee because of the reference to moorings, and the Committee's view would help inform the decision on the application. The Authority's

Officers sought legal advice on the requests by Members for the application to be considered by the Planning Committee and I see no reason to disagree with the position that the decision was delegated to Officers. Given that condition 6 was removed, and that would appear to be the result they were hoping for, it remains unclear to me what outcome the complainants are seeking at this stage that would not have been achieved through the Authority's own internal process and possibly the Local Government Ombudsman.

5.6 The Authority should be concerned about the impact that this episode has had on the planning service in general and the members of the planning team in particular, and consider what action it could take to protect its staff in the future.

Raymond Crawford
September 2021

Appendix 1
Norfolk and Suffolk Broads Act 1988

Section 9

6)

In addition to consulting the Navigation Committee in accordance with requirements imposed by other provisions of this Act, the Authority shall—

(a)

consult the Navigation Committee—

(i) before delegating any function of the Authority in relation to the navigation area to any person;

(ii) before appointing any member of the Navigation Committee under this section;

(iii) before proposing, determining or bringing into force any new policy, plan, strategy or procedure or any change to an existing policy, plan, strategy or procedure which may significantly affect the use or enjoyment of the whole or any part of the navigation area;

(iv) before determining any application for planning permission which may **significantly affect the use or enjoyment of the whole or any part of the navigation area and which materially conflicts with any policy, plan, strategy or procedure of the Authority;**

(v) on the preparation of the annual budget, including in particular any income or expenditure attributable to the navigation area;

(vi) (except in case of urgency) before incurring expenditure which may have a significant effect on the use or enjoyment of the whole or any part of the navigation area and which has not been specifically provided for in the annual budget approved by the Authority;

(vii) before applying for any amendment of or alteration to the Navigation Committee's constitution as set out in this section or the Authority's constitution as set out in section 1 of this Act or any change to the functions of the Authority in relation to the navigation area as set out in Part II of and Schedule 5 to this Act and under Parts 2 and 3 of the 2009 Act; and

(b)

report to the Navigation Committee upon the exercise of powers in relation to the navigation area by the Authority or any officer of the Authority since the last meeting of the Navigation Committee

- (6) In addition to consulting the Navigation Committee in accordance with requirements imposed by other provisions of this Act, the Authority shall—
- (a) consult the Navigation Committee—
 - (i) before delegating any function of the Authority in relation to the navigation area to any person;
 - (ii) before appointing any member of the Navigation Committee under this section;
 - (iii) before proposing, determining or bringing into force any new policy, plan, strategy or procedure or any change to an existing policy, plan, strategy or procedure which may significantly affect the use or enjoyment of the whole or any part of the navigation area;
 - (iv) before determining any application for planning permission which may significantly affect the use or enjoyment of the whole or any part of the navigation area and which materially conflicts with any policy, plan, strategy or procedure of the Authority;
 - (v) on the preparation of the annual budget, including in particular any income or expenditure attributable to the navigation area;
 - (vi) (except in case of urgency) before incurring expenditure which may have a significant effect on the use or enjoyment of the whole or any part of the navigation area and which has not been specifically provided for in the annual budget approved by the Authority;
 - (vii) before applying for any amendment of or alteration to the Navigation Committee's constitution as set out in this section or the Authority's constitution as set out in section 1 of this Act or any change to the functions of the Authority in relation to the navigation area as set out in Part II of and Schedule 5 to this Act and under Parts 2 and 3 of the 2009 Act; and

Subject: Example Email to Nav Com

Dear Nicky and Simon

A planning application has been submitted by XXXX for XXXX at XXXX

You will recall that the scheme of consultation (as set out in Section 9 of the NSBA 1988 (as amended by the Broads Act 2009) requires the Broads Authority as Local Planning Authority to consult the Navigation Committee:

- (iii) before proposing, determining or bringing into force any new policy, plan, strategy or procedure or any change to an existing policy, plan, strategy or procedure which may significantly affect the use or enjoyment of the whole or any part of the navigation area;
- (iv) before determining any application for planning permission which may significantly affect the use or enjoyment of the whole or any part of the navigation area and which materially conflicts with any policy, plan, strategy or procedure of the Authority;

I am of the view that the application does not meet the tests set out above and does not therefore need to be referred to Navigation Committee. Are you content with this, or would you wish to submit comments, either formally or informally?

I am the case officer and the reference number is BA/XXXX

I look forward to hearing from you both.

Regards

Cheryl

Cheryl Peel MA MRTPI
Senior Planning Officer
Broads Authority

01603 756030
07786 026978

Appendix 3 Extract from Scheme of Delegation as it relates to planning decisions

The purpose of these Delegated Powers is to ensure that officers are empowered to make decisions and take appropriate action within the guidelines laid down, and to enable members to focus on key strategic and policy issues.

E Planning

- (1) All planning applications¹ are considered to fall within the delegation scheme and will be determined by officers unless:
- (i) it is for a major development as defined in the Town and Country Planning (General Development Management Procedure) Order 2010;
 - (ii) the application represents a departure from the development plan policies including the Broads Local Plan/Local Development Framework and any relevant policy adopted by the Authority and it is proposed to grant planning permission;
 - (iii) objections are received from any statutory consultee (excluding parish councils) in respect of any proposed development within the 21 day period for consultation and it is proposed to grant planning permission;
 - (iv) representations in writing are received from parish councils in respect of any proposed development within the 21 day period for consultation where these raise material planning considerations of significant weight ;
 - (v) representations are received in writing from other persons in respect of any proposed development within the 21 day period for consultation where these raise material planning considerations of significant weight ;
 - (vi) any member of the Authority requests within 21 days of receipt of the schedule of planning applications that the application is placed before the Planning Committee for a decision and provides a

¹ The applications and notification shall include planning permission, approval of reserved matters, advertisement consent, listed building consent, conservation area consent, prior approval applications submitted under the Town and Country Planning (General Permitted Development) Order 1995 and consent under the Hazardous Substances regulations.

material planning reason of significant weight for that request in writing;

- (vii) the Ward Member of the relevant District Council requests within 21 days of receipt of the schedule of planning applications that the application is placed before the Planning Committee for a decision and provides a material planning reason of significant weight for that request in writing;
 - (viii) the Director of Strategic Services considers that the matter ought more appropriately be referred to the Committee for a decision;
 - (ix) any member or member of staff of the Authority, including co-opted members of the Navigation Committee, is involved in the application.
- (2) To approve details submitted in accordance with a condition of a planning consent.
 - (3) To determine reasons for decisions.
 - (4) To formally discharge planning conditions upon compliance.
 - (5) To serve Breach of Condition Notices, Planning Contravention Notices and Section 330 Notices.



Mr Michael Haslam
Michael Haslam Planning and
Development Consultant
Woodcote
Cargate Lane
Saxlingham Nethergate
Norwich
NR15 1TS
United Kingdom

Cheryl Peel
Senior Planning Officer
01603 756030
Cheryl.Peel@broads-authority.gov.uk

12 June 2020

BA/2020/0045/COND

Dear Mr Michael Haslam

Application No : BA/2020/0045/COND
Proposal : Removal of condition 6 of permission BA/2019/0167/FUL
Address : Piling Left Bank Of Haddiscoe Cut, North Of Haddiscoe Dam (A143),
Northern River Edge,
Applicant : Mr Chris Bromley

This letter is to advise you that the Broads Authority has determined the planning permission for the development detailed above.

I enclose a copy of the decision notice. This permission is granted but may be subject to conditions and it is the owners and the person responsible for the implementation of the development who will be fully responsible for their compliance throughout the development and beyond.

The permission relates to re-piling only and does not convey any mooring use. The LPA is of the opinion that there is no lawful mooring use on this site and suggests if the landowner disagrees that a Certificate of Lawfulness application is made in order to establish the lawful position. Alternatively, the landowner could make an application for mooring use and I would note that the Authority's Navigation Committee have indicated that they would be supportive of the provision of 24 hour moorings here.

If you have any queries relating to the decision notice, please do not hesitate to contact the case officer using the details above.

Yours sincerely

A handwritten signature in black ink, appearing to read "Cally Smith".

Cally Smith
Head of Planning
Enc.