
Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 June 2020

Appeal Ref: APP/T0355/X/19/3240732

Romney Weir, Lock Road, Windsor, Berkshire SL4 6HX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr David DeChambeau of Southeast Power Engineering against the decision of Council of the Royal Borough of Windsor and Maidenhead.
 - The application, Ref 18/03623, dated 13 December 2018, was refused by notice dated 23 April 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is a proposed floating hydro powered barge.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation, which is considered to be lawful.

Procedural Matters

2. The Planning Inspectorate initially decided that this appeal could be determined following a site visit. That event could not take place given the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and related guidance.
3. The file has subsequently been reviewed to consider the optimal procedure for the appeal. It appeared that the appeal could be determined on the papers – that is, without a site visit – without causing prejudice to any party. This is because the case turns on legal points and the parties have submitted sufficient plans and information to understand the nature of the site given the points in dispute. The parties were contacted on 23 April 2020 and were advised that this would be the approach unless any comments were received raising any concerns. The appellant confirmed that he was content to proceed as outlined and no comments were received from the Council. As such, I can proceed to a decision on this basis.
4. The application form does not contain a detailed description of the development. In answer to question 4¹ the appellant ticked 'No' and in answer to question 5, the Grounds for Application, the appellant states 'For the reasons

¹ Does the proposal consist of or include the carrying out of building or other operations? Does the proposal consist of or include a change of use of the land or buildings?

set out in the accompanying letter the barge does not represent a form of development within the meaning of Section 55...' and 'Weirs do not fall within a given use class' and 'Please see the covering letter. The barge does not represent a form of development'. The details of the proposal are discussed in the applicant's covering letter though, from which the Council have derived a description for the decision notice. This is set out above in the appeal summary.

5. The covering letter refers to the development as a 'barge' and also that it would have 'two screws'. However, the proposal is labelled as 'barges' on the plans; most drawings (Nos 3-10) show two barges, described as 'paired' by the applicant, each with a single screw. Drawings Nos 3-10 are technical drawings and show how the barges would relate to the weir. Where a single barge with one screw is shown, it is passing through a lock (General layout drawing and sheet No 2).
6. The evidence submitted under the heading 'Further Information to support the application' (the 'Further Information'), comprises a bundle of emails between the appellant and the Environment Agency (EA). Within this evidence the proposal is referred to as 'barges'. The appellant states 'Please see illustrations below of a proposed method to moor the barges to the weir... strapping around the weir to moor the barge to... the trash screens are part of the barges... we will move the barges to safe haven'. The Council have determined the proposal on the basis that it would be a single barge, 10m wide, with two screws but it seems to me, based on the drawings and the Further Information, that the structure technically comprises a set of paired barges, each 5m wide.
7. The appellant refers to this in his Statement of Case and states 'The appellant however, with a degree of hindsight, tried to clarify to the Planning Officer that the drawings which show two barges together merely demonstrate that a barge(s) can be paired and navigated together to provide additional electricity when and where required'. In his 'Final Comments' the appellant refers to the proposal confusingly as 'barge(s)' throughout. However, it does not appear to be stated anywhere that the proposal is for one barge with one screw and within the appellant's 'Final Comments' at Appendix 2, paragraph 5, it is stated 'Size; the proposed barges will weigh approximately 60 tonne each, when temporarily connected next to each other'.
8. Section 39 of the Town and Country Planning (Development Management Procedure)(England) Order 2015 states that an application for a certificate must be accompanied by not only the relevant form but also such evidence verifying the information included in the application as the applicant can provide. In the absence of any clear statement to the contrary, I will determine the appeal taking into account the details shown on the plans and the 'Further Information' that accompanied the application, namely that the proposal is for two barges, with two screws, that are paired. The description of development within the Council's decision notice is therefore deficient and the proposal is best described as the proposed mooring of two (paired) hydro power barges at Romney Weir.
9. Whereas section 191(4) of the Act allows the Council (or an Inspector on appeal) to modify the terms of an application, so as to accord with the facts and evidence, there is no similar power under section 192 unless the appellant agrees. However, it is considered in this case that modifying the Council's

summary description of the development based on the submitted information would not be *ultra vires*. This is because the appellant has not provided a specific description himself and, in order to proceed, this needs to be ascertained. As such, I will proceed on the basis that the appeal is seeking an LDC for the proposed mooring of two (paired) hydro power barges at Romney Weir. It is not considered that there would be any injustice to either party in doing so.

10. The Council are concerned that the appellant has submitted new information with his appeal papers, in particular Counsel's opinion, that was not before them previously. Furthermore, that this contradicts what was said by the appellant at the time of the application. The Council contends that the appeal is confined to the narrow remit of reviewing its decision. It is sometimes argued that the Inspector must only consider the evidence which was before the Council when they made their decision. However, this denies the purpose of the LDC procedure, which is to arrive at an objective decision based on the best facts and evidence available at the time the decision is taken. It would also serve no useful purpose to refuse an LDC on the basis only of the evidence submitted with the application, if subsequent evidence comes to light proving the case on the balance of probability.
11. Section 195 of the Act refers only to the refusal being well founded, that is, the decision itself, not the reasons for it and, in this case, it is not considered that the appellant's submissions are contradictory. This is because the Counsel's opinion simply puts the case that the proposal does not amount to development by cantering through all the relevant legislation and case law on the matter. It relies on the same description of the proposal provided at the application stage in both the covering letter and the 'Further Information' and, as such, I shall have regard to it in reaching my decision.

Main Issue

12. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well founded.

Reasons

Evidence in LDC cases

13. A certificate of lawful use or development is not a planning permission. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action. The issue of a certificate depends entirely on the facts and evidence available at the time the decision is taken and the interpretation of any relevant planning law or judicial authority.
14. I note the comments from a third party at the appeal stage which refer to the omission of information about infrastructure such as cranes to connect the barges to the weir. These have been addressed by the appellant in his 'Final Comments'. An Inspector can only assess the lawfulness of a proposal based on the submitted information before them. The burden of proof regarding decisive matters of fact rests on the applicant, now the appellant. If, at a later date, a use or development that is found lawful is implemented and it differs from the plans and information that accompanied the application or appeal, then that would be a matter for the Council.

The proposal

15. The appellant proposes to moor floating, paired, motorised hydro power barges to the downstream side of Romney Weir for part of the year to generate hydroelectricity, which would be stored within batteries on the barges. Thereafter, the barges would be steered and navigated, with their own propulsion, by one or two crew members along the River Thames to any riverside destination, where they would be moored. A marine power cable would then be plugged into the batteries to transfer power to riverside customers. Mooring the barges and transferring power to customers elsewhere on the river is not part of this LDC application, which only concerns mooring the barges at Romney Weir.
16. Each individual barge would be approximately 20m in length, 5m in width (but paired this would be 10m) and would have two distinct parts. The bridge section, which would contain the cabin (5m x 9m and 3.9m high above the water line) from which it would be steered, would be connected via metal bars and connectors to a screw section. The screw section would have the gearbox, generator and batteries all situated on a level platform with a superstructure of railings and a projecting (retractable) gangway. The screw section would be capable of pivoting so that it could be placed at an angle to the weir.
17. The appellant sets out two descriptions of how the barges would be secured to the weir. In the covering letter this is described as being via hooks which would hook onto eyelets on the weir. However, in his Statement of Case, reference is made to a clamp and hawser, which is described in detail in the accompanying Counsel's opinion. A U-shaped clamp mechanism would be placed around but not physically affixed to a weir abutment and held in place by a cross-member and the hawser would be tied to the clamp at one end and the barge at the other end.
18. The difference is explained in the appellant's Final Comments where it is stated that he had been having discussions with the EA during the application and it was established that the hook/eyelet system would not be appropriate as there needs to be a flexible connection, hence the proposal for a clamp and hawser. The Council were advised of this in the appellant's 'Further Information' submitted before the application was determined. In the appellant's view, the clamp and hawser method of mooring would provide sufficient stability for the barges when moored whilst allowing a degree of flexibility to compensate for the movement brought about by flowing water.

Assessment

19. Any application for an LDC is seeking to ask a question, namely whether a particular use or development, as described in the application, is or would be lawful. In this case the application was made under section 192(1)(b) of the Act but it was clear from the covering letter that the Council were asked to confirm that a proposed activity would not amount to development.
20. Section 55(1) of the Act provides the definition of development which is the carrying out of 'building, engineering, mining, or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land.' The Council determined that the proposal would amount to development on the basis that mooring the barges adjacent to the weir would amount to a building operation. They did not consider whether the proposal

would amount to any other form of development and they offered no comments on the appellant's Counsel's opinion, which discussed this. I shall return to this point towards the end of my assessment.

21. Section 55 (1A) states that for the purposes of the Act 'building operations' includes a) demolition, b) rebuilding, c) structural alterations of or additions to buildings and d) other operations normally undertaken by a person carrying on business as a builder.
22. A building is defined by section 336(1) of the Act as including any structure or erection and any part of a building. With respect to the question of what is a 'building', the Courts in *Cardiff Rating Authority*² (endorsed by the Court of Appeal in *Skerritts*), have identified three primary factors as being decisive of what a building is: (a) that it is of a size that it would normally be constructed on site, as opposed to being brought ready-made onto the site; (b) it would cause a physical change of some permanence; and (c) there would be a physical attachment to the ground. No one factor is decisive.
23. With regard to size, the Council are concerned that the set of paired barges would be substantial, having an area of 200sqm. The cabins would also appear as buildings sitting on top of what appears to be a pontoon given their size. They would be 3.9m above the waterline and would each have a footprint of 45sqm.
24. I consider the size of a pair of barges would be significant but not unlike other craft on the river such as narrow boats and barges in terms of their length and width or river cruise boats and houseboats in terms of their height. A building is normally something that is constructed on site as opposed to being brought to a site ready-made. In this case, the barges and their machinery would be manufactured in a boatyard by a shipwright and would be fitted with an engine, steering equipment, rudders, bow thrusters, navigation lights and marine radios. They would also have safety features, a boating licence number and a unique boat name, necessary conditions of EA legislation³ and licensing requirements. They would arrive at the weir completely formed and under their own propulsion.
25. Furthermore, having regard to their size when moored compared to the size of the weir, this structure is a substantial size, some 60m wide with 11 gates set in concrete bays. Two of the bays have already been altered in that they have been fitted with Archimedes screws, which sit partly in the water and partly above it. The proposed barges when moored at the weir would be much smaller in scale than the weir itself and when the barge screws would be in position, they would resemble the fixed existing Archimedes screws in that they would be of similar dimensions and would sit partly in and partly out of the water. The appellant's screws though would be encased in a cylindrical casing so that the shape of the screw would not be visible.
26. There is a walkway across the weir and although the screws would be designed to pivot when moored, they would not project above the railings on the walkway. Only the retractable gangplank would extend across the top of the railings in a level fashion. This part of the barge would be a transparent

² *Skerritts of Nottingham v SSETR* [2000] 2 P.L.R. 102 and *Cardiff Rating Authority v Guest Keen Baldwin* [1949] 1 KB 385

³ Environment Agency (Inland Waterways) Regulations 2010

lightweight structure and, in my view, would not appear as a building for that reason. When in position across the walkway railings, it would be lower in height than the raised gates above the Archimedes screws, which adds to my overall conclusion that the scale of the barges compared to the weir structure would be much smaller.

27. All of these observations weigh against concluding that the barges would be a building or a building operation. In addition, the barges would be fabricated by a shipwright not a builder, which would not bring them within the meaning of 'building operations' in section 336(1) of the Act.
28. With regard to permanence, the appellant sets out that the intention of the operation is to make use of the high river flows in the autumn and winter months, and occasionally during spring, to generate power for subsequent sale. However, this would not mean that the barges would be moored continuously from September through to March, or June. The appellant submits that they would be in the same position for, at most, a period of six weeks at a time. This is because the barges would have to be moved at very short notice during high or low water events.
29. The Council are concerned that even though the barges would be moved on a regular basis, it would appear that they would moor within the vicinity of the weir, especially as the red line on the site location plan is drawn around a small area of the river. As such, the barges would appear as a permanent structure, akin to the movable poultry units within the field in the case of *R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin).
30. The appellant states he has worked on this stretch of the river for about 10 years. In that time there have been 55 high water events during the autumn and winter months. This information is not disputed by the Council. These events are monitored by the EA and are based on upstream weather forecasts and the findings from river flow measuring stations. These begin when the forecast predicts a particular level of rainfall and do not end until such time as the river flow stations confirm that river flow has returned to normal levels for the time of year.
31. All of this takes time which means that each high water event could last from two weeks or, at worst, up to two or three months. On that basis, the barges would only ever be moored at the weir for around four to six weeks at a time. In addition, the appellant submits head and flow calculation data from the EA gauge stations.
32. This shows that the EA's own screws benefit in the first instance from the river flow necessary to generate power. Only when there is more capacity would the barges moor at the weir. They would not moor at the same gates every time but would go to different gates as directed by the EA, based on river flow conditions at that time. The barges would also be absent twice a year for scheduled maintenance, although it is not stated how long this would take, and during summer months when there is insufficient river flow.
33. It is clear from *Cardiff Rating Authority* that a structure that moves can still be a building. Also, from *Skerritts*, buildings do not need to be onsite 365 days/year to be counted as permanent. The *Woolley* judgement also deals with the length of time a building is in situ. It is stated that permanence has to be

construed in terms of significance in the planning context. Within the judgement, reference is made to the *Hall Hunter* case⁴ which concerned polytunnels and is also referenced by the appellant. The polytunnels were in a particular location for three months and this was found to be of consequence in the planning context. In *Woolley*, the poultry units were permanently in their field with no limit on the length of time they would remain there. The ability to move them around the field did not remove the significance of their presence in planning terms.

34. In my view, the barges would be moored at regular intervals but in various positions along the weir with the intention that they would be there as long as possible, pending direction from the EA. However, when not moored at the weir, they could be moored within sight of the weir or much further afield, outside the red line area drawn on the site location plan. The appellant confirmed that the purpose of the red line was not to indicate where the barges would moor when not generating power, as the barges could travel a considerable distance along the river in order to sell the power that had been generated. Furthermore, the question being asked in the application is whether the mooring of the barges at the weir would amount to development.
35. High or low river flow periods and scheduled maintenance would mean mooring the barges at the weir would not be feasible for regular periods. They could be moored for up to six weeks at a time on a regular basis though. As such, I consider the evidence weighs in favour that they could be considered to be a building, or building operation, having regard to the appellant's intent and the significance of their presence. In particular, it is unlikely that the appellant would go to the trouble and expense of building the barges if they were so infrequently used. This is the case, notwithstanding the appellant's Counsel's opinion, that the facts would indicate a strong element of impermanence due to the need to move the barges being outside the control of the appellant.
36. With regard to physical attachment, the use of a clamp and hawser would not change the condition, state or quality of the weir and they could easily be removed by one crew member without any power tools. They would provide the stability the barges would need in order to safely generate electricity whilst also being able to be removed quickly. Any rigid mooring point would be unsafe and would not meet the requirements of the EA for the barges to be able to be moved quickly, should water levels change suddenly. If the fixing design amounted to a physical alteration, the movement of the barges on the water when moored and any rise or fall of water levels, however small, would damage the barges or, at worse, would cause damage to the weir.
37. There would also be no other links between the barges and the weir. The marine power cable would plug into the batteries and would deliver power to the customers' devices without involving the weir, in the same way as a phone charger cable transfers power from a socket to a phone without using any other structure. The gangplank over the railings would also not change the condition, state or quality of the weir. It is therefore my view that on physical attachment, the evidence does not weigh in favour of concluding that the mooring of the barges at the weir would mean that they would be a building or a building operation.

⁴ R (oao Hall Hunter Partnership) v FSS & Waverley BC [2007] JPL 1023

38. I have found, having regard to size and physical attachment, that the mooring of the barges at the weir would not amount to a building or a building operation but, in terms of permanence, the evidence weighs in favour of the proposal being a building. On balance, therefore, taking all of my findings into account on this aspect of the meaning of development, I find that the proposal would not be a building or a building operation.
39. In order to reach an overall conclusion that the proposal would or would not amount to any form of development though, within the meaning set out in section 55(1), it is also necessary to consider it against the remaining parts of the definition.
40. With regard to engineering operations, the Act provides no definition, however, it has been held in the Courts that the carrying out of an engineering operation involves work with some element of pre-planning. This would normally, but not necessarily, be supervised by a person with engineering knowledge.
41. Whilst the mooring of the barges at the weir would require some pre-planning, in terms of liaison with the EA, the act of carrying out the mooring would be undertaken by people described as 'crew' by the appellant. They would navigate and operate the barges and, to all intents and purposes, would not be engineers within the accepted and usual meaning of that term. I find that the proposal would not amount to engineering operations.
42. Clearly, the proposal would not amount to a mining operation as no minerals would be worked and it is also not considered to fall within the phrase 'other operations' as there would be no permanent physical alteration to the land.
43. It is also considered that the proposal would not amount to a material change of use. Again, this is not defined in the Act. As such, it is a question of fact and agree in each case. For there to be a material change of use there needs to be some significant difference in the character of the activities from what has gone on previously. This is usually carried out by making use of the concept of the planning unit as set out in *Burdle*⁵. It is first necessary to ascertain the correct planning unit and the present and previous primary users of that unit. The tests laid down in *Burdle* start with the unit of occupation and turn on the concept of physical and functional separation.
44. In this case it is considered that the unit of occupation would be Romney Weir, a single engineered structure placed at a particular point in the river. This is managed by the EA and they have control of the river both upstream and downstream of the weir, including the power to exclude boats from the vicinity of the weir for river management purposes.
45. The primary use of the weir would appear to be a mixed use as the original purpose of river management, to control the flow of water, has changed following the installation of Archimedes screws within two of the gates. These provide a second primary purpose, to generate hydroelectric power.
46. in this context, the appellant's proposal would involve using two more gates out of a total of 11, to generate hydroelectric power. The fact that this would be for a different end user would not change the use taking place. Rather it would be an expansion of an existing use within the current mix. The barges would not be moored permanently at the weir and the EA could direct that they

⁵ *Burdle v SoSE* [1972] 1 WLR 1207

be moved so that the gates could be used for river management purposes. As such, it is considered there would be no significant difference in the character of the activities from what has gone on previously. This is the case even though the barges would be physically separate from the weir.

47. For all these reasons therefore, it is concluded that the proposal would not amount to development requiring planning permission, within the meaning of section 55(1) of the Act, and would therefore be lawful.

Conclusion

48. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed mooring of two (paired) hydro was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

D Fleming

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 13 December 2018 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The activity described in the proposal would not amount to either operational development at the weir or, any other form of development, as set out in section 55(1) of the Town and Country Planning Act 1990, as amended. It would not therefore fall within the meaning of development and no planning permission is required.

Signed

D Fleming

Inspector

Date: 17 June 2020

Reference: APP/T0355/X/19/3240732

First Schedule

Proposed mooring of two (paired) hydro power barges at Romney Weir, as shown on drawing Nos 3-10, for up to six weeks at a time between 1 September and 1 June each year,

Second Schedule

Land at Romney Weir, Lock Road, Windsor, Berkshire SL4 6HX

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 17 June 2020

by **D Fleming BA (Hons) MRTPI**

Land at: Romney Weir, Lock Road, Windsor, Berkshire SL4 6HX

Reference: APP/T0355/X/19/3240732

Scale: not to scale

