



Appeal Decision

by **Jean Russell MA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 22 September 2021

Appeal ref: APP/G3110/X/21/3272418

Eastern Bank of Castle Mill Stream, from opposite Combe Road to the end of William Lucy Way, Jericho, Oxford, OX2 6EQ

- The appeal is made by Mr Elliot Smith under section 195 of the Town and Country Planning Act 1990 (TCPA90) against the decision of Oxford City Council (the Council) to refuse an application to grant a certificate of lawful use or development (LDC).
 - The application (ref: 20/02292/CEU) was made under section 191(1)(a) of the TCPA90, dated 15 September 2020 and refused by notice dated 27 October 2020.
 - The existing use for which an LDC is sought is described as 'up to five boats moored on the Eastern bank of Castle Mill Stream, between opposite Combe Road and the end of William Lucy Way. All boats used as permanent residential moorings. Lawful development certification is not sought for any structures or items on the bank, except for mooring pins (max two per boat) and gangplanks (max one per boat).'
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FORMAL DECISION

1. The appeal is allowed to an extent and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

PRELIMINARY MATTERS

2. The appellant and the Council have made applications against the other for awards of costs. The applications are subject to a separate decision.

The Appeal Site

3. Castle Mill Stream is a tributary of the River Thames which runs to the west beyond an intervening railway. To the east of the stream lie a towpath, over which the public have rights of way, then the Oxford Canal and then mainly residential streets within the Jericho neighbourhood on the edge of Oxford city centre.
4. The site address given on the application form is partly right but I would say that the appeal relates to a stretch of land which comprises the eastern bank and eastern half of the stream bed of Castle Mill Stream where it runs from William Lucy Way to opposite Combe Road. I shall consider the appeal on this basis.
5. The appellant requested in their statement of case that the site plan submitted with the LDC application is replaced by one sent to the Council as part of pre-application talks¹. The difference is that the pre-application or substitute plan includes within the site a triangular patch of open land on the eastern bank of Castle Mill Stream to the immediate south of William Lucy Way.
6. The enforcement notice issued by the Council, discussed further below, related to the same site shown on the original LDC plan. However, the Council did not object to my changing the LDC plan in their appeal submissions, or comment on the site

¹ Appendix 10.3 to the appellant's statement of case.

boundaries in their pre-application advice². The additional land is shown in photographs appended to the Council's statement of case.

7. Extending the site to include more dry land could not alter the number of moorings found to be lawful, and the appellant is clear that an LDC is not sought 'for any structures or items on the bank' except for two mooring pins and one gangplank per boat. I expect that the extra land was used by the occupiers at least for access purposes, but either way the site is in mixed use as described below, and the extra land does not come into my reasoning as to whether the residential use is lawful. I can accept the substitute plan without causing prejudice to the Council's case.

The Existing Use

8. S191(4) of the Town and Country Planning Act 1990 (TCPA90) allows a planning authority to modify the description of use or development for which an LDC is sought. An Inspector may exercise this power on appeal and is obliged to issue an LDC for any use or development shown to be lawful on the facts and evidence³.
9. The appellant proposes that I modify the description so that an LDC is sought for a mixed use of land for railway and waterway amenity purposes – the lawful use – as well as residential use. The Council has not objected and the revised wording is in line with (although not identical to) the allegation set out in the enforcement notice. I shall modify the description as suggested⁴.
10. I would also say that the description of the use given on the application form (and quoted in the banner heading) could be simpler and clearer. It is not necessary to say what an LDC is not sought for, and so I shall change the description to:

'The existing use of land for a mixed use for railway and waterway amenity purposes and the permanent residential mooring of up to five boats with the associated placement of up to two mooring pins and one gangplank per boat'.
11. It is right to stress that 'permanent residential mooring' is the use in question; that would be the same whether the number of moorings or boats is one, five or 50⁵. That said, any LDC should describe the level as well as type of any activity found to be lawful, as a benchmark against which the lawfulness of any future change or intensification of use can be assessed. Given s191(4), an LDC could be granted in respect of five or some lower number of moorings if that is found to be lawful.

The Occupiers and the Landowner

12. The appellant, Mr Smith, lives on one of the five boats subject to this appeal. In this decision letter, I shall refer to other occupiers and individuals by their initials. I understand that Network Rail registered the land in two separate parcels in 2018 and 2019⁶ and, as landowner, does not permit residential moorings⁷.
13. The appellant has stressed that he and the other occupiers did not **enter** the site as trespassers. S79 of the Thames Conservancy Act 1932 (TCA32) provides that:
'(1)...it shall be lawful for all persons whether for pleasure or profit to go by pass

² Appendix 10.9 to the appellant's statement of case.

³ *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461

⁴ The Planning Practice Guidance on Lawful Development Certificates states at paragraph ref ID: 17c-010-20140306 that where an LDC 'is granted for one use on a "planning unit" which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over subsequent intensification of the certified use'.

⁵ The Council also modified the description of the existing use but, like the appellant, worded it so that there was no reference to mixed use and the focus seemed more on boats than use.

⁶ Land title numbers ON337907 and ON352590; appendices 7 and 8 to the appellant's statement of case.

⁷ Network Rail letter to the site occupiers dated 21 March 2019, Appendix 4 to the Council's statement of case.

and repass in vessels over or upon any and every part of the Thames...including all such backwater creeks side-channels bays and inlets connected therewith...(2) the right of navigation...shall be deemed to include a right to anchor moor or remain stationery for a reasonable time in the ordinary course of pleasure navigation...'

14. However, there is no dispute that mooring for permanent residential use is not lawful under the TCA32 and the occupiers are on the site without the consent of the landowner. Network Rail has commenced (but perhaps stayed) litigation to secure the vacating of the site. This appeal decision letter is written without prejudice to those separate proceedings and any party thereto.

The 2020 Enforcement Notice

15. The Council issued an enforcement notice (ref: 17/00360/COU) on 18 August 2020 which alleged that there had been, without planning permission, a [material] change of use of [the original LDC site] from railway and canal amenity land to a mixed use of railway and canal amenity land and permanent residential moorings. Mr Smith made an appeal (ref: APP/G3110/C/20/3259485) against the notice on 15 September 2020; I shall refer to the '2020 EN' and '2020 appeal'.
16. Under s174(1) of the TCPA90, an appeal against an enforcement notice may only be made by a person 'having an interest in the land...or a relevant occupier...' The Planning Inspectorate wrote to Mr Smith on 17 September 2020 and requested details of his interest⁸. After considering his reply, the Planning Inspectorate wrote again on 5 October 2020 to say: 'we have examined the evidence available...you do not fulfil the requirements of s174(1)...your appeal is not valid'⁹.
17. The s174(1) limitation on who may make an enforcement appeal does not apply to LDC proceedings; s191(1) is clear that 'any person' may make an application to ascertain the lawfulness of any existing use or development. For the avoidance of doubt, however, on the date of this decision letter, the 2020 EN will have taken effect and be in force because it was not successfully appealed.

Section 191 of the TCPA90

18. The appeal is made to ascertain whether the appeal mixed use is lawful as described under s191(2). It provides that '...uses and operations are lawful at any time if (a) no enforcement action may then be taken against them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.'
19. The relevant 'time' for the purposes of s191(2) is the date or 'time of the [LDC] application' as set out under s191(5).

Section 285 of the TCPA90

20. The Council suggests that this appeal ought not to succeed because s285(1) provides that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.
21. Given s191(2)(b), I am bound to determine whether the 2020 EN was in force at the time of the LDC application and the mixed use would constitute a contravention of its requirements. However, this decision letter should not be read as questioning

⁸ Appendix 14 to the appellant's statement of case.

⁹ Appendix 15 to the appellant's statement of case.

the validity of the 2020 EN insofar as I cannot comment on its issue, service, wording or continuing effect. It exists outside of this appeal as a matter of fact.

22. The validity of the 2020 EN is being questioned in the sense that an LDC is sought on the same basis that the notice was appealed, namely that the time for taking enforcement action against the mixed use has expired¹⁰. In *Staffordshire CC v Challinor & Robinson* [2007] EWCA Civ 864, an LDC was granted in respect of a use, but an enforcement notice was subsequently issued and not appealed on the grounds that the use was lawful. The Court of Appeal held that an enforcement notice could take away lawful use rights in this circumstance:

'...the plain purpose of the statutory scheme, and of s285 in particular, is to prevent any challenge to the enforcement notice on grounds which can be raised...under s174, in any place other...If the [LDC] did provide an answer to the enforcement notice, that was a ground of challenge which could and should have been the subject of an appeal under s174...In short, s285 prevails over s191(6). The latter establishes conclusively the lawfulness of the certified use [only] at the time of the [LDC]...'

23. There is no discussion in *Staffordshire* regarding the appellant's point that LDC applications are brought – to quote s285(1) – under Part VII of the TCPA90, but I do not need to turn over that stone. Since s285(1) and *Staffordshire* bear on enforcement proceedings, they do not prevent my allowing this appeal. I make no determination as to what was lawful on the date of issue of the 2020 EN, and my decision to grant a certificate should not be taken as a ruling on the validity of the 2020 EN which will have taken effect anyway.

Matters of Evidence

24. Where an LDC is sought, the onus is on the appellant to make their case on the balance of probabilities. Their evidence should be accepted so long as it is sufficiently precise and unambiguous, and there is no evidence to contradict their version of events or make it less than probable¹¹.
25. The occupiers of the site and others have submitted 'statutory declarations' in support of the appeal. Those documents were signed and stamped by solicitors and I shall treat them as sworn statements which carry significant but not necessarily decisive weight. The declarations were made on various dates in September 2020.
26. The parties have raised issues such as the effect of the moorings on the character and appearance of the area; whether the site is safe and provides reasonable living conditions; the effect of the use on trees and wildlife; whether the use gives rise to (fear of) anti-social behaviour or crime; the need for residential moorings and/or affordable housing in Oxford¹²; benefits of the use to the Jericho community; and the personal circumstances of the site occupiers. I have no discretion to consider the merits or otherwise of the use, or to make any determination regarding the occupiers' human rights¹³. The question for this appeal is whether the use is lawful under s191(2) on the balance of probabilities.

¹⁰ The 2020 appeal was made on grounds including that set out under s174(2)(d): that, at the date when the enforcement notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the notice.

¹¹ *Gabbitts v SSE & Newham LBC* [1985] JPL 630

¹² It is stated on the application form that the existing use represents 'affordable home ownership' but I cannot determine whether or not that is so. Residential use remains the same whether the accommodation meets any policy definition of 'affordable' or not. Where planning permission is granted for housing, a planning obligation or condition is required to ensure that it remains 'affordable' in perpetuity.

¹³ Including whether the Council respected the rights of the occupiers to a 'fair trial' set out under Article 6 of the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act 1998, or whether evicting the occupiers would violate their Article 8 rights to private and family life, home and correspondence.

MAIN ISSUES

27. The main issues are:

- a) Whether the use of the site for a mixed use for railway and waterway amenity purposes and the permanent residential mooring of two boats with the associated placement of up to two mooring pins and one gangplank per boat is lawful as described under s191(2)(b):
 - i) Whether the use would contravene any of the requirements of the 2020 EN and, if so,
 - ii) Whether the 2020 EN was in force at the time of the LDC application.
- b) If s191(2)(b) is met, whether the use is lawful as described under s191(2)(a):
 - i) Whether the time for taking enforcement action has expired under s171B(3), and
 - ii) Whether the time for taking enforcement action has expired because of the effect of s171B(4).

28. The tests set out under s191(2)(a) and (b) do not need to be considered strictly in that order. In this case, it is prudent to consider (b) first; the Council refused the application on that basis and the appeal would have to be dismissed if the Council was right. It would be inappropriate for me to consider personal evidence relating to s191(2)(a) if the 2020 EN is an insuperable barrier to the grant of an LDC.

REASONS FOR THE DECISION

Section 191(2)(b) of the TCPA90

The Requirements of the 2020 EN

29. As noted above, the description of the existing use subject to this appeal has been modified to reflect but not match the allegation set out in the 2020 EN. The differences in wording matter not and indeed it would not matter if I had decided not to modify the description at all. S191(2)(b) is explicit that lawfulness depends on whether what is subject to the LDC application would constitute a contravention of any of the requirements of an enforcement notice in force, not whether it is the same breach of planning control described in the notice.

30. The requirements of the 2020 EN were to '(i) cease the use of the Land for residential moorings and remove from the Land all boats and vessels, sunken or afloat together with all associated equipment; and (ii) remove all personal and domestic items from the Land associated with the residential moorings'. Granting an LDC for the existing use of land for (a mixed use including) the permanent residential mooring of any number of boats with (or without) mooring pins or gangplanks would constitute a contravention of the requirements of the 2020 EN.

'Then in Force'

31. The Council argues that the 2020 EN came into effect on 16 September 2020, and the 'time of the application' should be taken as being the same date. I shall treat 'in effect' as meaning the same as 'in force' for the purposes of s191(2)(b).

The Time of the LDC Application

32. The LDC application was actually dated 15 September 2020, but it was submitted via on-line portal at 21.40 hours on that day, following receipt of fee payment at

- 21.36 hours¹⁴. The Council argues that, since it was uploaded after office hours, 'the time of the application' was the next working day, being 16 September.
33. The Council prays in aid s336(4A) of the TCPA90 which provides that 'where (a) an electronic communication is used for the purpose of serving or giving a notice or other document on or to any person for the purposes of this Act, and (b) the communication is received by that person outside that person's business hours, it shall be taken to have been received on the next working day'. I accept that the word 'document' could include an LDC application form – and that the Council is a 'person' for the purposes of s336(4A)¹⁵.
34. However, the Council has not explained why s336(4A) is relevant to this appeal or 'the time of the [LDC] application' should be taken as when that was 'received'. As noted by the appellant, it was held in *Nicholson v SSE & Maldon DC* [1998] JPL 553 that 'on a straightforward reading, the question [of whether something is lawful under s191(1)] is directed towards the time when the application is made...'
35. The Encyclopaedia of Planning Law and Practice (EPLP) at paragraph P191.03.1.1 states that 'lawfulness is referable to the date on which the s191 application is validly made' – which does not mean 'received' or even 'validated'. The Planning Practice Guidance (PPG) states in relation to s191 that '...the statement in a lawful development certificate of what is lawful relates only to the state of affairs on the land at the date of the certificate application'¹⁶.
36. Paragraph 1.8.1 of the Planning Inspectorate's Procedural Guide: Certificate of Lawful Use or Development Appeals – England affirms that 'the Inspector will consider the lawfulness of the use or development on the date that the application was made to the local planning authority'. It is indeed custom and practice for Inspectors to take the date given on the LDC application form as the material date for lawfulness. It has not been shown that this approach is wrong and I shall not change the goalposts in this case by introducing the novel question of receipt.
37. It follows that the 'time of the [LDC] application' should be taken as the date that was made, being 15 September 2020 in this case. That date is before the effective date of the 2020 EN even on the Council's account but, in the interests of clarity and natural justice, I will discuss when the 2020 EN came into force.

The Effective Date of the 2020 EN

38. I can understand why the Council argues that the 2020 EN came into force on 16 September 2020. That was the effective date given on the notice and it was not validly appealed. The Planning Inspectorate told the appellant on 5 October 2020 that the 'appeal is not valid' and 'in the absence of any...application to the High Court, the enforcement notice(s) would take effect from the date stated in it, in accordance with provisions of s173(8) and s175(4) of the 1990 Act'.
39. I regret the difficulties caused to all parties but find the last quoted sentence in the letter likely to be incorrect. S173(8) of the TCPA90 provides that an enforcement notice shall specify the date on which it is to take effect and, subject to s175(4) and s289(4A), shall take effect on that date¹⁷. S175(4) provides that where an appeal is brought [against an enforcement notice] under s174, the notice shall be

¹⁴ Appendices 17 and 18 to the appellant's statement of case.

¹⁵ The TCPA90 does not define the word 'person' and so s336(4A) must be interpreted in accordance with Paragraph 1 of Schedule 1 of the Interpretation Act 1978, which defines 'person' as including 'a body of persons corporate or unincorporate'.

¹⁶ PPG on Lawful Development Certificates, paragraph ref ID: 17c-002-20140306

¹⁷ S289(4A) provides for the High Court or Court of Appeal to order that a notice shall have effect pending the final determination of enforcement appeal proceedings; it is not relevant to this appeal.

of no effect pending the **final determination** or the withdrawal of the appeal [my emphasis]. S175(4) does not say 'where a valid appeal is brought...'

40. The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 do not mention appeal validity. The EPLP states at P173.08 that '...provided [an appeal] is made before the notice takes effect, the notice is of no effect pending the final determination or the withdrawal of the appeal...the safest course, as is indeed the practice, is to proceed on the basis that the Secretary of State's s174 decision is the final determination...'
41. Similarly, the PPG states at para 17c-003-20140306 that: 'an enforcement notice is not in force where an enforcement appeal is outstanding...' The Procedural Guide to Enforcement Appeals and the information note to be attached to enforcement notices tell appellants that the Planning Inspectorate must 'receive' an enforcement appeal before the effective date given on the notice – but not that the effective date will remain the same if the appeal is not valid.
42. The 2020 EN itself stated at paragraph 7: 'the notice takes effect on 16th September 2020 unless an appeal is made against it beforehand'. The PPG's example enforcement notice is worded the same and, again, there is no reference to validity. In this case, I find that an appeal was 'brought' against the 2020 EN for the purposes of s175(4) and the appeal was 'finally determined' on 5 October 2020 when the Secretary of State decided that it was invalid; that must be the date when the EN came into effect or force.
43. I would add, although this may be immaterial, that my finding makes practical sense for two reasons. Firstly, it is consistent with my conclusion and indeed the representations on the 'time of the application' where the question was whether to look at the date of submission or receipt; validation did not come into it. The 2020 appeal was made after office hours on 15 September 2020 but not deemed out of time by the Planning Inspectorate although it had to be in before the 16th.
44. Secondly, no appellant or planning authority should be worse off because an appeal is made which turns out to be invalid. If the Planning Inspectorate turns away an enforcement appeal after the effective date given on the notice – as is bound to happen sometimes, given that an appeal may be made as late as the day before – but the effective date is deemed unchanged, the period for compliance with the notice would be shortened by the validation process.
45. The 2020 EN and appeal show the problem. The notice gave the occupiers six weeks from the effective date to comply with the requirements, that is, to leave their homes. If the appellant was only told on 5 October that the notice had come into effect on 16 September, the period for compliance would in practice have been almost halved. That would plainly be unfair to the appellant and potentially make it harder for the Council to prosecute for any non-compliance with the 2020 EN.

Conclusion on s191(2)(b)

46. I conclude that the time of the LDC application should be taken as 15 September 2020, when it was made, while the EN should be taken as coming into force or effect on 5 October 2020, when the Secretary of State made a final determination on the 2020 appeal. It follows that s191(2)(b) is met.

Section 191(2)(a) of the TCPA90

47. Although the Council did not refuse to grant an LDC for this reason, they suggest that 'enforcement action may be taken' against the use because 'the time for

enforcement action' had not expired on the date of the application. The time limits for enforcement are set out in s171B; the relevant subsections are (3) and (4)¹⁸.

Time for Taking Enforcement Action under s171B(3)

48. S171B(3) provides in the case of any...breach of planning control [consisting of a material change of use of land], no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
49. For me to find that the appeal mixed use is 'immune' from enforcement action under s171B(3), the appellant must demonstrate that, on the balance of probabilities, the residential element of the use commenced by no later than 15 September 2010, ten years before the date of the LDC application. The appellant must also show that the use took place without substantial interruption for a ten year period, although that does not mean no interruptions at all¹⁹.
50. I stress that last point because the use was carried out on 'liveaboard' boats which the occupiers could be expected to have moved at times as discussed below. The occupiers could have replaced their vessels while continuing the use or mooring, just as use as a caravan site can be continued in different caravans. And, as with any kind of dwelling, the occupiers may have changed without the (level of) use of the land necessarily being paused for a material period. The significance of any interruption to the use must be considered as a matter of fact and degree. The test is whether the Council could have taken enforcement action at any time.

The First Mooring

51. The first of the current site occupiers is a person that I shall refer to as 'SCW'. Their boat is 'Asterix' although I understand it was not officially named for some time²⁰. The appellant suggests that Asterix is usually moored at the north end of the site, that is, just south of William Lucy Way and close to Jericho footbridge, which links Mount Place and dwellings to the east with the canal towpath.
52. SCW made a sworn statement on 16 September 2020 which includes the claim that 'I have been living on a boat on the Castle Mill Stream, just south of the end of William Lucy Way, since April 2000'²¹. As far as it goes, that statement is precise and unambiguous; 'living' must mean 'using for residential purposes'.
53. SCW does not expressly say that they carried out the use without substantial interruption from April 2000 or indeed for any ten year period. Their statement is short in length and light on detail considering that it ostensibly covers a 20 year period of their life²². I also note that SCW has provided no other documents or records that connect their name to Castle Mill Stream; they paid no Council Tax or utility bills and did not register for electoral, waste collection or postal delivery services at the site. I can understand the Council's dismay at SCW's avoidance of authority, and I also find it surprising for their own sake that SCW did not submit more evidence of their claimed long-term permanent residential use.
54. However, the 'Oxford Boat Dwellers Accommodation Needs Assessment' (OBDANA) report of July 2018 describes in paragraph 5.44 that 'although some permanent moorings have water and electricity hook-ups, most do not (most share water

¹⁸ S171B(1) and (2) provide that no enforcement action may be taken after the end of a period of four years from the date on which building or other operations were substantially completed, or from the date of a change of use of a building to use as a single dwellinghouse.

¹⁹ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226

²⁰ Paragraph 7.49 of the appellant's statement of case.

²¹ Appendix 5 to the appellant's statement of case.

²² The same is true of SCW's 'personal impact statement' submitted with the appellant's costs application.

facilities and have no access to electricity). Human and household waste disposal facilities are generally limited and can be difficult to access...boat dwellers without an official address find it difficult to access services such as local GPs...[and] have to resort to using family or friend's addresses'²³.

55. SCW has never had the landowner's consent to live on the site or planning permission to use the land for residential purposes. It is not unusual for people in either, let alone both situations to try and stay under the radar of their local authority. There is no suggestion that SCW's failure to register for Council Tax or any other service amounts to positive deception in the planning process.
56. CJG made a sworn statement that, after they moved to a nearby house in 2009, they let SCW use their postal address²⁴. It is not clear when the arrangement began and I have seen no copy of any letter sent to SCW via CJG – but that does not matter because an appellant's case is not contradicted or made less than probable simply by an absence of corroborative evidence. The lack of records is understandable in this case and does not count for or against the appeal.
57. SCW has provided a copy of a letter from the Council, dated 15 May 2009, which was addressed to 'the Owner/Occupier, Unauthorised Boats and Tents, Castle Mill Stream and Towpath...' It stated that:
- 'I am writing to you as the occupant and possibly the owner of a boat or/and tent on Castle Mill Stream and moored to the towpath...The mooring of boats to...and the siting and use of residential tents on the towpath requires the benefit of formal planning consent [sic] which has not been obtained. The boats and tents in this location are, therefore, unauthorised...I must formally request that the unauthorised mooring of the boat(s) to...and the siting of a residential tent on the towpath ceases before 15th July 2009. This will avoid the need for the City Council to consider taking planning enforcement action'.
58. There is nothing to suggest that the letter is not genuine or was not received by SCW on their boat in May 2009. Interestingly, given that it warned of formal enforcement action, the letter did not identify the use for which boats were moored; the word 'residential' was used in connection only with tents. However, I would infer that boats were moored for that purpose because no other was identified and the letter was directed at the boats and tents together. The letter indicates, then, that SCW was probably residing on the site in May 2009.
59. Four people have provided sworn statements to the effect that SCW has lived on the site since 2000 or at least before 15 September 2010:
- Another site occupier, ECP, has known SCW since the 1970s. ECP states that SCW 'lived on a boat called Tao moored at Castle Mill Stream just south of William Lucy Way since at least 2003 when I was living at [other] moorings. I knew the boat Tao well as I had owned it and lived on it...from 1991 to 1996. [SCW] lived on Tao until 2009 when [they] began to live on a boat known as Asterix on the same mooring and [they have] lived there ever since'.
 - A nearby occupier, SHu, said that they had known SCW for eighteen years and 'all that time, [SCW] has lived on a boat moored on the Castle Mill Stream, south of William Lucy Way near the Mount Place footbridge'²⁵;

²³ Appendix 33 to the appellant's statement of case; the report was prepared by RRR Consultancy Ltd. The report to the Council's Scrutiny Committee and Cabinet of 11 November 2020 regarding Waterways also notes that 'some basic infrastructure for live-aboards moored in Oxford is absent'; appendix 6 to the appellant's statement of case.

²⁴ Appendix 30.4 to the appellant's statement of case.

²⁵ Appendix 30.7 to the appellant's statement of case

- MJD has conducted guided tours along the canal towpath since 2002. They 'state categorically that [SCW] was resident [on Castle Mill Stream] in November 2007, based on an entry in my logbook, though I am in no doubt that [their] time there pre-dated that by several years'²⁶.
 - The occupier on an off-site boat in Oxford, EA, describes knowing SCW 'since 2000, when [they] moved onto a boat on the Castle Mill Stream. Over the years [they have] done a lot of repair work on my boat'²⁷.
60. As to continuity, the other existing occupiers said in their sworn statements that SCW was already living on the site when they moved here: September or October 2018 in the case of Mr Smith, June 2015 in the case of ECP, January 2014 in the case of JPRM and June 2014 in the case of BP²⁸.
61. A former site occupier, SHa, did not refer to SCW in their declaration²⁹. However, the former owner of Mr Smith's boat, MS, made a sworn statement that they employed SCW on boat repair and visited SCW on their 'mooring on Castle Mill Stream opposite Mount Place between 2013 and 2020'³⁰. Further evidence as to SCW's continued use and occupation is set out in sworn statements made by the occupiers of nearby houses or moorings:
- AGJ moved to the area in 2010 and since then has walked past the site twice-weekly. They confirm that SCW has lived on a boat moored in Castle Mill Stream as their 'primary/sole residence' since 2010³¹.
 - As noted above, CJG has lived in the area since 2009 and is a personal friend of SCW. They swear that SCW currently resides on Asterix 'moored on Castle Mill Stream near the Jericho footbridge which crosses the canal from Mount Place'. CJG not only received SCW's post but has also, since 2009, employed SCW on and off, and visited SCW's boat for social reasons³².
 - LNS lived on an off-site mooring between 2005 and 2014 and, during that period, as a friend, visited SCW's boat 'where they lived on the Millstream south of William Lucy Way'. They worked with SCW 'each summer to clear the Millstream of debris and keep the waterway free from obstruction'³³.
62. Most of the unsworn representations submitted by the appellant are concerned with the merits rather than lawfulness of the use. However, one local resident wrote that they have an unnamed 'long term friend who has lived on the Mill Stream since 2000'³⁴; that cannot, on the balance of probabilities, be anyone other than SCW. Another said that SCW has 'lived for a number of years' on their boat 'on the Mill Stream'³⁵.
63. Against the claims made by and on behalf of SCW, the Council states that 'having also considered the Council's own records, it seems likely that [SCW's] is one of the boats which has come and gone over the years'. The Council does not need to provide evidence of its own, with the onus being on the appellant, but it is still striking that the Council has only produced two photographs in support of that claim. They were taken during a site visit on 16 December 2015 'to facilitate the

²⁶ Appendix 30.8 to the appellant's statement of case.

²⁷ Appendix 30.9 to the appellant's statement of case.

²⁸ Appendices 4.1, 4.2, 4.3 and 4.4 to the appellant's statement of case.

²⁹ Appendix 28 to the appellant's statement of case.

³⁰ Appendix 29 to the appellant's statement of case.

³¹ Appendix 30.3 to the appellant's statement of case.

³² Appendix 30.4 to the appellant's statement of case.

³³ Appendix 30.5 to the appellant's statement of case.

³⁴ Appendix 31.2 to the appellant's statement of case

³⁵ Appendix 31.12 to the appellant's statement of case

- removal of waste material from the bank that had been dumped by a different boater'. The Council says that the photographs show a different boat on the part of Castle Mill Stream where Asterix was usually moored.
64. SCW claims that their boat can be seen in the photographs but, either way, they only show part of the site and not that Asterix was away altogether. They do not show the use that any boat was moored for – or a probable 'cessation of the use'. For those reasons, and since SCW might in any event have lived on the site for ten years by December 2015, the photographs do not count for or against the appeal.
65. The Council suggests that: '...the Oxford Mail [article of] June 2014 includes evidence that the five to ten new boats only appeared "recently". This evidence actually suggests that the use of the Site has been transient.' That is a misreading of the article³⁶ which in fact says: 'Another resident...who has lived in Jericho for 66 years, said: "There are two elderly narrowboats which have been there for ages, but these [five] new boats have only recently arrived'. I see nothing in that or any other newspaper clipping to undermine SCW's claim.
66. The letter that was sent to the site occupiers by Thames Valley Police in December 2015 does not describe the nature or continuity of their use of the land, but also does not make SCW's version of events less than probable. I have not seen the August 2017 letter from a Jericho ward councillor but, even if that can be read as suggesting that boats had only been on the site for three years, the Council had been aware of the land being used for residential moorings since at least 2009. The same councillor was quoted in the Oxford Mail article of 2 March 2012 that was headed 'Council acts on illegal boaters'.
67. The Council notes that, since the site is not set up for permanent residential use, the occupiers need to leave the site on their boats in order to access basic services. Indeed, the OBDANA states that 'some boat dwellers [in Oxford] access water using a shared tap some distance from the mooring'. However, any unlawful residential use of a building is not normally ceased for the purposes of s171B(3) when the occupier goes shopping, to work or even, perhaps, on holiday. The use of a Gypsy caravan site is not necessarily ceased when the occupiers travel.
68. The 'fact and degree' principle must apply if and when boat occupiers leave their mooring to access some service – even if they travel on the boat itself³⁷. The essential question is, if the Council had made a site visit on any given day, would they probably have seen a 'liveaboard' boat or domestic activity or paraphernalia so that they could have enforced against the residential use.
69. The Council accepted in its statement of case that 'on the evidence it is likely that [SCW] has been on a residential boat and has had a presence on the Site in excess of ten years. The Council also suggests that 'the evidence shows that [SCW's] presence has been sporadic' – but that claim seems to be inferred from the 2015 photographs, the lack of Council Tax or other records, and the fact that boats 'come and go', not evidence of SCW being absent. I do not doubt that SCW and other occupiers moved their boats but that general remark has less precision than the sworn statements and other evidence which weigh in SCW's favour.
70. I am satisfied that, in the ten (plus) year period prior to the LDC application, SCW was living and present on the site when other people moved to Castle Mill Stream or nearby houses or moorings. SCW was living and present on the site when other people wished to contact them or simply walked along the towpath. SCW was living and present on the site when the Council investigated the use in May 2009 and it is

³⁶ Appendix 32.3 to the appellant's statement of case: 'Boat People in Land Grab', Oxford Mail, 18 June 2014.

³⁷ And even if the way that the service is accessed is unlawful under separate legislation.

probable, therefore, that the same would have been true if the Council had taken enforcement action at any other time in the period.

71. I find that, on the balance of probabilities, SCW had used the site for the permanent residential mooring of a boat without substantial interruption for at least ten years by the time of the LDC application.

Other Moorings

72. The Council says that, when they began enforcement action, 'the majority of [the] vessels were either abandoned, wrecked or merely stored at the site'³⁸. It is not difficult to infer that residential boats could have been there in the minority. I find it probable that the use of the site for the permanent residential mooring of more than one boat started before and continued after 15 September 2010:

- SCW's sworn statement includes that 'while I have been here other boaters have come and gone, including one who unfortunately fell in and drowned in 2008'³⁹. The occupier of an off-site boat, MJD, recalled the same tragedy in their sworn statement and said that 'there were one or two liveaboard boats moored on Castle Mill Stream even' in 2002 when they started conducting guided tours along the towpath⁴⁰.
- SHa sets out in their sworn statement that they occupied 'the boat known as 'Just Chillin' from 2009 to 2015, moored on Castle Mill Stream, opposite Whitworth Place...[as] my sole residence during this period'⁴¹. SCW also stated that SHa 'lived on a narrowboat just downstream from 2009 to 2015'.
- CJG swears that 'although boats have come and gone, there have been at least 2 boats used as primary or sole residences during that time' since they moved to the area in 2009⁴².
- LNS lived on a boat at Walton Bridge Moorings between 2005 and 2014 and swears that, during that time, they 'were friends with the other boaters living on the Millstream namely [SCW] and [SHa]'. LNS also says that ECP, who was their neighbour at Walton Bridge, has lived at the site since 2015. LNS has visited ECP at the site since⁴³.
- The occupier of a nearby house and former local councillor, SD, submitted a sworn statement that they have lived in the area for 33 years and 'boaters...have lived on the Castle Mill Stream for as long as I can remember'⁴⁴.
- EA, who has lived on a boat on the Oxford Canal since 1993, swore that 'there have always been other boaters [as well as SCW] living on the stream'⁴⁵.
- Unsworn letters from local residents suggest that people have been living on boats on Castle Mill Stream 'for at least a decade', 'since at least the 1990s' or for 'well over 10 years', 'more than 2 decades' or 'twenty odd years'. The 'boaters' are seen as 'long...part of the Jericho community'⁴⁶.
- As quoted above, the Council's letter of 15 May 2009 referred to 'boats' plural.

³⁸ Paragraph 6.26 of the Council's statement of case.

³⁹ Appendix 5 to the appellant's statement of case.

⁴⁰ Appendix 30.8 to the appellant's statement of case.

⁴¹ Appendix 28 to the appellant's statement of case.

⁴² Appendix 30.4 to the appellant's statement of case.

⁴³ Appendix 30.5 to the appellant's statement of case.

⁴⁴ Appendix 30.6 to the appellant's statement of case.

⁴⁵ Appendix 30.9 to the appellant's statement of case.

⁴⁶ Quotes from appendices 31.4, 31.3, 31.7, 31.13 and 31.1 to the appellant's statement of case.

73. Other documents, such as Network Rail's application on the Land Registry's FR1 form⁴⁷, correspondence between Council officers and the appellant⁴⁸, the OBDANA⁴⁹ and media articles⁵⁰ do not show in themselves but add weight to the evidence that the use began and continued from prior to 15 September 2010.
74. For example, it is said on the FR1 form that 'the property is currently squatted...we have been informed by Oxford City Council that some of the boats have been in occupation since 2000...' I have not seen any Council document which might be the source for that claim and the appellant has not shown that 'boats' plural have been moored on the site for permanent residential use since 2000. However, the FR1 form is consistent with the claim that SCW moved to the site then.
75. Similarly, the OBDANA referred to the 'Unlawfully Moored Boat Enforcement Group (UMBEG)' – and the article from the Oxford Mail dated 2 March 2012 quoted a 'City Council spokesman' as saying 'the Umbeg meetings were set up in 2010 by the enforcement agencies to tackle unlawfully moored boats'. It is not said that the Umbeg meetings were set up before 15 September 2010 to tackle unlawfully moored boats in residential use on Castle Mill Stream (and other waterways) but that is possible if not probable, given the Council's letter of 15 May 2009.
76. However, none of the above documents tell me the number of boats or level of residential use at the site on any given date. They certainly do not show that the land was used without substantial interruption for the permanent residential mooring of five boats. Thus, it is necessary to look at the evidence relating to other named occupiers.
77. As noted above, SHa swore that they lived on the site from 2009 to 2015 – and that claim is backed by SCW and, to an extent, LNS. The claim is also backed by an existing occupier, BP, who swears that they moved to Castle Mill Stream in June 2014 and that SHa was living there then⁵¹. In turn, there are sworn statements from another existing occupier (JPRM), from the occupier of an off-site boat (AGJ) and from BP's sister to corroborate that BP moved to the site in June 2014⁵². BP is clear that they have lived on the site since that time; AGJ and BP's sister also state that BP has used their boat ('Corrie') as their sole residence since June 2014.
78. None of that evidence is contradicted by the Council who, as with SCW, seem to rely on generalised submissions regarding failure to pay Council Tax or that boats have come and gone. SHa and BP lived in different boats but the appellant is right that the question is the continuity of the residential use. I find it probable that SHa and BP both moored boats on the site for residential purposes, their moorings overlapped and so, between them, they carried out the use for more than ten years without substantial interruption. To put it another way, by 15 September 2020, the appeal stretch of Castle Mill Stream had been used for ten years for the permanent residential mooring of SCW's and another household's boat.
79. However, it has not been shown that any other occupiers – together or separately – have used the site for residential purposes for ten years.
- There are references in several documents to a former occupier named ESt but there is no information as when they moved to the site, how long they stayed

⁴⁷ Appendix 33 to the appellant's statement of case.

⁴⁸ For example, appendices 9.1 and 23 to the appellant's statement of case.

⁴⁹ Appendix 33 to the appellant's statement of case.

⁵⁰ Appendix 32 to the appellant's statement of case. The Oxford Mail article of 15 April 2019 states how long each occupier has lived on the site but does not give the source or delve into the continuity of use.

⁵¹ Appendix 4.4 to the appellant's statement of case.

⁵² Appendices 4.3, 30.3 and 30.10 to the appellant's statement of case.

here or whether they lived here continuously. The same applies in respect of the person who drowned in 2008.

- Whether their boat or place of work is now their main residence, JPRM only claim to have moved to the site in January 2014⁵³.
- Whether their boat or cottage in Wales is their main residence, ECP only claims to have moved to the site in June 2015⁵⁴.
- The appellant has lived on the site since September 2018. The former occupier of the same boat, DH, only lived on the site from 2014 – and they left some four months before the appellant moved in⁵⁵.

80. I find that the time for taking enforcement action had only expired by the date of the LDC application, on the balance of probabilities, in relation to the permanent residential mooring of two boats; that is consistent with the evidence from CJG and quote from a long-term resident in the Oxford Mail article of 18 June 2014.

Section 171B(4) of the TCPA90

81. S171B(4)(b) provides that the preceding subsections, being s171B(1)-(3), do not prevent a local planning authority from taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, they have taken or purported to take enforcement action in respect of that breach.
82. S171A(2) is clear that the issue of an enforcement notice constitutes taking enforcement action, and so the effect of s171B(4)(b) is that a local planning authority has four years from the date of issuing one enforcement notice within which to issue another. Thus, the Council argues that an LDC could not be granted in this case because, on the date of the application, four years had not elapsed since the 2020 EN was issued on 18 August 2020 and 'the time for enforcement action' had not expired for the purposes of s191(2)(a).
83. S171B(4) exists to protect the position of local authorities where a notice is issued before the expiry of the relevant four or ten year period, but there is a risk of the development subsequently becoming immune from enforcement action – perhaps because the notice proves defective and needs to be withdrawn and re-issued, or the four or ten year period might expire during appeal proceedings.
84. If a second notice is issued under s171B(4) and appealed on ground (d), the question will be whether enforcement action could be taken when the Council first acted or purported to act, that is, on the date of issue of the first notice. S171B(4) cannot be read as meaning that four years must be added, from the date of any enforcement notice issued, to the four or ten year periods described in subsections (1)-(3). It cannot be read as meaning that a use cannot be found lawful if and just because a notice was issued less than four years ago.
85. S171B(4) says that (1)-(3) 'do not prevent' the taking of further enforcement action; under s191(2)(a), the question is not whether action is prevented but whether it may be taken. S171B(3) states that that 'no enforcement action may be taken after the end of the period of ten years...' I have found that use for two permanent residential moorings had been carried out for a period of ten years by the time of the LDC application on the balance of probabilities. It follows that the

⁵³ Appendix 4.3 to the appellant's statement of case.

⁵⁴ Appendix 4.2 to the appellant's statement of case.

⁵⁵ Appendices 4.1 and 29 to the appellant's statement of case.

time for enforcement had then expired and no action may be taken for the purposes of s191(2)(a).

86. As a side note, the Council would have no reason to issue another notice, and it would make no difference if they did because the first has come into effect and may be enforced in any event. But even if that was not the case, I am satisfied that, for the purposes of s191(2)(a), the time for enforcement will have expired if, on the date of an LDC application, the use or development is immune under s171B(1)-(3). The effect of s171B(4) is that the local authority is not prevented from issuing a second notice if the first was issued before immunity was accrued.

Conclusion on s191(2)(a)

87. I find that the use of the site for a mixed use for railway and waterway amenity purposes and the permanent residential mooring of two boats had taken place for a continuous ten year period by the time of the LDC application. By 15 September 2020, the time for enforcement action in respect of the use had expired under s171B(3) even if the Council is not prevented, under s171B(4), from taking further action in the four year period from the date of issue of the 2020 EN.

OVERALL CONCLUSION

88. I conclude that, while the use for which an LDC is sought would constitute a contravention of the requirements of the 2020 EN, that notice was not in force at the time of the LDC application. There is no conflict with s191(2)(b) of the TCPA90.
89. I also conclude that, at the time of the LDC application, the mixed use for railway and waterway amenity purposes and the permanent residential mooring of two (but not five) boats had, on the balance of probabilities, taken place without substantial interruption for ten years. To that extent, the use was lawful within the meaning of s191(2)(a) of the TCPA90 because the time for taking enforcement action had expired as described under s171B(3), even if the Council is not prevented from issuing a second notice under s171B(4).
90. The Council does not dispute that the residential use was facilitated by the associated placement of up to two mooring pins and one gangplank per boat. I conclude that the Council's refusal to grant an LDC was not well-founded and the appeal should succeed to the extent described. I will exercise the powers transferred to me under s195(2) of the TCPA90 to grant a certificate under s191.
91. For the avoidance of doubt, it is not for me to address whether any proposal to increase the number of moorings from two to five – or to any other number – would represent a material change of use by intensification.

Jean Russell

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 15 September 2020, the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate would have been lawful within the meaning of s191 of the Town and Country Planning Act 1990 for the following reasons:

The mixed use of the land for railway and waterway amenity purposes and the permanent residential mooring of two boats with the associated placement of up to two mooring pins and one gangplank per boat did not constitute a contravention of requirements of an enforcement notice then in force at the time of the LDC application on 15 September 2020.

At the time of the application, no enforcement action could be taken in respect of the mixed use of the land for railway and waterway amenity purposes and the permanent residential mooring of two boats with the associated placement of up to two mooring pins and one gangplank per boat, for the purposes of s191(2)(a) of the Town and Country Planning Act 1990 because, on the balance of probabilities, the mixed use had taken place without substantial interruption for a period of ten years as described under s171B(3) of the Town and Country Planning Act 1990.

Signed

Jean Russell

INSPECTOR

Date 22 September 2021

.....

Reference

APP/G3110/X/21/3272418

First Schedule

The existing use of land for a mixed use for railway and waterway amenity purposes and the permanent residential mooring of two boats with the associated placement of up to two mooring pins and one gangplank per boat.

Second Schedule

The eastern bank and eastern half of the stream bed of Castle Mill Stream, from opposite Combe Road to the end of William Lucy Way, Jericho, Oxford, OX2 6EQ

NOTES

This certificate is issued solely for the purpose of s191 of the Town and Country Planning Act 1990. It certifies that the operation described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful on the certified date and was not liable to enforcement action under s172 of the TPCA90 on that date.

This certificate applies only to the extent of the operation described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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 s192(4) of the TPCA90 which states that the lawfulness of a specified operation is only conclusively presumed where there has been no material change before the operation is 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: 22 September 2021

by Jean Russell MA MRTPI

Land at Eastern Bank and Eastern half of the stream bed of Castle Mill Stream, from opposite Combe Road to the end of William Lucy Way, Jericho, Oxford, OX2 6EQ

Reference: APP/G3110/X/21/3272418

NOT TO SCALE

Site Map

Ordnance Survey map reference SP5006NW
Scale 1:1250
Administrative area Oxfordshire : Oxford



