



Appeal Decision

Hearing and site visit held on 21 September 2021

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 November 2021

Appeal Ref: APP/G2815/C/19/3227613

The Moorings, Elton Road, Fotheringhay, Northamptonshire PE8 6RJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Graham Bail against an enforcement notice issued by East Northamptonshire District Council.
- The enforcement notice was issued on 1 April 2019.
- The breach of planning control as alleged in the notice is without planning permission the construction of a car parking area and trackway, various structures and the installation of five boat moorings in the approximate positions marked [P, X, M1, M2, M3, M4 and M5] on the attached site plan, and the change of use of the Land not in the course of navigation to residential use, the hire of boats and the long term mooring of boats.
- The requirements of the notice are:
 - (i) Cease the uses (including: Boat hire business and long term boat mooring) of the Land for the mooring of boats not in the course of navigation and allow the use of the land to revert to its authorised mixed use as agricultural land and/or for incidental mooring in the course of navigation.
 - (ii) Cease the residential use of the section of Land (riverbed) marked by a Yellow boundary on the attached site plan.
 - (iii) Remove all boat mooring structures from the Land (except for the riverbank earthwork moorings in the approximate positions marked M1 and M2 on the attached site plan), including all boardwalks, platforms, poles, railings, steps, entrance archway etc and all associated paraphernalia, and return the Land to its condition prior to the development.
 - (iv) Remove the hard surface track and the hard surface parking area marked with a red 'P' on the attached Site Plan (shown in photograph P1, Appendix A), and return the Land to its condition prior to the development.
 - (v) Remove all structures not related to the agricultural use, including the timber shed, decking and wood store in the approximate position marked by a red 'X' on the attached Site Plan and identified as S1 and S2 of photograph M1c (Appendix A), and return the Land to its condition prior to the development.
 - (vi) Cease the use of Land for the storage of items, other than for the purpose of agriculture.
 - (vii) Remove all resultant debris from steps (i) to (iv) from the land.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld with corrections and variations as set out below in the Formal Decision.

Preliminary matters

1. Since the enforcement notice was issued, East Northamptonshire District Council has merged with parts of Northamptonshire County Council to form

North Northamptonshire Council. This does not affect the enforcement notice or appeal.

2. There is no agreed terminology relating to the various types of boat moorings. For those relevant to this appeal, I shall adopt the following wording and definitions:
 - Course of Navigation – travelling boats being moored for short periods, such as overnight
 - Home/leisure – boats being moored long term, where people live aboard occasionally, such as weekends or holidays, and which are used for travelling (not an occupiers' main residence)
 - Residential – boats being moored long term, where people live aboard full time and travel for servicing and short periods (occupiers' main residence)
3. While an appeal on ground (b) was not originally lodged, the appellant claims, in their statement of case, that part of the matters alleged have not occurred. The Council has had time to consider this matter in detail as set out in their Delegated Enforcement Report and subsequent appeal statement. No injustice would arise from my consideration of the ground (b) arguments and I will proceed on that basis.
4. There is no dispute that the land was in agricultural use at the time of the appellant's purchase or that the riverbank can be used for mooring boats used in the course of navigation.

The notice

5. There is no dispute that the land is used for agriculture and the mooring of boats, which may or may not be occupied as a main place of residence. The allegation includes "*change of use of the Land not in the course of navigation to residential use*". While the appellant understands that it is the mooring of boats that the notice relates to, this is not clearly spelt out. For precision, the allegation should be corrected to refer to the mooring of boats for residential and home/leisure use. Both appeal parties evidence addresses these points, which were also the subject of discussion at the Hearing.
6. For clarity, the part of the allegation relating to the use of land should read "*the material change of use of the land to a mixed use of agriculture, the mooring of boats for residential and home/leisure use and the operation of a boat hire business*". No injustice would arise from my correction of the notice and I will proceed on this basis.

Appeal on ground (b)

7. To succeed on this ground the appellant should show, on the balance of probability, that the boat hire business did not occur.
8. The appellant claims that the boat hire business was only a marketing exercise and that boats were never hired out. The evidence shows that the business was registered with Companies House and that the business was not formally closed until after the notice was issued. Regardless of whether any boats were hired out, the boat hire business did occur as a matter of fact.

9. For this reason, the appeal on ground (b) fails.

Appeal on ground (c)

10. The appeal on this ground is that, if the operational development matters have occurred, they do not constitute a breach of planning control. The onus of proof is on the appellant.
11. I saw that the timber shed, located approximately in position 'X' on the site plan, contained items such as strimmers, fishing tackle, fuel cans, and toolboxes. While some of the contents of the shed could be put to some incidental agricultural use, taken in the round the contents are akin to those likely to be found in any domestic outbuilding. The appellant claims the land adjacent to the shed is being used by the occupier of mooring M1 for horticultural purposes. The land was however mainly grassed and while I saw horticultural squares and plant pots, they were not in use. I therefore find it less than probable that the shed is being used for agricultural purposes. The shed is therefore development requiring planning permission, which has not been granted. The erection of the shed constitutes a breach of planning control.
12. The other structures to be removed includes the entrance archway, which I saw to be attached to gates and fencing. The archway, gates and fencing have been erected as a single operation and could benefit from express consent having regard to Article 3(1) and Class A, Part 2, Schedule 2 of the GPDO¹ relating to minor operations. Article 3(5) of the GPDO however states that "*The permission granted by Schedule 2 does not apply if – (b) in the case of permission granted in connection with an existing use, that use is unlawful*".
13. In this case, the archway, gates and fencing have been erected as a means of delineating mooring M5. It is yet to be determined whether the use of mooring M5 is lawful. As such, it is not yet clear whether Article 3(5) applies. I will therefore conclude on this matter and the ground (c) appeal following my consideration of the ground (d) appeal.

Appeal on ground (d)

14. To succeed on this ground, the appellant should show that the matters in the corrected allegation were lawful at the date the notice was issued. The onus of proof is on the appellant to show, on the balance of probability, that the construction of a car parking area and trackway, various structures and the installation of five boat moorings, and the material change of use of the Land to a mixed use of agriculture, the mooring of boats for residential and home/leisure use and the operation of a boat hire business began on or before the material date.
15. There is no dispute that a change of use of the land has occurred or that the operational development facilitates agriculture and boat mooring activities. As the operational development facilitates the change of use, s171B(1) does not apply. The relevant time limit for a change of use is set out in s171B(3) and is 10 years. The material date is 1 April 2009 and any continuous 10-year period is relevant.

¹ Town and Country Planning (General Permitted Development) Order 2015 as amended

The planning unit

16. The dispute relates to when the change of use occurred, having regard to whether there is more than one planning unit and whether the interchange between residential and home/leisure uses of the moorings is material.
17. Where the use of land is determinative, it is necessary to first identify the extent of the planning unit. The Council argue that each mooring represents a separate planning unit, whereas the applicant argues that the moorings occupy one planning unit in mixed use. The land identified in the notice however encompasses a greater area than that occupied by the moorings and it is this land that needs to be considered.
18. The Courts held in *Burdle*² that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. The concept of physical and functional separation is key, and Bridge J suggested 3 broad categories of distinction:
 - a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
 - b) A single planning unit that is in mixed use because the land is put to 2 or more activities and it is not possible to say that one is incidental to another; and
 - c) The unit of occupation comprises 2 or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
19. The land is used by the appellant for agriculture, the mooring of his own residential boat and the leasing of boat moorings for residential and home/leisure purposes. The residential mooring of the appellant's boat could be incidental to his agricultural activities on the land. Moorings not occupied by the appellant are leased on a 6-month basis. Tenants are required to move their boats away from the land for a minimum of 2 weeks within each 6-month period. Agriculture and the mooring of boats for residential and home/leisure use, on a commercial basis, are not activities that are incidental to one another. The access track and car parking area are used in connection with agriculture and boat mooring activities. While there are fences within the land, I saw that these mainly delineate the public right of way route through the land and enclose the area where poultry would normally be kept.
20. While the moored boats may contain facilities for day-to-day private domestic existence, not all boats are permanently occupied for residential purposes. The moored boats are all fully operational and capable of travel. The boats are also self-contained in respect of fuel, power, water and waste, furthermore they have to travel to refuel, take on water and dispose of waste. I therefore find the mooring of boats to be a use of land.
21. From the definitions I have provided for the two types of boat mooring taking place, the length of time boats would be moored in association with either activity would be long term. Both mooring activities would result in short to

² *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

mid-term periods when the moorings would be vacant. Both activities would generate comings and goings of associated people and vehicles. While the moored boats are occupied, the adjacent land would be used for incidental and ancillary purposes, such as vehicle parking and leisure/domestic activities. Therefore, I find no material difference in the character and appearance of the moorings, regardless of which mooring activity is taking place. As there is no material difference between the mooring of boats for residential or home/leisure purposes, the interchange between these 2 purposes would not of itself constitute a material change of use in the land.

22. While the area of land adjacent to the riverbank is only used for the mooring of boats, other activities incidental to that use take place within other parts of the land. Agriculture and boat mooring may be 2 distinct activities, however other areas within the land are used for purposes incidental to both those activities, such as the access track and car park. While there may be a functional separation between the agricultural and boat mooring activities, there is no definitive physical separation. For these reasons, I find that the land is one planning unit, in mixed use for agriculture and the mooring of boats for residential and home/leisure uses.

Time when the mixed use began

23. The Environment Agency evidence dated 20 November 2006, shows their agreement to the creation of 2 visitor and overnight moorings on the land. I have no reason to doubt the appellant's evidence showing that the EA's agreement was for moorings M1 and M2 or that the works to create these moorings occurred in 2007.
24. At that time the appellant also owned the adjacent agricultural land. The appellant's evidence shows that he used these 2 moorings for his own boat, which he occasionally lived aboard to oversee his livestock. During this time the appellant had a permanent home elsewhere. This amounts to boat mooring on a home/leisure basis.
25. The creation of moorings M1 and M2 introduced boat moorings on to the land. However, as the appellant farmed a larger area of land at that time and the boat moorings were used by the appellant for his own home/leisure purposes, I find this boat mooring activity to be incidental to the agricultural activity that the appellant was undertaking.
26. The appellant's response to the planning contravention notice, confirms that 3 further moorings were leased/created between October 2011 and May/June 2012. In 2012 the appellant sold the adjacent agricultural land, retaining only that which is identified in the notice. The appellant also moved his boat to mooring M5 in 2012, after which his boat was moored on a residential basis. The appellant also claims that mooring M1 was leased from 2010.
27. During 2010 and May/June 2012 additional boats, used for residential and home/leisure purposes, were moored on the land on a leasehold basis. The comings and goings of additional people, their vehicles and boats, unconnected with the agricultural use of the land, amounts to a significant change in the character of the activities being carried out. A material change of use to a mixed use of the land therefore occurred as a result of the creation of moorings M3, M4 and M5. As this took place during May/ June 2012, it occurred after the material date. The appellant has failed to show, on the balance of probability,

that the mixed use for agriculture and the mooring of boats for residential and home/leisure use began on or before 1 April 2009.

28. Even if I were to accept that the lease of mooring M1 in 2010 resulted in the material change of use to the mixed use, this also occurred after the material date. Ten years of uninterrupted mixed use for agriculture and the mooring of boats for residential and home/leisure use has not been shown to have occurred. The mixed use for agriculture and the mooring of boats for residential and home/leisure use has not achieved immunity from enforcement action due to the passage of time.

Moorings M1 and M2

29. As I have found that the creation and use of moorings M1 and M2 in 2007 did not amount to a material change of use, the engineering operations would fall to be considered under the time limits set out in s171B(1). Moorings M1 and M2 have existed for more than 4 years and are immune from enforcement action. The allegation shall be corrected to reflect this limited success.

Conclusion on ground (d)

30. For the reasons given above, the appeal on ground (d) succeeds in respect of moorings M1 and M2 but fails in all other respects.

Conclusion on ground (c) appeal

31. I have found that the shed is not in agricultural use. Furthermore, as I have found the material change of use of the land to be unlawful, Article 3(5) of the GPDO applies, and the archway, gates and fences do not benefit from express planning permission.

32. The appeal on ground (c) fails.

Appeal on Ground (f)

33. Due to my correction of the allegation, the wording of step (i) needs to be varied to refer to ceasing the use of moorings M3, M4 and M5 for the mooring of boats for residential and home/leisure use and ceasing the operation of the boat hire business. Step (ii) is also no longer relevant.
34. The access track and car park are used in connection with both the agricultural and boat mooring uses. A means of access would still be required to facilitate the lawful use of the land and it would not be uncommon for an associated parking area to be provided. As such, I find requiring the removal of the hard surfaced track and hard surfaced parking area to be excessive.
35. The appellant suggests that the boardwalks, platforms, poles, railings and steps could be used in connection with other river related activities, such as fishing. Why such activities could not be facilitated without the unauthorised development has not however been demonstrated. I do not therefore find the need to remove these items excessive.
36. The ground (f) appeal succeeds to this limited extent.

Overall conclusion

37. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the

enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that limited extent.

Formal decision

38. It is directed that the enforcement notice be corrected by:

The deletion of the words "without planning permission, the construction of a car parking area and trackway, various structures and the installation of five boat moorings in the approximate positions marked [P, X, M1, M2, M3, M4 and M5] on the attached site plan, and the change of use of the Land not in the course of navigation to residential use, the hire of boats and the long-term mooring of boats" and the substitution of the words "without planning permission, the construction of a car parking area and trackway, various structures and the installation of 3 boat moorings in the approximate positions marked [P, X, M3, M4 and M5] on the attached site plan, and the material change of use of the Land to a mixed use of agriculture, the mooring of boats for residential and home/leisure use, and the operation of a boat hire business" in section 3. THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL.

And varied by:

The deletion of the words "(i) Cease the uses (including: Boat hire business and long term boat mooring) of the Land for the mooring of boats not in the course of navigation and allow the use of the land to revert to its authorised mixed use as agricultural land and/or for incidental mooring in the course of navigation." and the substitution of the words "cease the use of moorings M3, M4 and M5 for the mooring of boats for residential and home/leisure use and cease the operation of the boat hire business", the deletion of steps (ii) and (iv), and the renumbering of steps (iii), (v), (vi) and (vii) as (ii), (iii), (iv) and (v) in section 5. WHAT YOU ARE REQUIRED TO DO.

Subject to the correction and variations the appeal is dismissed, and the enforcement notice is upheld.

M Madge

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

David Mead	Partners in Planning & Architecture
Graham Bail	
Nick Bail	
Fiona Challis	

FOR THE LOCAL PLANNING AUTHORITY:

Jack Smyth	Of Counsel
Chris Hancox	Former Planning Enforcement Officer for North Northamptonshire Council
Sue Scott	Principal Planning Enforcement Officer, North Northamptonshire Council

INTERESTED PERSONS:

Richard Donoyou

Oliver Nicholson

DOCUMENTS

- 1 Email exchange between Graham bail and the Environment Agency dated 23 May 2011
- 2 Email exchange between ENC Revenues and Sue Scott