



Appeal Decision

Inquiry held on 16-18 April 2024

Site visit made on 18 April 2024

by Peter Willows BA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th June 2024

Appeal Ref: APP/A2280/C/23/3315311

Land to the south of Upnor Road, nearby Upnor public convenience, including foreshore and bed of the River Medway, Lower Upnor, Rochester, Kent

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeal is made by Kingfisher Access Ltd against an enforcement notice issued by Medway Council.
 - The notice was issued on 22 December 2022.
 - The breach of planning control as alleged in the notice is, without the benefit of planning permission:
 - a) the material change of use of the land for the mooring of a water borne vessel used for residential purposes.
 - b) the operational development consisting of piles being driven into the riverbed of the River Medway within the land to enable the mooring of water borne vessels and the construction of a jetty and steps to create an access onto the riverbank on the land.
 - The requirements of the notice are:
 - (i) Cease the use of the Land for residential purposes
 - (ii) Cease the use of the Land for the mooring of water borne vessel(s)
 - (iii) Remove the large water borne vessel from the Land
 - (iv) Remove all piles from the riverbed within the Land and all protruding metal posts
 - (v) Remove the jetty from the Land and all materials used in its construction
 - (vi) Remove all ramps, stairs, and handrails associated with the constructed access to the riverbank and/or mooring within the Land
 - (vii) Remove all resultant debris and materials from compliance with the above steps from the Land.
 - The period for compliance with the requirements is 6 months.
 - The appeal was made on the grounds set out in section 174(2)(a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
-

Decision

1. It is directed that the enforcement notice is varied by:

- The deletion of requirements (i) and (ii) from section 5 of the notice (What you are required to do) and their replacement with the following new requirement (i): 'Cease the use of the land for the mooring of a water borne vessel used for residential purposes'.
- The deletion of 'six calendar months' from section 6 (Time for compliance) and its replacement with 'nine calendar months'.

2. Subject to those variations the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

3. All evidence at the inquiry was taken on oath/affirmation.
4. The Council proposes a change to the requirements of the notice. I deal with this along with other matters concerning the requirements of the notice under ground (f).
5. Although the appeal was made on the basis of the grounds of appeal set out above, they include the argument that no material change of use has occurred. That seems to me to fall naturally within the ground set out at s174(2)(b) of the Act, which is that the matters stated in the notice have not occurred. I have therefore approached the appeal on the basis that there is a ground (b) appeal. It does not, however, make any difference to the substance of the points raised, and no party is prejudiced by my approaching the appeal in that way.

Grounds (b), (c) and (d)

6. It is common ground that the operational development required planning permission. The appellant's case on grounds (b) (c) and (d) relates only to the use of the land and there are a number of strands to it. The case on these grounds is interlinked and I will deal with all 3 grounds together. There are 3 elements to the appellant's case:
 - that the use alleged in the notice is not materially different to the agreed lawful use for a general mooring;
 - that the use is lawful anyway because it existed before 1 July 1948 (the Appointed Day);
 - that, even if it did not take place before the Appointed Day, the use would have acquired lawfulness/immunity from enforcement action due to the periods when it subsequently took place.
7. Before addressing the specific arguments, however, I will set out my findings regarding the relevant history of the site during key periods.

Pre-July 1948

8. It is common ground that the land has been used as a wharf since before 1948. In fact, the site is clearly labelled as a wharf on maps dating back long before then.
9. The question of whether it was used for the mooring of a water borne vessel used for residential purposes is disputed. The appellant argues that there was such a use. In support of this I am referred to old photographs, a lease document, and information relating to the training ship *Arethusa*, which was moored close to the appeal site prior to 1948 (probably since 1933, judging by licensing records¹).

¹ See appellant's statement of case, figs 48 and 49

10. I am told, and it is not disputed, that the *Arethusa* was used by an organisation called Shaftsbury Homes and Training Ship ('the Society') for training destitute boys for the Royal and Merchant navies. The boys apparently lived on the ship but, since it was not moored within the appeal site, that is of limited relevance.
11. The wharf at the appeal site was also used by the Society, as the licensing records show. Additionally, photographs show large boats moored there prior to 1948.
12. It is possible that there were people living on these boats. For the appellant, Mr Collins was clearly of that view. For my part, I accept that larger boats are more likely to have living accommodation than smaller ones. It is possible, as was suggested, that people lived on boats at the wharf in connection with the use of the *Arethusa*. However, in my view that is to depart too far from what the evidence actually shows towards the realms of speculation. In truth, I can deduce nothing more from the evidence than that, pre-1948, the wharf was used by the Society and large boats were sometimes moored there. It does not show that boats moored there were used for residential purposes, occasionally or continuously, even if they contained living accommodation.
13. Of course, the passage of time and the imperfections of older records make it difficult to establish the precise position prior to 1948, and a reasonable overall view must be taken on such information as is available. However, the burden of proof falls on the appellant and, in my judgement, it has not been established that the use claimed took place prior to July 1948, on the balance of probability.

1951-1961

14. There is significantly more evidence relating to this period, during which there was a houseboat – '*Viper*' – moored at Lower Upnor. The first question is whether it was definitely moored at the appeal site, rather than some neighbouring land. While there is nothing before me to put that point beyond doubt, I have been provided with various photographs said to show *Viper* at the wharf. I have studied these carefully and, while none is conclusive, it appears probable to me that the boat was moored at the appeal site. Whether or not the whole of the appeal site was used in connection with *Viper* is impossible to say.
15. There seems to me little doubt that *Viper* was occupied as a home continuously for a significant period. An extract from the 1989 book '*The Maritime Paintings of John Chancellor*' indicates that John Chancellor and his wife moored *Viper* at the appeal site and moved onto it as their home around February 1951. A publication titled '*Viper Gets a Washing*' confirms that the Chancellors lived on *Viper* until 1961. Medway archive documents show that there was protracted consideration of the issue of 'house refuse' for *Viper* and other barges at Lower Upnor in 1955². The need to address the issue of house refuse is a clear indication that the barges were residentially occupied, and suggests a degree of permanence.

² Collins D6

1961-1985

16. It appears that Viper remained at Lower Upnor when the Chancellor's left in 1961. Electoral records refer to Viper between 1963 and 1985³ (with qualifying dates between 1962 and 1983). There are 6 entries in the register during this period, relating to a number of occupiers.
17. While the records only ever show who was registered to vote on a particular day, viewed as a whole they are indicative of residential occupation of the boat during the period they cover. There is no evidence to demonstrate clearly that the boat remained at the appeal site, and so I have some doubt on that point. However, there is nothing either to show that it was moved. The entries indicate that it was in Upnor, with references to 'Upnor Foreshore' in the later entries. Since Upnor is a modest settlement with only limited mooring opportunities, it seems to me more likely than not that Viper remained at the appeal site during this period.
18. A lease document⁴ from December 1961 shows that part of the appeal site was leased to Strood District Council in order to erect public conveniences. The building still stands on the appeal site and I understand that it was in use as public toilets until around 2019. I don't know precisely when the toilets were constructed, but the lease and the appearance of the building suggests that it was in the 1960s.

1985-2022

19. There is no substantive evidence before me to show the use of the site between the mid-1980s and when the current houseboat was moored at the site in September 2022. It seems to me that there would, in all probability, have been a reasonable amount of evidence available if the site had been used for the mooring of a boat for residential purposes during this period, particularly in more recent years. There is no claim that it was so used. It seems highly unlikely, therefore, that the use continued beyond the mid-1980s. A brief Facebook conversation submitted by the appellant suggests to me that people were struggling to remember the details of houseboats in the area due to the passage of time, which would be consistent with that. I understand that the public toilets remained in use on part of the site until around 2019.

Whether a material change of use has occurred

20. It is agreed that boats can be lawfully moored at the site and that this is a legitimate fallback position.
21. The matter alleged in the notice is 'The material change of use of the land for the mooring of a water borne vessel used for residential purposes'. Is that materially different to the agreed lawful use? *Thames Heliports Plc v London Borough of Tower Hamlets (1997) 74 P & CR 164*, which concerned the application of planning control to a floating heliport on the River Thames, established that, even if there was no physical connection between a structure placed on the river and the riverbed or bank, the use of the structure and the activity which it generates may amount to a material change in use, and thus require planning permission. In *R (KP JR Management Co Ltd) v Richmond LBC [2018] EWHC 84 (Admin)* it was common ground that the use of moorings for

³ Collins D17

⁴ Collins D21

residential use was capable of amounting to a material change in the ordinary and incidental use of the land, and thus potentially may require planning permission. In my judgement, in the circumstances of this particular case, a material change of use has occurred for the following reasons.

22. First, the use of the land involves the permanent and continuous mooring of the houseboat. The houseboat was towed to the site and cannot move under its own steam. It stays at the site and does not move. Nor is its place taken by any other boat. To the extent that it presents a permanent and unchanging scene, it has much in common with a built development. This distinguishes it from a more general mooring, where boats may come and go from time to time.
23. Second, the houseboat at the site – which I am told is typical of its type – is of a distinctive appearance. As I describe elsewhere, its conversion to a houseboat has entailed the construction of a 2-storey wooden addition on the original hull, giving it a distinct and very obviously residential appearance. Since the boat is, in effect, a permanent feature of the site, it has altered the character and appearance of the site.
24. Third, the site includes a grassed area of dry land. This contains a former public toilet building, which is now used, in part, for storage associated with the use of the site. A satellite dish has been added to the land and there is an electrical connection for the boat as well. Thus, the character of the use of the dry land has taken on a residential quality, albeit a limited one when I viewed the site.
25. Overall, these factors mean that the use alleged in the notice is a very distinct use. In my judgement it is materially different from the kind of general mooring that can be inferred from the historic use of the site as a wharf and the character of the use of the land has changed. Accordingly, it cannot be said that there has been no material change of use on this basis.

The pre-1948 argument

26. The requirement for planning permission to carry out the development of land is contained within s57(1) of the 1990 Act. However, in accordance with s57(7), this is subject to Schedule 4, which makes special provision as to land use in 1948. Paragraph 2 of Schedule 4 says:

Where on 1st July 1948 land was normally used for one purpose and was also used on occasions, whether at regular intervals or not, for another purpose, planning permission is not required in respect of the use of the land for that other purpose on similar occasions on or after 6th December 1968 if the land has been used for that other purpose on at least one similar occasion since 1st July 1948 and before the beginning of 1968.

27. However, as I have already indicated, the evidence before me does not show that the site was in use for the mooring of a water borne vessel used for residential purposes, either normally or on occasions, on/prior to 1 July 1948. Accordingly, such use cannot be lawful due to the provisions of Schedule 4, regardless of whether it was subsequently put to any such use. Even if an occasional use had been demonstrated, that would only make such use lawful 'on similar occasions', rather than on a continuous basis.

28. Overall, I am not persuaded that the use acquired lawfulness by virtue of existing at the Appointed Day. It follows from this that the question of whether or not a Schedule 4 use can be abandoned does not need to be considered.

Lawfulness by continuity of use

29. Where there has been a breach of planning control, a use may become lawful due to the passage of time. Here it is argued that lawfulness for the mooring of a water borne vessel used for residential purposes would have been acquired during the period when Viper was moored at the site.

30. The first question is the period of time necessary to acquire immunity. The time limits are set out at s171B of the 1990 Act. The 10 years specified by s171B(3) for 'any other breach of planning control' would now apply to a material change of use such as this. However, the material change of use of land would have acquired immunity from enforcement action after just 4 years at earlier times, in accordance with the Town and Country Planning Acts of 1947 and 1962.

31. As I have already found, it appears clear that the Chancellor family lived on Viper at the appeal site for a 10-year period from around February 1951 until some point in 1961. I don't know the month in which the family moved out, but the precise period is not critical, since a 4-year immunity period would have applied at that time.

32. Overall, I am satisfied, on the balance of probability, that the use was immune from enforcement action at the point when Viper was vacated by the Chancellors in 1961. However, that is not the end of the matter, since such an established lawful use can be lost through abandonment.

Abandonment

33. The courts have established 4 factors to consider when deciding questions of abandonment⁵:

- The period of non-use
- The physical condition of the land or building
- Whether there had been any other use, and
- The owner's intentions as to whether to suspend the use or to cease it permanently.

34. The lack of evidence to show use of the site for residential moorings from the mid-1980s leads me to conclude that such use had ceased by that time. Thus, it appears that the use was not carried out for well over 3 decades prior to the current houseboat being brought to the site in 2022. That is a very considerable period of time.

35. The wharf appears to be in adequate condition and capable of continued use for its intended purpose.

36. As to other uses of the site, it is clear that part of it was used for public toilets for several decades. However, that did not necessarily preclude the use of the

⁵ See *Hughes v SSETR & South Holland DC* [2000] JPL 826 and *Ocado Retail Ltd v Islington LBC* [2021] EWHC 1509 (Admin)

wharf for the mooring of a water borne vessel used for residential purposes. Indeed, it appears quite likely that such use continued until the mid-1980s. There is no evidence before me of any other use taking place on any part of the appeal site.

37. There is little information regarding the intention of the owners of the site once the Chancellors left. Part of it was leased in order to provide the public toilets, so plainly there was no intention for that land to be used in connection with a residential mooring. When the site was sold by The Port of Sheerness Authority (Peel Ports) to the appellant it was described as a wharf, but there is no indication that it was sold as a residential mooring. The valuation obtained by the appellant in March 2022 did not indicate any knowledge that the site could be lawfully used for a residential mooring. Overall, there is nothing to show that the previous owners of the site had any particular intention for the use of the site for residential mooring to resume.
38. Considering the evidence before me as a whole, it appears to me that the use of the site for the mooring of a water borne vessel used for residential purposes had been abandoned by the time the current houseboat was brought to the site. My view is formed in particular by the lack of any indication of such use for a considerable period of time, particularly from the mid-1980s onwards. It is also clear that any such use of part of the site ceased significantly earlier than that when public toilets were built. There is nothing to show any clear intention on the part of the previous owners to resume the use. Thus, I conclude that the most likely position, on the available evidence, is that the use had ceased entirely by the mid-1980s, if not earlier, and was abandoned by the time the current houseboat was brought to the site in 2022.

Conclusion – grounds (b), (c) and (d)

39. I conclude that it has not been demonstrated, on the balance of probability, that the matters stated in the notice have not occurred; that they do not constitute a breach of planning control; or that, at the date when the notice was issued, no enforcement action could be taken against them. Accordingly, the appeals on grounds (b), (c) and (d) fail.

Ground (a)

Main issues

40. By the close of the inquiry the disputed issues had narrowed. The main issues now are:
- Whether this use of the site is consistent with development plan policy relating to development along the River Medway and in the countryside;
 - The effect of the development on the character and appearance of the area; and
 - Whether any harm is outweighed by other considerations, including the lawful (fallback) use of the site and any general need for residential moorings in the area or any such personal need.

Planning Policy for the River Medway and the Countryside

41. The development plan is comprised of the Medway Local Plan, which was adopted in 2003. A replacement plan is being prepared, but the draft has not yet been published.

42. Local Plan Policy S3 is titled 'River Medway'. The relevant part of the policy says:

Proposals which are consistent with nature conservation, landscape and hydrological policies and which have no adverse impact upon coastal archaeology will be permitted that develop the River Medway for:

- (i) public access along the riverbank through the construction of riverside walks and cycle-ways;*
- (ii) use as a transportation corridor, both for freight and passengers;*
- (iii) appropriate commercial, tourism and leisure development along the river's edge of a high quality design;*
- (iv) recreational and tourism purposes.*

43. Despite its wording, the Council argues that the policy is not merely permissive. It is said that types of use not referred to in the policy would not further its aims and would be contrary to it.

44. It seems to me that that is reading too much into the policy. It clearly encourages development of the types listed, all of which may be seen as beneficial and of a type that make good use of the river as a resource. It might also be inferred that developments that would frustrate such aims are to be discouraged. But I do not see that it has anything to say about developments which are neutral – that is, which are not listed but which would not prevent such development from taking place. Reading the policy in the context of the supporting text, it appears to me that it is a policy setting out opportunities arising from the river, rather than a restrictive policy. Restrictions on development can be found elsewhere – BNE25, for example.

45. I am not persuaded that the houseboat use frustrates the use of the river for transport and recreation purposes. I have no evidence to demonstrate that the wharf would be used for such purposes if the current use were to cease, and there is nothing either to suggest that river traffic is compromised. Thus, I do not consider that there is an 'in principle' objection to the development based on S3.

46. The Council also refers to Policy BNE22, which is titled 'Environmental Enhancement'. The policy permits development leading to the protection and improvement of the appearance and environment of existing and proposed areas of development, transport corridors, open spaces and areas adjacent to the River Medway. However, the policy appears to be directly aimed at environmental improvement schemes rather than more general types of development and is of little relevance in my view.

47. Policy BNE25 deals with development in the countryside. The policy defines 'countryside' as that land outside the urban and rural settlement boundaries defined on the proposals map, which includes the appeal site. The policy only permits certain types of development, which it lists. None of the types of

development listed apply to this case. It is therefore clear that this proposal is contrary to the policy.

48. While I find no conflict with Policy S3 or BNE22, I conclude that there is conflict with the approach to development within the countryside, as set out in BNE25. However, as I explain later, I am not satisfied that BNE25 is up to date and in accordance with the Framework. Accordingly, I attach only limited weight to the conflict with it arising from this issue.

Character and Appearance

49. Lower Upnor is a small settlement along the bank of the River Medway. Upnor Road runs through the village, becoming Albion Place somewhere near the appeal site, before eventually petering out. Most of the built-up part of the village is on the northwestern side of the road, away from the water's edge. Nevertheless, there is a significant amount of water-related development along the riverbank, including wharfs, boatyards, sailing clubs, jetties and steel piles for mooring boats. One other houseboat has also been drawn to my attention. Additionally, planning permission was granted on appeal for 6 terraced houses and 2 apartments at Patman's Wharf, a short distance from the appeal site, which will add to the extent of residential development on the river frontage.
50. A pathway runs along part of the riverbank close to the appeal site and there is a small area of open space as well, affording views across the river. The river is very wide at this point, and boats are moored well out from the shore. Nearly opposite the appeal site is the Grade II listed memorial formed by the figurehead of the Arethusa. There are also an obelisk and London boundary stone nearby, each also Grade II listed.
51. The appeal site comprises an area of dry land and part of the bed of the River Medway. There is a former public toilet block on the site and an old wartime pillbox. The rest of the dry land is grassed. The houseboat is moored to some tall steel piles that have been driven into the riverbed. It is positioned at a right angle to the shore. The boat is reached via a jetty and steps.
52. The dry land area appears to have changed little as a result of the new use. The pill box and the public toilet building remain, albeit the latter has been repurposed in connection with the occupation of the houseboat. A satellite dish has been erected on the land, but this is a minor residential feature, and its visual effect is limited.
53. The houseboat is accessed via a gangway/ramp and steps, which runs parallel to the wharf wall. These features appear entirely at home in this riverside, wharf setting. Consequently, they do not harm the character or appearance of the area.
54. The boat is moored to tall steel piles, which have been driven into the riverbed. There are many more piles than are apparently needed by the single houseboat currently at the site, and most are currently unused. There are other, similar piles nearby and they are clearly a riverside feature. However, they are also very tall and have a utilitarian, engineered character. In this particular setting, not associated with any commercial use, and given their number, they result in a cluttered, somewhat industrial appearance and do not fully integrate into their surroundings. They are also highly prominent. Overall, they result in a small degree of visual harm.

55. The most significant visual impact arises from the houseboat itself. It is based on a Thames Lighter (a type of barge). This has been converted by the construction of a 2-storey wooden structure onto the hull. Thus, the boat is now tall, angular and blocky. The added structure has some of the character of a 2-storey flat-roofed building or residential cabin. Indeed, viewed at a distance, if the hull is obscured, it could be mistaken for a building, although at closer quarters it is clearly a houseboat.
56. Nevertheless, it looks incongruous in its setting. The boat rises with the tide but, for much of the time, sits on the flat mud of the riverbank, as it was when I saw it. Despite the significant amount of river-related development in Lower Upnor, development in the immediate area of the appeal site tends to be on the northwestern side of Upnor Road/Albion Place rather than on the water's edge. There are some jetties and boats moored in deeper water, but the houseboat, with its height and permanent, residential appearance, stands out as an unusual, bulky and obviously residential feature, sitting on the mud on the water's edge.
57. The only genuinely comparable feature nearby is the other houseboat. However, that has a much lower visual impact, being smaller (at least in terms of the wooden structure - I could see little of the hull due to the boat's more enclosed setting) and moored less prominently among other boats, close to a boat storage yard. It is also some distance from the appeal site and does not have any real bearing on its setting.
58. By contrast, the houseboat at the appeal site is in a highly prominent location, the entire boat being in clear view and separate from any comparable site. While the buildings on the dryland of the appeal site and the wharf wall provide some context of development close to the houseboat, they are smaller and different in character, and do not help assimilate it into its surroundings. In my opinion the houseboat is a highly intrusive feature. Its size and height in particular, means that it harms the openness of this section of the riverbank, disrupting views across the river. As a result, there is significant harm to the character and appearance of the area.
59. Of course, the appeal concerns the use of the site, and I cannot assume that this particular houseboat would always remain there. However, this site was acquired with the express intention of providing a mooring for this houseboat, which is owned by the owners of the site and is their home. Thus, it is likely that it will remain moored at the site for the foreseeable future if permission is granted. In any event, the appellant advises that it is typical of its type, so any future houseboat may be similar. Thus, it is appropriate to take its appearance into account in assessing the visual impact of the development.
60. Drawing these threads together, while a houseboat is necessarily a waterside feature by its nature, it does not follow that it is an appropriate feature in any waterside setting. Indeed, houseboats tend to have a distinct and obviously residential appearance, as is the case here. The houseboat that has been moored at the site is large, bulky and intrusive. These characteristics, together with its permanent and continuous presence and highly prominent location, results in harm to the character and appearance of the area.
61. While I accept that some improvement could be made by repainting the houseboat – something which could be secured with a planning condition – it would not fundamentally change its appearance, scale or visual impact.

62. For these reasons I conclude that the development has resulted in harm to the character and appearance of the area. Consequently, there is conflict with Policy BNE25, which only permits development where it maintains, and wherever possible enhances, the character, amenity and functioning of the countryside, including the river environment of the Medway. The visual harm arising from the piles also gives rise to conflict with the general principles for built development set out in Policy BNE1. While BNE25 is out of date in respect of its overall approach to development in the countryside, as I explain elsewhere, the aims for character and amenity are in line with current national Policy. Paragraph 135 of the Framework seeks to ensure that developments add to the overall quality of the area, not just for the short term but over the lifetime of the development, and are visually attractive.

Fallback

63. Notwithstanding the dispute regarding the use alleged in the notice, it is common ground that boats can be moored at the wharf. This, it is agreed, is a legitimate fallback position, to be considered as part of the overall planning balance. It is an important material consideration. It does not appear that there is any control as to the type of boats that could be moored at the site, or how long they could be moored there.
64. However, I have no evidence to show in any detail how the wharf might actually be used in the event of the appeal failing. It could be used regularly for mooring boats, occasionally or not at all. The boats could vary too – some might be larger than the houseboat currently at the site, some smaller. I have no details of any boats moored at the site in recent years as an indication of what might be likely. Nor is there anything to show a requirement for mooring any particular type of vessel. Most of the boats moored on the river near to the appeal site when I viewed it were smaller leisure craft. Overall, I have nothing to show that large boats would be regularly moored at the site such as to have a comparable or more harmful visual impact compared to that of the current houseboat.
65. Accordingly, given the uncertainty regarding the actual effect in practice of the fallback position, I attach only limited weight to it.

Need

66. I have considered whether there is a general need for houseboat moorings and also how this site meets the personal needs of this specific family.
67. The appellant refers to section 8 of The Housing Act 1985 (as amended). This requires every local housing authority to consider housing conditions in their district and the needs of the district with respect to the provision of further housing accommodation. That requirement includes a duty to consider the needs of people residing in or resorting to their district with respect to the provision of places on inland waterways where houseboats can be moored.
68. The above does not translate into a direct requirement in planning legislation to assess and fulfil all need for houseboat moorings. That said, paragraph 63 of the Framework advises that the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies. It does not refer specifically to houseboat moorings, but both parties regard houseboats as a specialist form of housing. Paragraph 60 advises that it

is important that the needs of groups with specific housing requirements are addressed. Thus, there is encouragement in national policy for local planning authorities with major waterways, such as Medway, to consider the need for moorings in preparing their local plans. Indeed, a policy for houseboats has previously been consulted on as part of the local plan review process in Medway, although it was not taken forward.

69. There is no doubt that the site meets the personal needs of this specific family. The site was bought with the express intent of providing a permanent mooring for the houseboat, which the family already occupied. It appears that the family have experienced difficulty in finding a mooring for their houseboat. Even if moorings are available for smaller boats, that does not help them in their search for a mooring for the boat they own.
70. At the inquiry I asked about the implications of upholding the notice on those living there. I was told that the houseboat currently moored at the site is occupied by a family of 2 adults and a child and that there would be financial implications and the need to search for a new mooring for the boat. Clearly, upholding the notice would deprive the family of their home in its current form. I did not hear directly from the occupiers of the boat, but the best interests of the child appear to lie in continuing to live at the site in accordance with the wishes of the adult members of the family. It is clearly the family's wish to remain on the houseboat, but there is no claim of any specific need to live on a boat as opposed to bricks and mortar accommodation.
71. As to any more general need, neither party has carried out any detailed assessment of demand for and supply of houseboat moorings within the area. The most significant evidence on the matter is the spreadsheet and accompanying notes and emails provided by the appellant setting out the responses to various enquiries regarding houseboat moorings⁶. The veracity of this information was not challenged, and I have no reason to doubt it. I also consider that the enquiries covered a wide geographical area; the appellant did not consider only an unduly constrained area.
72. The research shows that 55 boatyards have been contacted within Kent, Essex and London between October 2020 and March 2023. Of these, 17 no longer offered residential moorings. Many responses say 'no space' or similar. Others indicate difficulties due to the size of the boat – either because the mooring itself cannot accommodate it or because it is not possible to access the boatyard. An update in early 2024 did not identify any improvement in the situation.
73. From this information it appears that there were not moorings available to accommodate this particular houseboat within the area researched during that time. On the other hand, it also suggests that moorings suitable for a smaller craft were available. The Council draws a distinction between any *need* for moorings on the one hand, and the appellant's *preference* for a mooring for this particular houseboat on the other.
74. In considering that point, it is relevant to consider how typical the appellant's houseboat is in terms of its size. The appellant's research indicates that moorings have been ruled out due to its length, width and height. If the

⁶ Collins Appendix D7

appellant's boat is unusually large, it might be asking too much to expect a mooring to be easily available.

75. I understand that the houseboat is about 98ft by 23ft (30m by 7m). For the appellant, Mr Collins regarded this as a typical houseboat. In support of this, photographs of houseboats at nearby Port Werburgh (Hoo Marina) and other boatyards are provided⁷. These show great variety in types and design. A number are similar to the houseboat in this case, being in the form of a boxy cabin, of 1 or 2 stories, constructed on an older hull. Judging by their appearance, the houseboat in this case does not appear excessive in size.
76. Three houseboat occupiers gave evidence in support of the appellant and provided details of their own houseboats. I am told that one, a converted Thames Lighter, is 90ft long and 25 ft wide and thus comparable with the boat at the appeal site. The occupier advised that this is of a similar size to many of the other barge conversions moored on the River Medway. Another, a 24m (79 ft) Dutch barge is a little shorter, while a converted former Thames Pilot boat is significantly smaller at 16.5m (54ft). While all 3 currently had lawful moorings for their own boats, all reported difficulties either securing or retaining them.
77. Overall, I am not persuaded that the size of this particular vessel means that the appellant's mooring requirements are out of the ordinary. On the evidence before me, there appears to be some genuine difficulty in acquiring houseboat moorings in the area that has been identified. However, since there is no detailed assessment and no quantification of any shortfall, I attach only limited weight to any wider need, over and above the personal requirements of the appellant.
78. It is common ground that the Council cannot demonstrate a 5-year supply of deliverable housing sites, as required by the Framework. The apparent difficulty in finding moorings for houseboats should be seen in the context of this wider shortfall of market housing provision. While there is no policy requirement to meet any particular requirement for moorings, the mooring here would secure accommodation for a family, and so help address wider housing need. It is agreed that this site is satisfactorily served by local services and facilities.

Listed Buildings

79. Nearly opposite the appeal site is a memorial formed by the figurehead of the Arethusa. The memorial is Grade II listed. There are also an obelisk and London Stone nearby, both also Grade II listed. These are all fairly small structures and are mainly appreciated at close quarters. All 3 front Upnor Road/Albion Place, which is little more than a pathway at this point, and relate strongly to it. The figurehead also relates closely to the public toilet building and pillbox on the appeal site, which are opposite to it. These features mean that the settings of these structures are contained. While the houseboat has a visual relationship to the listed structures, both parties consider that their setting has been preserved, a view I share. Accordingly, despite the visual harm I have found to the area as a whole, the significance of these heritage assets has not been compromised.

⁷ Collins Appendix D18

Framework Paragraph 11

80. Paragraph 11 of the National Planning Policy Framework (The Framework) advises that plans and decisions should apply a presumption in favour of sustainable development. For decision making, this means:

- d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:*
- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or*
 - ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.*

81. There are clearly relevant policies in this case. What are the policies which are most important for determining this (deemed) application and are they out-of-date?

82. The Statement of Common Ground lists the following policies from the Medway Local Plan: S3, BNE1, BNE18, BNE22, BNE25 and BNE37. The Plan dates from 2003, but the Framework advises that existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of the Framework. Due weight should be given to them, according to their degree of consistency with the Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).

83. Policy S3 is concerned with development along the River Medway. It lists certain types of development that are encouraged. As I explain elsewhere, I am not convinced that it prohibits all other forms of development. I can see nothing that is inconsistent with the Framework and do not regard it as out of date, but it seems of marginal relevance to this development, which is not one of the types of development listed in the policy. Policy BNE22 is concerned with developments aimed at environmental enhancement. Again, I do not regard it as out of date, but it also appears of limited relevance in this case.

84. Policy BNE1 is titled 'General principles for built development'. It is relevant in respect of the operational development – the piles, jetty and steps. It seeks to ensure that development is satisfactory in appearance and is in accordance with the Framework. The policy is not out of date.

85. Policy BNE18 is concerned with the setting of listed buildings, and so is relevant to this development. It does not follow the approach set out in the Framework and it is common ground that it is out of date.

86. Policy BNE25 is concerned with development in the countryside. Given that this site is in the countryside for the purposes of the local plan, it is a relevant policy. Indeed, it seems to me that, by establishing the overall approach to development in the countryside, it was an important starting point for considering the development. It is not, in my opinion, in full accordance with the Framework. While the Framework recognises the intrinsic character and beauty of the countryside and seeks to protect it, it has a more nuanced

approach. It states, for example, that planning policies and decisions should recognise that sites to meet local business and community needs in rural areas may have to be found adjacent to or beyond existing settlements. It also supports the sustainable growth and expansion of all types of business in rural areas. Policy BNE25 is a little blunter in its approach, setting out specific forms of development which are permitted. Both parties consider, and I agree, that the policy is not in full accordance with the Framework. Consequently, it is out of date.

87. Policy BNE37 seeks to protect non-designated wildlife habitats and is relevant to the development. It is generally consistent with the Framework.
88. Viewed as a whole, it seems to me that the basket of policies most important for determining the application is out of date. While, in practice, BNE18 has not proved central to the case, BNE25 was a key policy to consider. The fact that the Council appeared to place more emphasis on Policy S3, which I have not found to be out of date, does not alter my view. Accordingly, the circumstances set out in Paragraph 11 d)(ii) apply. This means that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

Planning Balance

89. I have found conflict with Policy BNE25 due to the location of the development but, as I have explained, attach only limited weight to that. I have found significant harm to the character and appearance of the area, and consequent conflict with Policies BNE1 and BNE25 and the Framework. Having considered all the policies drawn to my attention, I conclude that there is conflict with the development plan as a whole.
90. I attach some weight to the fact that this site meets the housing needs of a family and, in so doing, makes a small contribution to meeting the housing needs for the borough as a whole. The fact that there is not currently a 5-year housing land supply in place adds to the importance of this. The information before me also suggests some unfulfilled (but unquantified) need for houseboat moorings.
91. However, while mindful of the agreed lawful use of the site, I am concerned at the visual harm arising from the development. The river is key to the character of Lower Upnor, and this use has introduced a permanent and intrusive feature along a relatively open section of the shoreline. In my judgement, the harm arising from the development significantly and demonstrably outweighs the benefits, when assessed against the policies in the Framework taken as a whole.
92. I am mindful of the important implications of upholding the notice for the occupiers of the houseboat. Loss of their home would represent a serious interference with their right to respect for their private and family life and home in accordance with Article 8 of the European Convention on Human Rights, as set out in Schedule 1 of the Human Rights Act 1998.
93. However, the right here is a qualified right. The interference in this case is in accordance with the law, given the provisions of the Town and Country Planning Act 1990. The disruption that compliance with the notice would cause

must be weighed against the public interest of ensuring the proper planning of the locality. There is no claim that upholding the notice would result in any violation of the rights of the individuals concerned, and I regard the requirements of the notice (in its varied form) as proportionate, in all the circumstances of the case.

Conclusion – ground (a)

94. Having considered all matters raised, I conclude that there are no material considerations to indicate that planning permission should be granted contrary to the provisions of the development plan. Accordingly, the appeal on ground (a) fails.

Ground (f)

95. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. In this case, the notice requires the use to cease and all operational development to be removed. This is consistent with remedying the breach of planning control in accordance with s174(4)(a).
96. The appellant's concern is that requirements (ii) and (iii) do not recognise the agreed lawful fallback of mooring boats at the site. The Council accepts that requirement (ii) should be amended to make clear that it is only the mooring of boats for permanent residential use that should cease, but does not agree that requirement (iii) should change.
97. It seems to me that, in order to remedy the breach of planning control, the requirements should reflect the matters alleged in the notice as closely as possible. The use alleged is the mooring of a water borne vessel used for residential purposes. That could be addressed with a single requirement – to replace both requirements (i) and (ii) - to cease the mooring of a water borne vessel used for residential purposes. There could be no injustice to either party in making such a change, since it would more closely reflect the use alleged in the notice and would address the appellant's concern about preventing use for the more general mooring of boats. There will be no requirement (ii) in the revised notice.
98. Requirement (iii) is 'Remove the large water borne vessel from the Land'. The appellant argues that a houseboat such as this could be lawfully moored at the site provided it is not used residentially. Thus, it is said, the notice goes too far in seeking its removal. It is established law that the requirements of an enforcement notice must not purport to stop a person from doing something they are entitled to do without planning permission by relying on existing lawful use rights, including right of reversion under s57(4) of the Act⁸.
99. However, it seems to me that the houseboat now moored at the site is fundamentally associated with the breach of planning control. It is a vessel which has been converted for use as a houseboat. It is not self-propelled, and I imagine other potential uses for it are limited. Section 174(4)(a) of the Act establishes that remedying the breach of planning control may include restoring the land to its condition before the breach took place. In this case the

⁸ See *Mansi v Elstree RDC* [1964] 16 P&CR 153

houseboat facilitated the breach of planning control – it was brought to the site for the specific purpose of providing accommodation - and restoring the land to its previous condition therefore requires the boat to be removed.

100. In reaching that view I am mindful of the agreed lawful fallback position that boats can be moored at the site. While the notice will continue to have effect against subsequent development in accordance with s181 of the Act, it will not prevent any lawful use of the site – even a lawful use involving a houseboat. However, it is first necessary for the current breach of planning control to be remedied, and that requires the houseboat which was brought to the site as part and parcel of that breach to be removed.
101. It has also been suggested that the notice could require the removal of some rather than all of the piles in the event that the number of piles was an impediment to granting planning permission. However, since I have concluded that the development as a whole is harmful and planning permission is refused, there is no reason to amend the requirement relating to the piles. It is common ground that they are a breach of planning control, and their removal is required in order to remedy the breach.
102. For these reasons, I will replace requirements (i) and (ii) with a new requirement, as outlined above. The appeal on ground (f) succeeds to that extent only.

Ground (g)

103. The ground (g) appeal is made on the basis that additional time is needed to find an alternative residential berth for the houseboat. A 2-year period is sought. The Council argues that the 6 months specified by the notice is ample time to remove the houseboat.
104. Relocation of the houseboat, which is home to a family, is clearly a very disruptive undertaking. Moreover, the evidence before me indicates that it is not an easy thing to find a suitable mooring in the area. It is desirable that an alternative residential mooring is found to minimise disruption to the family. It is argued that a 2-year period would recognise the time it may take for new moorings to come forward through the Council's emerging local plan.
105. However, I am not persuaded that it is appropriate to grant any period based on the emerging local plan; there is insufficient certainty regarding the timescales and potential outcomes. Moreover, it cannot be assumed that the only prospect of finding a mooring will come from new sites via the local plan – there is likely to be some turnover at existing boatyards. While the alternative of selling the boat and moving to bricks and mortar accommodation would also take time, that needs to be balanced against the desirability of remedying the breach of planning control without undue delay, and I am concerned that a 2-year period would undermine the effectiveness of the notice. In my judgement, 9 months strikes an appropriate balance between these competing considerations, and I will vary the notice accordingly. To that extent, the appeal on ground (g) succeeds.

Conclusion

106. For the reasons given above, I shall uphold the enforcement notice with variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act (as amended).

Peter Willows

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Melissa Murphy KC

Who called: John Collins MBA BA(Hons) MRTPI (DHA Planning)

FOR THE LOCAL PLANNING AUTHORITY:

Ashley Bowes – Barrister

Who called: Iain Warner BSc(Hons) DipTP MRTPI (Tetlow King Planning)

INTERESTED PARTIES:

Nick Burton

Ieuan Paul Hill

Justine Oakley

DOCUMENTS SUBMITTED AT THE INQUIRY

1. Opening Submissions – LPA
2. Opening Submissions – Kingfisher Access Ltd
3. Statement of Common Ground
4. Strategic Access Management and Mitigation – Medway Council Interim Policy Statement November 2015
5. Consultation and email exchange - Natural England
6. Advice from Ecological Advice Service dated 12 April 2024
7. Statement – Nick Burton
8. Statement – Ieuan Paul Hill
9. Statement – Justine Oakley
10. Further emails – Natural England
11. Extract – ‘The Maritime Paintings of John Chancellor’
12. Extract – ‘Viper Gets a Washing’
13. Agreed amendment to Statement of Common Ground dated 18 April 2024
14. Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461
15. R (oao Colver) v SSCLG & Rochford DC [2008] EWHC 2500 (Admin)
16. Closing submissions – LPA
17. Closing Submissions – Kingfisher Access Ltd.