



Appeal Decision

Site visit made 23 October 2024

by D Hartley BA (Hons), MTP, MBA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 OCTOBER 2024

Appeal Ref: APP/C2741/C/23/3330303

Fulford Reach Moorings, Mooring 7, St Oswald's Road, York, North Yorkshire, YO10 4PF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Miss Wendy Blackeway against an enforcement notice issued by City of York Council.
- The notice was issued on 24 August 2023.
- The breach of planning control as alleged in the notice is without planning permission unauthorised change of use to residential use and without planning permission unauthorised development including the erections of structures, sheds, a shepherd's hut and fencing over 1 metre.
- The requirements of the notice are to 1) remove or reduce the fencing to 1 metre in height, 2) remove all the structures from the land including shepherd's hut with the exception of one wooden shed 2x3x2 metres high, 3) cease the use of the land for residential purposes, and 4) remove from the land all the domesticated items including the barbeque, bike sheds, wood, table, chairs, baskets, parasol, ornaments, containers, ladders, plant pots, metal, bags, garden tools, watering can, buckets and other items facilitating the residential use.
- The period for compliance with the requirements is 12 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d) and (f) of the Town and Country Planning Act 1990 (as amended) (the Act).

Decision

1. It is directed that the enforcement notice is corrected and varied by (i) the deletion of the words *"without planning permission unauthorised change of use to residential use, and without planning permission unauthorised development including the erections of structures, sheds, a shepherd's hut and fencing over 1 m"* in section 3, and the substitution of the words *"without planning permission the unauthorised material change of use of the land to a residential use including the siting of a residential caravan, and without planning permission unauthorised development including the erection of structures, a shed and fencing over 1 metre in height"*, and, (ii), the deletion of the words *"remove all the structures from the land including the shepherd's hut with the exception of one wooden shed 2x3x2 metres high"* in section 5(2), and the substitution of the words *"remove the shed, structures and residential caravan from the land"*. Subject to the correction and variation, the appeal is dismissed, and the enforcement notice is upheld.

Applications for costs

2. An application for costs has been made by the appellant against City of York Council. An application for costs has been made by City of York Council against the appellant. These applications are the subject of a separate Decisions.

Preliminary matters

3. The appeal site forms part of a larger area for the mooring of boats. It is one of 10 moorings situated on the riverbank of the River Ouse. It is accessed via a vehicular access track which terminates at the end of mooring 10. The notice relates to land associated with Mooring 7 and specifically the riverbank.
4. Planning permission was granted on 21 August 1973¹ (1973 Permission) for the *'construction of boat moorings, in accordance with the amended plans submitted with the letter dated 24 July 1973, from the applicant'*. This planning permission includes land associated with the mooring which is the subject of this appeal. The planning permission includes one condition which is that *'the development to which this permission relates shall be begun not later than the expiration of five years beginning with the date of the permission as required by section 41 of the Town and Country Planning Act 1971'*.
5. The Council states that the planning permission permits use of the land for a moored boat. It accepts that such a moored boat could be used for residential or leisure purposes. The Council draws attention to this position being accepted by other Inspectors who have determined other appeals that have considered the 1973 Permission.
6. It is noteworthy that when considering the 1973 Permission, the Inspector who determined a certificate of lawful development on appeal relating to a neighbouring boat mooring and associated riverbank in April 2009² commented, *'I agree with the Council's assessment that the ancillary use and development of the riverbank for the purpose of a boat mooring is very limited. Of necessity, it includes the means of attachment of the boat to the bank (in the present case, rising poles designed to accommodate significant annual changes in river level) and a gangplank or means of access' and 'beyond limited storage for the boat mooring and a single parking space, I conclude that the use of the riverbank for purposes ancillary to the residential occupation of the houseboat was not authorised by the 1973 permission'*. Furthermore, the Inspector commented that *'the Inspector for the 2007 inquiry considered the same point and concluded that 'the single primary use of the land is use as a boat mooring. Such use might carry with it lawful ancillary uses for storage of, for example, fuel and essential items needed for the boat'*.
7. On the evidence that is before me, I have no reason to depart from the views expressed by other Inspectors in terms of what the 1973 Permission authorises.
8. The Council has prepared a document, dated 2022, which outlines what it considers could take place on the land. It states that this document has been prepared so that there is some certainty and parity in respect of all the moorings in the area. The document states that the current permitted usage of the mooring (land) is *'use for mooring a boat, no domestic use or storage of domestic items and not a garden, residence or extension of residential boat use'*. In terms of the expediency of taking enforcement action, and the requirements of the notice, it is clear that the Council has considered its document dated 2022. In particular, the notice permits the retention of a

² Appeal reference APP/C2741/X/08/2085343

wooden shed and a fence of no more than 1 metre in height. I deal with the retention of a wooden shed later in this decision.

The Notice

9. The Council's document dated 2022, which was attached to a letter sent to the appellant dated 3 March 2022, indicates that a storage structure (i.e., a shed) of 3x3x2.5 metres high would be permitted (excluding flood mitigation measures). The appellant states that a shed on the land falls within the measurements that were suggested in that letter. The appellant therefore considers that the requirements of the notice should be varied so that it corresponds with the Council's letter in March 2022 (the notice refers to the retention of a shed measuring 2x3x2 metres high). On the site visit, I asked the appellant and the Council to agree the measurement of the shed that was on the land. It was agreed that the shed measured 3.69m x 2.44m x 2.14m.
10. The notice specifically requires the removal of all structures from the land including the shepherd's hut '*with the exception of one wooden shed 2x3x2 metres high*'. The latter does not relate to the shed/structure that is currently on the appeal site. There is no evidence of a wooden shed measuring 2x3x2 metres high on the land when the notice was issued. In fact, and, as detailed below, the evidence is that only one shed was on the land when the notice was issued. The evidence is that this was the shed measuring 3.69m x 2.44m x 2.14m.
11. The requirements of a notice must relate to the breach of planning control. The retention of a shed measuring 2x3x2 metres high does not relate to any part of the operational development which is the subject of the breach of planning control. It is an unnecessary and superfluous requirement. Therefore, I shall vary requirement 5(1) of the notice, without injustice being caused to the main parties, by deleting the words '*with the exception of one wooden shed 2x3x2 metres high*'. I recognise that the Council is currently 'permitting' the erection of one storage structure for boat related items on the riverbank in accordance with its 2022 document. The evidence is that this document is being used for the purposes of underenforcement. The provision of a shed on the land which is unconnected with the breach of planning control is a separate matter to be discussed between the appellant and the Council.

Reasons

Appeal on ground (b)

12. The appeal made on ground (b) of section 174(2) of the Act is that the matters alleged in the notice have not occurred. The onus is on the appellant to make their case on any legal grounds of appeal.
13. The notice alleges the unauthorised use of the riverbank for residential purposes and the erection of structures, sheds, a shepherd's hut and fencing over one metre in height. The notice attacks an alleged material change of use of the land and operational development.
14. The claim made by the appellant under ground (b) is that planning permission is in place for use of the riverbank for residential purposes in association with the mooring of a river boat used for residential purposes. Moreover, and,

although not expressly claimed as part of her ground (b) appeal, the appellant states that when the notice was issued, there was only a shed on the land and not sheds. Furthermore, the claim made by the appellant is that use of the appeal land for residential purposes has continued for more than ten years and hence is lawful under section 191(2) of the Act. However, these are matters that I am required to consider as part of the ground (c) and (d) appeals below.

15. The appellant does not provide any objective evidence or reasonable proof that when the notice was issued, the appeal land was not being used for residential purposes. The onus is on the appellant to make her case in this regard. In correspondence with the Council on 26 April 2022 it is noteworthy that the appellant stated *'I have permission from my brother to stay on the boat. As it was, it would not have been practical, especially in winter months. I have therefore insulated the walls, floor & ceilings and I am currently working on boarding it up so that it will be habitable'*.
16. The appellant claims that only one shed had been erected on the land prior to the notice being issued. The evidence, including photographs from the main parties, demonstrates that at some point there were a number of sheds on the appeal site. However, I am persuaded by the appellant's written and photographic evidence that when the notice was issued, there was only one shed on the appeal site. The evidence is that prior to the notice being issued, the appellant had removed some of the sheds from the appeal site.
17. Indeed, in an email from the appellant to the planning officer dated 9 March 2023, she comments *'I'm trying my best to address your requests/demands but as yet you/the council have not provided me with any material to back up or support your demands/ requests. I have removed two sheds which leaves just one now, not 2. The shepherd's hut is up for sale & I have recently reduced the price'*. While some of the appellant's photographs are not dated, I find that when these are considered alongside email correspondence between the appellant, her agent, and the Council, I am persuaded that other than one shed, the others were re-located to the pontoon and outside of the appeal site.
18. In respect of this matter, it is noted that the Council comment that they could not see everything on the land when the notice was issued. The Council do not actually refute what the appellant says about the removal of all but one shed from the appeal site prior to the notice being issued. On 18 October 2024 the Council commented that *'The service of the notice did not require entry onto the land, and it is not possible to view the interior of the site due to the high boundary fencing/gate. It is not known which, if any sheds were removed prior to the service of the notice as no evidence was provided to the Council to confirm this'*. The comment made about evidence not being provided about the removal of the sheds from the appeal site in advance of issuing the notice is not correct given the email exchange between the appellant and the Council on 9 March 2023. This email pre-dates the notice which was issued on 24 August 2023.
19. On the balance of probability, and, considering the evidence that is before me, I find that all but one of the sheds were removed from the appeal site prior to the notice being issued. The evidence leads me to find that when the notice was issued, structures, a shed, and fencing over 1 metre in height were on the land. As the notice refers to sheds rather than a shed, I conclude that the

ground (b) appeal partly succeeds. However, I shall correct the breach of planning control in the notice, without injustice being caused to the main parties, by deleting the words *'without planning permission unauthorised development including the erections of structures, sheds, a shepherd's hut and fencing over 1 m'* in the second bullet point of section 3, and substituting them with *'without planning permission unauthorised development including the erection of structures, a shed, a shepherd's hut and fencing over 1 m'*.

20. The appellant states that the reference to a shepherd's hut in the notice is incorrect as it is in fact a caravan. I was able to examine the referenced 'shepherd's hut' as part of my site visit. There is decking to the front, but it is not fixed to the so-called shepherd's hut. It has facilities within it for residential occupation, is on wheels, has a metal chassis with a tow bar, is single axel, and there is no evidence of it being fixed to the ground in such a way that it could not be moved with ease. I find, as a matter of fact and degree, that it could be moved intact, using a crane or hoist, on the back of a lorry or simply towed away using a vehicle. It is mobile and, in this regard, it does not have permanence. I find that it meets the definition of a caravan in the Caravan Site and Control of Development Act 1960 and Caravan Sites Act 1968. Therefore, it is not a building (i.e., operational development) and instead is a residential caravan. To this extent, the ground (f) appeal succeeds.
21. I have considered whether I could vary the breach of planning control without injustice being caused so that it refers to a residential caravan rather than to a shepherd's hut. A single notice has been issued by the Council and this alleges both a material change of use of the land and unauthorised operational development. The siting of the residential caravan constitutes a use of land and not operational development. The notice alleges a material change of use of the land to residential use: the siting/use of a residential caravan would be part of parcel of such an allegation.
22. I have considered whether I could correct the breach of planning control without injustice being caused to the main parties by deleting all the words and substituting them with *'without planning permission the unauthorised material change of use of the land to a residential use including the siting of a residential caravan, and without planning permission unauthorised development including the erection of structures, a shed and fencing over 1 metre in height'*. I do not find that this correction would cause injustice to the main parties. In particular, no injustice would be caused in respect of the appellant's ground (d) appeal claim. This is because the relevant period for immunity for residential use is ten years and for operational development it is four years. The appellant's evidence does not demonstrate that the so-called shepherd's hut has been in situ for four years and so in turn ten years continuous use could not therefore be claimed. I shall accordingly correct the breach of planning control.
23. As I have corrected the breach of planning control, it is necessary that I also vary the requirements of the notice. This is because a breach of planning control and its requirements should align. I shall therefore vary requirement 5(2) of the notice by deleting all the words and substituting them with *'remove the shed, structures and residential caravan from the land'*.

24. The appellant claims that the residential caravan was being used for a use that was ancillary to the lawful existing use of the land (i.e., a mooring). I deal with this as part of the ground (c) appeal below, but it is worth pointing out that whether one was to consider it to be a use of land, or operational development, it would, in any event, amount to development requiring planning permission.
25. For the reasons outlined above, I conclude that some of the matters alleged in the notice did not occur. In other words, the evidence is that one shed was erected on the appeal site when the notice was issued and not sheds. Moreover, a residential caravan is sited on the land and not a shepherd's hut. To this extent, I conclude that the ground (b) appeal succeeds. Notwithstanding success on ground (b), I have corrected the breach of planning control without injustice being caused to the parties. In turn, I have also varied the requirements of the notice.

Appeal on ground (c)

26. The appeal made on ground (c) of section 174(2) of the Act is that those matters (if they occurred) do not constitute a breach of planning control.
27. The appellant claims that the fence that is the subject of the breach of planning control is not adjacent to a highway used by vehicular traffic. On this basis, and as it is not more than 2 metres in height above ground level, she claims that it is therefore permitted development given Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the Order).
28. The fence that has been erected on the land is one single and continuous structure in the form of a means of enclosure. Put another way, it is one fence. I was able to see on my site visit that part of it is adjacent to an access which is used by vehicular traffic. There was indeed a vehicle (van) parked beyond the appeal site. Part 2 of the Order does not define what is meant by a highway. Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge.
29. In this case, the fence is adjacent to a route where my site visit revealed that gates were not closed or locked. The route is used by vehicular traffic and indeed a number of vehicles were parked next to the various moorings. Free movement of passage was capable along the access. There is no evidence before me to indicate that the public are prohibited in any way from being able to pass or repass the route. On my site visit, I noticed a cyclist and a motorist using the access. In my judgement, the fence is adjacent to a highway for the purposes of considering Class A of Part 2 of Schedule 2 of the Order. There is no objective or persuasive evidence before me to indicate that members of the public cannot, as of right, pass or repass the adjacent highway.
30. Contrary to the view of the appellant, I find that the fence is not therefore permitted development owing to part A1(a) of Class A of Part 2 of Schedule 2 of the Order which states that development is not permitted if *'the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed 1 metre above ground level'*.

31. Even if one were to disagree with my conclusion that the fence is adjacent to a highway, it was, in any event, agreed by the main parties on the site visit that part of it measured 2.06 metres in height above ground level. As part of the fence exceeds more than two metres in height above ground level, the whole of it requires planning permission, in any event, given the limitation imposed in Class A of Part 2 of the Schedule 2 of the Order.
32. It is also noteworthy that paragraph 3(5) of the Order states '*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*'. The onus is on the appellant to make an appeal on legal grounds. As detailed below, the appellant's evidence does not sufficiently demonstrate, on the balance of probability, that the fence was erected on land in association with a lawful use. The evidence before me is that the fence that is the subject of the notice has been erected in association with the material change of use of the land for residential purposes and, for the reasons outlined below, this is not a permitted/lawful use with reference to the 1973 Permission, or lawful given my conclusion in respect of the ground (d) appeal. Consequently, I do not find that the fence is permitted development.
33. The appellant considers that the land has been used for an ancillary residential purpose in association with the primary use of the land as a boat mooring. The Council accepts that the 1973 Permission would not preclude the use of a moored boat for residential or leisure purposes. In this regard, the appellant is of the view that the riverbank could be used for ancillary residential purposes. The permitted use of the riverbank with reference to the 1973 Permission has been considered by other Inspectors. Specific comments were made by Inspectors which I have identified in the preliminary matters part of this decision. I have considered the 1973 Permission, and, also the comments made by previous Inspectors, and find that the 1973 Permission is for a single primary use of the land as a boat mooring.
34. I do not find that the 1973 Permission has allowed use of the riverbank for residential use purposes. The 1973 Permission is for the primary use of the land as a sui-generis boat mooring. On the evidence that is before me, the appeal land was being used for residential use purposes when the notice was issued and, as a matter of fact and degree, such a residential use was not in accordance with the 1973 Permission as it went well beyond the essential items required for ancillary boat storage and including the parking of a vehicle.
35. I recognise that the Council is advising landowners that one wooden storage shed can be erected/retained on the land measuring 3x3x2.5 metres and used for boat related items. This is based on its 2022 document. However, I read that document as relating to an approach to underenforcement at Fulford Reach Moorings. I do not consider that it should be interpreted as meaning that the Council has accepted that the appeal land can lawfully be used for residential use purposes.
36. On my site visit, I was able to appreciate the structures (e.g., decking and the structure connecting to the bridge which links to the pontoon), shed and residential caravan, and some of the other domestic items listed in the requirements of the notice. The appellant does not dispute that when the notice was issued, the building/structures on the land were being used in

connection with use of the land for residential purposes, or that various items listed in requirement 5(4) of the notice were in association with use of the land for residential/domestic purposes.

37. On the evidence that is before me, I do not consider that when the notice was issued, the appeal site was being used for ancillary use purposes in connection with use of the approved boat mooring. The appeal land was being used intensively and extensively for residential purposes. The evidence is that it included use of a residential caravan on the land. It was not being used for ancillary car parking or very limited boat storage purposes in association with the 1973 Permission. As a matter of fact and degree, I do not find that when the notice was issued, the evidence demonstrates that the residential use/items/structures on the land were for the essential use of the boat mooring. A residential use of the land had occurred which was not ancillary to the sui-generis boat mooring use.
38. Moreover, on the evidence that is before me, I find that when the notice was issued, a material change in the character of the use of the land had occurred. The site no longer has the character and appearance of land associated with simply a boat mooring and looks like a homestead in its own right. Indeed, the extent of the residential use of the land is such that a material change to the physical character of the riverbank has occurred. As a matter of fact and degree, I find that a material change of use of the appeal land has taken place to a residential use for which there is no planning permission.
39. The appellant has not provided me with any compelling or objective evidence to indicate that when the notice was issued it was being used for a purpose which was ancillary to the primary use of the land as a boat mooring. This is an important factor given that the onus is on the appellant to make her case on the legal grounds of appeal.
40. For the reasons outlined above, I conclude that the ground (c) appeal should fail.

Appeal on ground (d)

41. The appeal made on ground (d) of section 174(2) of the Act is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.
42. The claim made by the appellant is that all structures, the shed and the fence have been on land for more than four years and that the land has been used on a continuous residential basis for more than ten years. Therefore, the appellant considers that the unauthorised development is immune from enforcement action.
43. The claims made by the appellant are not supported with any objective or persuasive evidence. The sales brochure dated 2019 does not reasonably support the appellant's assertions as part of her ground (d) appeal. Moreover, the Google Earth images are not detailed enough to provide the kind of certainty and precision needed to reach a view about what structures and

paraphernalia have been on the land over time. Moreover, the Google Earth images do not provide a continuous ten or more years timeline. The appellant's claims are not supported by the sort of evidence that would assist in demonstrating immunity from enforcement action such as statutory declarations, witness statements and dated photographs.

44. The appellant's evidence is not sufficiently precise or unambiguous in terms of demonstrating that when the notice was issued, the building/structures and fencing had been substantially completed for four years and that the land had been continuously used for residential purposes for at least ten years. On the balance of probability, I therefore conclude that the ground (d) appeal fails.

Appeal on ground (f)

45. An appeal on ground (f) of section 174(2) of the Act is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
46. The purpose of the corrected/varied notice is in part to remedy the breach of planning control by ceasing residential use of the land (including subordinate and moveable items which facilitated the residential use) and by remedying the injury caused to amenity by requiring all structures (including the residential caravan) to be removed from the land.
47. The appellant's claim under ground (f) relates to matters that I have already considered as part of the other legal grounds of appeal. The appellant states that as the Council has allowed the retention of one shed on the land, it therefore recognises that the land '*must be in some kind of lawful use which includes the need for storage*'. The notice requires the residential use of the land to cease. This is not an excessive requirement particularly in the context of the 1973 Permission which, as also concluded by other Inspectors, permits limited and ancillary storage for the boat mooring and a single parking space.
48. I have already decided that the 'requirement' to retain a shed measuring 2x3x2 metres high is not necessary and is superfluous given the agreed position of the main parties on the site visit. While the Council has decided to underenforce activities on the riverbank associated with lawful boat moorings by allowing a single boat storage structure of a specified size to be positioned and/or retained, this is a matter that needs to be considered between the appellant and the Council outside of this appeal process.
49. As detailed elsewhere in this decision, the appellant has not provided any reasonable evidence to counter the Council's view that it appeared to them that the structures, shed, residential caravan and domestic items listed in requirement 5(4) of the notice were erected/used for residential purposes. In this regard, the corrected/varied notice is not excessive in terms of requiring the residential use to cease or the removal of operational development.
50. It is not a function of this appeal for me to reach a finding in terms of the extent, type, and position of storage that would be regarded as ancillary on the land. Should the appellant want to determine what might constitute ancillary storage, she should liaise with the Council separately including the possibility of

submitting an application for a certificate of lawful development. However, it seems to me that the Council has already reached an informal view about this matter in terms of its document dated 2022. While I have found that the shed on the land is larger than outlined in the notice and the Council's document dated 2022, it nonetheless remains the case that under section 173A(1)(b) of the Act, the Council can "*waive or relax any requirement of such a notice*". I say this not because the notice as corrected/varied is wrong, but simply because I am not certain whether it was actually the Council's intention for the identified shed on the land to be retained for the storage of boat related activities and despite its size.

51. For the above reasons, I conclude that the steps in the corrected/varied notice are not excessive. Based on the evidence before me, which incidentally does not include a ground (a) appeal and a deemed planning application (therefore planning merits cannot be considered by me), I find that they are necessary to remedy the breach of planning control in respect of the unauthorised material change of use of the land, and to remedy the injury which has been caused to amenity arising from the operational development.

52. For the above reasons, I conclude that the ground (f) appeal fails.

Conclusion

53. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and a variation.

54. In reaching the above conclusion, I note that the appellant is suffering from a health condition. The evidence is that the health condition is having a negative impact on her day-to-day activities. For the purposes of this appeal, I am therefore treating the health condition as a disability. I recognise that if the notice were to be upheld, it would likely have an adverse impact on her wellbeing, including her ability to continue to live on the site with the same level of privacy and security. On the evidence that is before me, I nonetheless find that upholding the enforcement notice is a legitimate and proportionate response to addressing the breach of planning control in the public interest. This finding considers the interference with the appellant's rights under Article 8 of the European Convention on Human Rights as incorporated into the Human Rights Act 1998.

55. Moreover, I have considered the impact of upholding the notice in terms of the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. I find that the risk and harm caused by the development, as outlined in the reasons for issuing the upheld notice, outweigh its benefits in terms of eliminating discrimination against a person with the protected characteristic of disability, advancing equality of opportunity for that person and fostering good relations between them and others. It is proportionate and necessary to dismiss the appeal in the context of a compliance period of 12 months.

D Hartley

INSPECTOR