

ELMBRIDGE LOCAL PLAN EXAMINATION

NOTE ON APPLICATION OF PLANNING CONTROL TO FLOATING STRUCTURES

1. This note sets out how planning control applies to floating structures and how those principles should inform the policy wording.
2. By s.57 Town and Country Planning Act 1990 (“TCPA”), planning permission is required for the carrying out of development. The definition of “development” at s.55 TCPA operates by reference to “land”:

“(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, “development,” means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

3. “Land” is defined by s. 336(1) TCPA in terms of corporeal interests:

““land” means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land”

4. In Schedule 1, “land” is given the following meaning:

““Land” includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.”

5. In *Thames Heliports Plc v London Borough of Tower Hamlets* (1997) 74 P & CR 164, the Court of Appeal considered how planning control applied to land covered by water. Schiemann LJ held at pp. 168-9 that:

“It is common ground and I accept for present purposes that whichever segment of the bed of the river one focuses on is a corporeal hereditament and that flowing water is not a corporeal hereditament. ... So far as the vertical identification of the land is concerned I am prepared to come to a decision in this matter on the basis most favourable to Mr Fitzgerald's submissions namely that for that purpose in the context of the present case land means the bed and banks of the river.

So far as the horizontal identification of the land is concerned I do not find it necessary at this point in the argument to come to a decision. That is because, for reasons I shall give later this judgment, I consider the establishment of the boundaries is primarily a matter for the planning authorities ...”

6. Schiemann LJ concluded, that in principle a floating heliport was capable of causing a material change of use in the land i.e. the bank and beds and he proposed a declaration (with which Ward and Beldam LJJ agreed) which made it clear that the change of use to the bed and banks was not dependent on any physical connection between them and the vessel.
7. The specific issue of whether permanently moored vessels could give rise to a material change in use of the bed and banks covered by water came before the High Court in ***R(KPJR Management Company Ltd) v London Borough of Richmond upon Thames*** [2018] EWHC 84 (Admin). Lang J noted the concession between the parties (without adverse comment) at [52] that:

“Applying these principles, it was common ground before me that the use of moorings for 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. A change of use which is not material is not development within the meaning of section 57 TCPA 1990, and so does not require planning permission.”

8. Accordingly, the focus is on the character of the bed and the banks and whether, by virtue of the use of a floating structure, there has been a change of use of that land, from the lawful use of the River, which Schiemann LJ held to be “passing over the water

for the purposes of navigation, commerce, trade and intercourse” (at p.178) to something else.

9. The answer to that question is not determined by whether the floating structure meets the definition of a houseboat or is capable of self-propelled navigation, although those may be relevant to whether a material change of use has occurred. Instead, the focus is whether the use of the floating structure has given rise to a change in the character of the bed and banks over and adjoining where it floats.
10. Whether the residential use of a floating structure gives rise to a **material** change in use, in part depends on the appropriate planning unit against which the change is to be assessed.
11. The practice has generally been to treat each mooring on a River as a separate planning unit. See by way of illustration the decision of the Inspector in *The Berth*.¹ There Inspector considered the appropriate planning unit was the individual mooring and not the entire River Thames, see:

“... In the present case the appeal site is occupied overwhelmingly, if not on the evidence exclusively, by [the Appellant] for the mooring of one of its vessels. [The Appellant does] not own or occupy any of the rest of Temple Pier, or any contiguous land, whilst the pier is not occupied by the owner LRS for any single main purpose by Temple Maritime to whom it is licensed. The appeal site [comprising the riverbed below the mooring] can be taken to be the unit of occupation.”²

... I also note in respect of Temple Pier that, had the planning unit been the whole of the tidal Thames, it would have been unnecessary for planning permission to have been granted for the relocation of the Wilfred and permanent mooring of it and the St. Katherine, since in the context of the tidal Thames as a whole this may not have amounted to a material change of use.³

¹ *Temple Pier, Victoria Embankment, London* (APP/X5990/C/07/2038830) (17 December 2007)

² DL, 9.

³ DL, 12.

I therefore consider, as a matter of fact and degree, that the appropriate planning unit in this case is the appeal site, i.e. the river bed below the mooring on the riverward side of the upstream pontoon at Temple Pier.”⁴

12. That might well be different in the case of a man-made unit like a canal or a marina, where the planning unit might be the entire marina or canal and, judged against that context, the residential use of a mooring within one of those units might not be material.

13. Accordingly, the best approach is to refer to “residential moorings”, as that avoids semantic (and potentially irrelevant) debates about whether a given floating structure is or is not a houseboat. Moreover, it focuses the attention of the decision taker on the effects on the character of the land itself, which is the critical question.

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⁴ DL, 13.