

National Bargee Travellers Association

Response to Fenland District Council Moorings Management Survey

1. What period(s) of time are you usually moored at March/Whittlesey?

Between 1 April to 30 September

Summer only

Winter only

Occasionally

Other (please specify)X

This consultation response is from the National Bargee Travellers Association (NBTA). The NBTA is a volunteer organisation formed in 2009 that campaigns and provides advice for itinerant boat dwellers on Britain's inland and coastal waterways. The term Bargee Traveller includes anyone whose home is a boat and who does not have exclusive use of a permanent mooring for their boat with planning permission for residential use. The NBTA is the only national organisation in Britain dedicated to upholding and defending the rights of itinerant boat dwellers. The NBTA has members who live and travel on the Middle Level waterways and who need to use the Middle Level to travel between the River Nene and the Rivers Ouse and Cam.

2. Do you think the current arrangements for 'Visitor 36 Hour' moorings work effectively?

Yes

NoX

If not, please explain why:

A Public Right of Navigation exists on navigable rivers, whether natural or canalised, including the Old River Nene. This has existed since Time Immemorial and was first codified in the Magna Carta of 1215. This right includes the entitlement of all boats to moor, anchor or remain stationary temporarily in the course of navigation for a convenient time and unless modified by statute, without liability or payment of tolls to a land owner. The reasonableness of the stay time depends on all the circumstances such as weather conditions, water levels, floods, fitness of crew, illness, injury and mechanical breakdown. Without new primary legislation, limiting the time that a boat may moor to 36 hours violates the Public Right of Navigation. The Council therefore has no powers to set mooring time limits and in doing so it is acting *ultra vires*. In the absence of any lawful powers to set mooring time limits, these time limits are advisory only and should be only be complied with voluntarily out of consideration for other boaters.

In levying fines for every 24 hours that a boat overstays, the Council would also be acting *ultra vires*. A statutory authority can make no charge other than those expressly permitted by statute. See *McCarthy and Stone v London Borough of Richmond upon Thames* [1992] UKHL.

In the absence of the above powers, pursuant to paragraphs 38 and 39 of *Moore v British Waterways* [2013] EWCA 73 (Civ), there is no prohibition on boats being moored on the banks of the Old River Nene in March and Whittlesey.

In paragraph 96 of the judgment in *Moore v British Waterways* [2012] EWHC 182 (Ch), Hildyard J stated that following the authority of *Proprietors of the Stourbridge Canal v Wheeley* [1831] 2 B & Ad 792, the Claimant, a statutory authority:

"...can claim nothing which is not clearly given to them by the Act(s).' I accept this; and thereby both implicit parts of the proposition, being (a) the BWB, not being a natural person but a creature of statute, has only those powers with which it is endowed by statute and (b) in the event of ambiguity, such powers should ordinarily be strictly construed if a wider construction would deprive a member of the public of an existing right" [such as the right to moor for a reasonable time in consequence of the Public Right of Navigation].

This principle is further endorsed in the authorities of *Swan Hill Developments & ORS v British Waterways Board* [1997] EWCA Civ 1089 and *McCarthy and Stone (Developments) Ltd v Richmond upon Thames LBC* [1989] UKHL 4.

The Council claims that it can impose daily fines for overstaying without obtaining any specific powers to do so and in particular without obtaining byelaw powers. In *Attorney General v Wilts United Dairies* [1921] 37 TLR 884, the Attorney General had argued that the levying of certain charges, whilst not perhaps expressly or impliedly provided for by statute, was nonetheless a contractual matter of agreement between the parties.

Atkin LJ stated clearly, in response to this argument:

"It makes no difference that the obligation to pay the money is expressed in the form of an agreement. **It was illegal for the Food Controller to require such an agreement as a condition of any licence.** It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party ..." [our emphasis in bold].

Further, if terms and conditions such as time limits are imposed on an essential service such as a mooring, where no other mooring is available, the contract is not freely entered into by both parties and would be in breach of the Consumer Protection from Unfair Trading Regulations 2008; see also *Burnett v British Waterways Board* [1973] 1 WLR p1.

The NBTA believes that its members should observe visitor mooring time limits whenever possible out of consideration to other boaters, even though these time limits are unlawful. However, the 36 hour limit is the wrong time limit for visitor moorings. A 36 hour time limit is difficult or impossible to comply with. If a boat arrives on day 1 at 5pm, the time that most boats are likely to arrive, and the boater needs to stay for a day, they have to leave at 5am on day 3. It may be dark at 5am and unsafe to navigate. For most boaters it is just not possible or practical to leave at 5am. A typical day's cruising starts at 9am or 10am and finishes at about 5pm. It would be unjust to enforce a time limit that is very difficult to comply with by way of fines for non-compliance.

The proposed time limits and fines would mean that boaters would be threatened with fines for needing to take a rest day in a long cruise or for needing to be in March or Whittlesey for longer than an overnight stop, which is very often the case given that there are virtually no services of any kind anywhere else. This would be fundamentally unjust, especially where older boaters, boaters with disabilities, boaters who are ill and boaters with children are concerned, as these boaters are more likely to need a full day's rest or to stay for a longer period while they receive healthcare. This would potentially be a breach of the Equality Act 2010.

Boaters need to be able to stop for longer than 36 hours. The no return within limit of 48 hours makes this even more difficult and will lead to boaters being fined when they need to

stay longer than 36 hours to carry out repairs, fill up with diesel, gas or water, go shopping or visit a GP. As there are so few services elsewhere, it is almost inevitable that many boaters need to stay in March or Whittlesey for longer than 36 hours. It is unjust to penalise boaters for simply needing to stop for the time it takes to obtain essential services and for the fact that services are not available in many other places.

3. At the moment, visitor mooring is available for 36 hours at FDC March and Whittlesey moorings. No return is allowed within 48 hours. Do you think this length of stay maximises the opportunities for boaters to visit March and Whittlesey?

Yes

NoX

Q: If no, please explain why:

As above. A Public Right of Navigation exists on navigable rivers, whether natural or canalised, including the Old River Nene. This has existed since Time Immemorial and was first codified in the Magna Carta of 1215. This right includes the entitlement of all boats to moor, anchor or remain stationary temporarily in the course of navigation for a convenient time and unless modified by statute, without liability or payment of tolls to a land owner. The reasonableness of the stay time depends on all the circumstances such as weather conditions, water levels, floods, fitness of crew, illness, injury and mechanical breakdown. Without new primary legislation, limiting the time that a boat may moor to 36 hours violates the Public Right of Navigation. The Council therefore has no powers to set mooring time limits and in doing so it is acting *ultra vires*. In the absence of any lawful powers to set mooring time limits, these time limits are advisory only and should be only be complied with voluntarily out of consideration for other boaters.

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specific powers to do so and in particular without obtaining byelaw powers. In *Attorney General v Wilts United Dairies* [1921] 37 TLR 884, the Attorney General had argued that the levying of certain charges, whilst not perhaps expressly or impliedly provided for by statute, was nonetheless a contractual matter of agreement between the parties.

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Further, if terms and conditions such as time limits are imposed on an essential service such as a mooring, where no other mooring is available, the contract is not freely entered into by both parties and would be in breach of the Consumer Protection from Unfair Trading Regulations 2008; see also *Burnett v British Waterways Board* [1973] 1 WLR p1.

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The proposed time limits and fines would mean that boaters would be threatened with fines for needing to take a rest day in a long cruise or for needing to be in March or Whittlesey for longer than an overnight stop, which is very often the case given that there are virtually no services of any kind anywhere else. This would be fundamentally unjust, especially where older boaters, boaters with disabilities, boaters who are ill and boaters with children are concerned, as these boaters are more likely to need a full day's rest or to stay for a longer period while they receive healthcare. This would potentially be a breach of the Equality Act 2010.

Boaters need to be able to stop for longer than 36 hours. The no return within limit of 48 hours makes this even more difficult and will lead to boaters being fined when they need to stay longer than 36 hours to carry out repairs, fill up with diesel, gas or water, go shopping or visit a GP. As there are so few services elsewhere, it is almost inevitable that many boaters need to stay in March or Whittlesey for longer than 36 hours. It is unjust to penalise boaters for simply needing to stop for the time it takes to obtain essential services and for the fact that services are not available in many other places.

4. Why do you moor in March or Whittlesey ?

With a few exceptions, March and Whittlesey are the only places on the Middle Level where it is feasible and safe to moor a boat for either an overnight stop or a longer stay. They are also two of the few places where there is a good range of shops and services on the 100 miles of Middle Level waterways, which mostly flow through isolated rural areas

with no moorings; no towpaths; no services such as diesel, gas, chandlery or boat repairs; no facilities for disposing of sewage or rubbish; no potable water taps; no shops and no health services.

5. Select your reason(s) for being on the river:

Residential

Socialising

Event Stay

Day Trip

Shopping

Weekend Break

Other (please specify) Passage between River Nene and Rivers Ouse or Cam

6. How often does your boat move positions along the river?

Daily

Weekly

Occasionally

N/A

7. Do you think that the current enforcement action taken by the Council is effective?

Yes

No

Q: If you answered 'no' why do you think it is not effective?

8. How could the Council better regulate the 36 hours moorings?

A better deterrent for overstayers would be to meet the needs of boaters, especially those who live on their boats, as the Council is required to do under Section 124 of the Housing and Planning Act 2016. This should be done by providing a mix of mooring stay times and by opening up more areas of the river bank for mooring, either with purpose built moorings or with areas of undeveloped river bank set aside for mooring. A mix of mooring stay times should include 48 hours; 14 days; long-stay moorings of up to 28 days and permanent residential moorings, with time limits that are extended in floods and in cases of illness, injury, family emergency, mechanical breakdown or other unforeseen circumstances.

Assessing and meeting the housing needs of people who live on boats forms part of the statutory duties of the Council under Section 124 of the Housing and Planning Act 2016. Time limits, allocation and management of any Council temporary or permanent moorings should therefore now come within the Council's social housing policy. This policy should recognise that boats provide affordable homes for people on low incomes, many of whom work in essential services such as health and education, who would otherwise be homeless because of the lack of affordable housing in Fenland district.

9. There have been recent issues with overstaying boats. To manage the mooring better, the Council is intending on fining overstayers for each 24 hour period they are on a

mooring after the initial 36 hour stay.

Q: Do you think that this a reasonable approach to deter overstaying boats?

Yes

NoX

Q: If you do not think this is reasonable, could you please suggest a better deterrent for overstayers?

A better deterrent for overstayers would be to meet their needs and provide a mix of mooring stay times and to open up more areas of the river bank for mooring. The proposal for daily fines is punitive, prohibitive and unjust, especially where older boaters, boaters with disabilities, boaters who are ill and boaters with children are concerned. This would potentially be a breach of the Equality Act 2010. We note that no Equality Impact Assessment has been carried out on the proposal to impose fines. It would be unjust to enforce a time limit that is difficult to comply with by way of fines for non-compliance. Even boaters who are on holiday need to stay in places where there are shops and services longer than 36 hours at a time.

There is no provision or procedure to accommodate the needs of boaters who need to exceed any given mooring time limit due to unforeseen circumstances such as adverse weather, floods, bereavement, family emergency, illness, injury or mechanical breakdown. To penalise boaters for such misfortunes would also be punitive, prohibitive and unjust and in the case of boaters with protected characteristics such as disability, would be a breach of the Equality Act 2010. It could also lead to the Council having indirect responsibility for injury, loss of the boat or loss of life in the case of flood conditions or boaters who are ill.

Typically, boat dwellers are either working people on low incomes or retired people on fixed incomes. A minority of boat dwellers are virtually destitute because they are not working and not in receipt of welfare benefits, usually because they have been turned away by either DWP or a local authority when they have tried to claim Jobseekers Allowance, Employment and Support Allowance, Universal Credit or Housing Benefit and are wrongly informed that they do not qualify because they live on a boat and do not have a fixed or local address. Given that the boat dwellers who may need to overstay for the longest periods of time may be on the lowest incomes, it would be counter-productive to impose financial penalties on them, because they will not have the means to pay.

Any enforcement regime that threatens the immediate seizure of boats would be unlawful in respect of boat dwellers. Pursuant to Articles 6 and 8 of the European Convention on Human Rights, it has been long established in case law, including *Canal & River Trust v Jones* [2017] EWCA Civ 135, that it is unlawful to remove the home of any person, including a boat that is their home, without due process; the opportunity to put a defence, and an assessment of the proportionality of depriving them of their home carried out by an independent court.

The Council states that "several boats" overstayed the mooring time limit in 2017. The NBTA has information that the number of boats that overstayed is less than 5. To penalise all boaters, whether they live aboard or not, for the actions of less than 5 people is punitive in the extreme and is a gross over-reaction on the part of the Council. In other contexts collective punishment is a crime.

No information has been provided regarding the level of fines or the enforcement process.

Without that information, this consultation is meaningless in that it does not allow those consulted to give intelligent consideration and an intelligent response. It therefore fails to meet the standards for consultation laid out in the Government Consultation Principles, which the Council as a public body is required to comply with.

10. Thank you - your feedback will help us to address overstaying boats and put in place a practical solution to managing the moorings.

For the reasons stated above, the proposals to introduce daily fines for boats overstaying on Fenland District Council moorings in March and Whittlesey would be unlawful and should be dropped.

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