

National Barge Travellers Association

Response to Elmbridge, Runnymede and Spelthorne Councils Unauthorised Moorings Stakeholder consultation.

Introduction

The National Barge Travellers Association (NBTA) is a volunteer organisation formed in 2009 that campaigns and provides advice for itinerant boat dwellers on Britain's inland and coastal waterways. This includes anyone whose home is a boat and who does not have 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 on all the major navigation authorities' waterways and beyond. The navigable inland waterway system in Britain is home to an estimated 15,000 to 50,000 Barge Travellers. There are as yet no accurate statistics for the number of people living on boats either with or without a permanent mooring in the UK. The NBTA deals with approximately 200 individual cases each year.

Option 1: Public Space Protection Order (PSPO) banning mooring

The PSPO would criminalise itinerant boat dwellers for the simple act of living in their homes. It would violate the Public Right of Navigation (PRN) on the River Thames, which has existed since Time Immemorial and which includes the right to moor for a "reasonable time" (see Halsbury's Laws of England, 5th edition, paragraph 691). The PRN includes the right to moor and fix temporary moorings in the waterway, or on the foreshore or to ground for undefined temporary periods on the river banks, including on private land; riparian land owners do not have an automatic right to demand payment. Case law has established that "reasonable" cannot be defined in advance but has to be decided on a case-by-case basis, so any mooring time limit is also unlawful (see for example *Moore v British Waterways*, EWCA Civ 73). The rights of the owner of the soil are subject to the precedent general rights of the public to exercise the PRN (see Edmund Whelan, *Marine Law: Public Rights of Navigation*, page 77).

The judgement in *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1978] Scot CS CSIH 3 confirms that while a PRN does not extend to the right to lay permanent mooring structures, where a PRN exists, it includes the right to moor for temporary periods using equipment that is intended to be, and can conveniently be, taken onto and carried on board the vessel in the ordinary course of use. The Court made no ruling on what length of time constitutes "temporary". Further authority is given in *Tate and Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 545, *Moore v British Waterways* [2009] EWHC 812 (Ch) and others.

Public quays exist throughout the Thames. On all land that the public has acquired the right of mooring or unloading, by whatever means, vessels may stay as long as they like, provided this right is exercised reasonably (J B Phear Esq: *A Treatise on Rights of Water*, Stevens and Norton 1859).

The policy of the Environment Agency (EA) of defining a "reasonable time" as 24 hours is not supported by either statute or case law, and the EA is acting *ultra vires* in imposing this blanket time limit. The PSPO would itself be *ultra vires* because it seeks to undermine the lawful rights of boaters and to usurp the powers of the navigation authority in legislation such as Section 79 of the Thames Conservancy Act 1932. The PSPO would therefore also

breach Section 66 of the Anti-Social Behaviour, Crime and Policing Act 2014. Therefore the PSPO would be unenforceable as it would be invalid.

The PSPO proposed by the Councils is likely to carry criminal fines of £1,000 for anyone caught mooring anywhere without the permission of the land owner. PSPOs are intended to address anti-social behaviour. There is nothing inherently anti-social in mooring a boat that is your home on a river bank. According to the Crime and Disorder Act 1998, Anti-Social Behaviour is action causing "harassment, alarm or distress". Mooring without the consent of the landowner clearly does not satisfy the statutory definition of Anti-Social Behaviour. The simple act of mooring a boat on a river bank does not of its nature have a detrimental effect on quality of life. Therefore the conditions in Section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014 are not met.

The PSPO would violate the rights of boat dwellers to respect for their homes under Article 8 of the European Convention on Human Rights. The sanctions are grossly disproportionate to the level of any alleged offence, especially given that river banks have boats mooring on them all the time.

The Councils claim that "unauthorised" mooring affects the quality of life of people in the boroughs and causes the loss of visual amenity. The councils have not provided any evidence in the consultation of how the quality of life of housed residents has been affected. Loss of visual amenity cannot remotely be described as "anti-social" and in any case, arguably part of the visual amenity of riverside locations is the sight of boats either moving or moored, which is the case on all waterways. Under planning law, house dwellers have no right to the preservation of a particular view from their property. In addition, the presence of moored boats, which are moveable, does not amount to a permanent removal of a view from any piece of land in the same way as a new building would permanently remove a view. The Anti-social Behaviour, Crime and Policing Act 2014 only gives councils the statutory power to make a PSPO if activities are persistent and will have a detrimental effect on quality of life. However, the report provided contains insufficient evidence to conclude that the activities detailed within it do indeed have a significant detrimental effect on quality of life. The scale and scope of the PSPO are thus disproportionate to the perceived problems.

In seeking to displace Bargee Travellers in favour of what the councils refer to as "genuine leisure cruisers" the PSPO is discriminatory in its effect as well as violating the Article 8 rights of boat dwellers, whose occupation of their boat as their home gives them superior rights to those simply using the river for a leisure pursuit. The proposed PSPO is not an appropriate balance between the needs of those against whom the PSPO will be employed and the wider community.

The councils are not proposing any measures to assist boat dwellers whom they allege are mooring "illegally" and therefore the proposed PSPO criminalising the simple act of mooring is not justified.

The PSPO will cause widespread homelessness amongst the Bargee Traveller community. Given that the consultation documents identify a total in the region of 50 to 80 boats moored along the River Thames within Elmbridge, it is likely that there are similar numbers of boats in Runnymede and Spelthorne. Previous research shows that for boat dwellers there is an average of 2.1 people living on each boat. The number of boats suggests a total population of between 315 and 504 adults and children, a proportion of whom will be elderly, disabled, pregnant, children of school age or people who are

vulnerable for other reasons. The consultation has failed to propose any measures that would protect these vulnerable people, and therefore the proposals fail to meet the tests set out in the Anti-social Behaviour, Crime and Policing Act 2014.

Given that the councils acknowledge that anyone whose home is a boat who has nowhere that they are entitled or permitted to place it and reside in it is homeless, it is deplorable that the councils are proposing a PSPO the effect of which will be to make up to 504 people homeless.

In addition, nowhere in the consultation do the councils propose carrying out welfare assessments of these boat dwellers, given that local authorities are required to consider the welfare needs of Travellers on land before taking steps to evict them, and not to evict at all if welfare needs are identified.

Sufficient enforcement powers against Anti-Social Behaviour already exist. There is a grave danger that any blanket PSPO that creates a blanket ban on mooring will catch innocent people who are not guilty of any Anti-Social Behaviour. Not only would a PSPO risk criminalising innocent boat dwellers, banning or restricting mooring with steep criminal penalties for overstaying mooring time limits would compromise navigational safety by forcing boaters to navigate in unsafe river conditions. This could result in boats sinking and loss of life. Have the Councils considered what information their representatives would be required to provide to a Coroner in such circumstances?

Option 2: Byelaws prohibiting mooring

As the text of any byelaw proposal has not been provided, the consultation violates the Government's Consultation Principles 2018 in that it provides insufficient information for those consulted to form a view. However, for the reasons stated above any byelaws prohibiting mooring would subvert the right to moor pursuant to the PRN on the River Thames and would thus be repugnant to the general law. In addition, byelaws with strict mooring time limits would compromise navigational safety by forcing boaters to navigate in unsafe river conditions. This could result in boats sinking and loss of life. This is precisely why the PRN includes the right to moor for a "reasonable time", "reasonable" not being definable in advance.

Therefore, boats may only be prevented from mooring if they remain for longer than a reasonable time. There is no definition in law of what is a reasonable time in this context. The reasonableness of the length of stay depends on factors such as the circumstances of each boat and on river and weather conditions. "Reasonable" is dependent upon the facts and cannot be laid down in advance, and consequently cannot be codified in byelaws.

In seeking to curtail mooring for a reasonable period of time, any such byelaws would be seeking to rescind the PRN and thus seeking to rescind Article 29 of the Magna Carta of 1215 and additionally to set aside authorities from Courts of Record. Byelaws are neither primary nor secondary legislation and therefore any such byelaws would be repugnant to the general law if enacted.

Option 3: Managed moorings

By "Managed Moorings" we understand that the Councils are referring to the so-called civil contract enforcement model such as is carried out by District Enforcement or similar car parking enforcement companies on behalf of some local and navigation authorities.

The business model and practices of District Enforcement and similar companies are highly questionable. Firstly they work on the assumption that vehicle parking and the mooring of boats are comparable activities, which they are not. The rights of navigators to moor on all riverside land pursuant to the PRN are not comparable to the legal rights of vehicle owners when parking on both private and public land. The danger inherent in requiring moored boats to move when river or weather conditions are unsafe is not comparable to setting a parking time limit on a road or in a car park.

Secondly they are incentivised to bully and harass boaters to pay the steep £100 per day mooring fines because that is how they make their profit. They do not receive a fee from the landowner for carrying out the enforcement. Because of this, when taking boaters to court District Enforcement have sought to do this on the cheap, with a director acting as a litigant in person rather than using a solicitor. This has resulted in numerous procedural errors that have severely disadvantaged boat dwellers, violating their rights to a fair trial under Article 6 of the European Convention on Human Rights.

The imposition of daily charges of £100 violates of the right to moor for a "reasonable time" within the PRN, which is codified in Section 79 of the Thames Conservancy Act 1932. This action is unlawful.

District Enforcement signs also claim that the company has the right to exercise a general lien upon any vessel and/or property of the owner while on/in the location; that the lien shall extend to the cost of recovering any sums due; that the company shall have the right to sell the goods by public auction or private treaty without notice to the owner; that the company is likely to take debt recovery action; that data relating to the owner will be obtained from the navigation authority; that data will be processed in accordance with the Data Protection Act 2018 and that the master of the vessel indemnifies the company against any loss or damage.

As stated above, mooring charges do not apply under any circumstances. In any event, the alleged fee of £100 per day is of a size that amounts to a fine. It is grossly disproportionate in relation to other commercial mooring charges. Therefore the amount is materially a fine. The only way that a fine can be imposed is by statute and as car park enforcement companies have no statutes, the mooring charge claimed is unlawful.

A general lien can only be imposed in accordance with the Torts Interference with Goods Act 1977 and this excludes further consideration that the boat is the owner's home and they are entitled to due process, thus violating their rights under Articles 6 and 8 of the European Convention on Human Rights.

Car parking enforcement companies such as District Enforcement can only take boat dwellers to court if they have the appropriate authority and provide a copy of the contract with the riparian owner; they can only make a claim using CPR Part 55 served in accordance with the practice direction; and they must afford the defendant the opportunity to defend the case. In the process of considering the case the court must perform a "full scope proportionality assessment" with respect to Article 8 of the European Convention on Human Rights (see *Jones v Canal & River Trust* [2017] EWCA Civ 135). They have no right to sell the boat without first obtaining a court order. Debt recovery action has the effect of circumventing due process and thus amounts to harassment. Car parking enforcement companies also claim that the master of the boat indemnifies them from the consequence of damage. As they are acting unlawfully this is unenforceable. Given the

duty of care that they inherit from in particular any public sector client they are not gifted to make this assertion.

Car parking enforcement companies are not engaging in law enforcement activity as they claim to be enforcing a civil debt. Accordingly under the General Data Protection Regulation the navigation authority should not share boat licence information with them. Should the navigation authority do so it will itself be in breach of the General Data Protection Regulation.

Option 4: Do Nothing

Out of the options proposed in the consultation, "Do Nothing" is the option that would result in the least harm to itinerant boat dwellers. Therefore the NBTA favours this option if no alternatives to what is proposed are considered by the Councils. Land owners, whether they are public bodies, corporate bodies or private individuals, already have sufficient enforcement powers to remove boats that are moored to their land for periods that are considered by a Court to be longer than a "reasonable time". Furthermore, sufficient powers to deal with Anti-Social Behaviour already exist and there is no need for any additional powers in this respect. However, the NBTA makes alternative proposals below. Our proposals would deal with the genuine issues that exist regarding mooring on the River Thames, rather than the issues that are perceived to exist by the residents of Elmbridge, Runnymede and Spelthorne and by those who rely on their votes in order to remain in power.

Alternative proposals

Instead of any of the four proposals in this consultation document, Elmbridge, Runnymede and Spelthorne Councils should should work with other riparian landowners to establish a network of temporary moorings for Bargee Travellers with durations of between two weeks and twelve weeks.

Such a network of temporary moorings should be managed by a permit system that is available only to people whose only home is their boat. Any permit system needs to be genuinely affordable, in line with the PRN, and all such moorings should include an initial free-of-charge period of 14 days. The establishment of a residential temporary mooring permit system would be not amount to a change of use of the riparian land, as the use of mooring space for temporary periods by leisure boaters also includes the boater residing on their boat for the duration of their cruise or holiday, and there would be a turnover of boats.

In addition the local authorities should provide facilities for boaters for potable water, rubbish disposal and chemical toilet sewage disposal.

Any provision of additional permanent moorings should not be made by utilising existing temporary mooring sites. The removal of temporary mooring sites forces more Bargee Travellers onto permanent moorings and therefore destroys their nomadic way of life.

We also recommend that the local authorities carry out an accommodation needs assessment under Section 124 of the Housing and Planning Act 2016. This section places a duty upon local authorities to " consider the needs of people residing in or resorting to their district with respect to the provision of ... (b)places on inland waterways where houseboats can be moored". This means that Bargee Travellers and boat dwellers must

now be included in the accommodation needs assessments that local authorities have a duty to carry out. We note that Elmbridge, Runnymede and Spelthorne Councils have not carried out an accommodation needs assessment under Section 124.

In addition to these measures, the councils should immediately carry out welfare assessments, in a sensitive and measured way, of all the estimated 315 to 504 people living on the boats that are to be targeted by the PSPO.

Please see the NBTA Best Practice Guide for Boat Dweller Accommodation Needs Assessments under Section 124 of the Housing and Planning Act 2016 here: <http://www.bargee-traveller.org.uk/best-practice-guide/>

Consultation fails to meet minimum standards set out in law and Government Guidance

The consultation does not meet criteria in the Government Consultation Principles 2018 in that it gives insufficient time for proper consideration of the proposals especially given that the consultation overlaps a holiday period. Five weeks is not sufficient for proper consideration of such serious proposals.

In addition the consultation violates the Government's Consultation Principles 2018 in that it provides insufficient information for those consulted to form a view. The wording of the proposed PSPO and byelaws are not provided; no details of the managed moorings proposal; the level of charges or the company that is proposed to operate the scheme are provided. The consultation makes blanket allegations of Anti-Social Behaviour, fencing off public land, overstaying on moorings and "illegal" mooring against an entire community, but fails to provide any evidence to support these allegations. The consultation lists the number of complaints made but fails to provide any information about the substance of the complaints. It fails to provide any information about the number of complainants, to assist consultees to assess whether they are the action of a small number of serial complainers.

The consultation also violates Section 72 of the Anti-Social Behaviour, Crime and Policing Act 2014 in that it does not publish the text of the proposed PSPO. It fails to show a detrimental effect on quality of life because no evidence to support the allegations made against boat dwellers in the proposals has been provided.

In addition the consultation violates the Equality Act 2010 because no assessment of the impact of the proposals on those with protected characteristics has been carried out. Finally, no account has been taken of the right to respect for private, family life and home under Article 8 of the Human Rights Act 1998.

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