
**CONSULTATION RESPONSE TO
LONDON BOROUGH OF HOUNSLOW**

“HOUNSLOW MOORING BYELAW CONSULTATION”

**BY THE NATIONAL BARGEE TRAVELLERS ASSOCIATION
3rd NOVEMBER 2017**

EXECUTIVE SUMMARY

The National Barge Travellers Association (“NBTA”) has been asked to comment on the proposed introduction by the London Borough of Hounslow (“LBH”) of byelaws to restrict mooring on the Thames in Hounslow. The NBTA supports itinerant boat-dwellers (“Bargee Travellers”, “BTs”).

The NBTA opposed such a proposition by LBH on the strongest of terms. The consultation introduction itself is highly offensive as it predicates the consultation with the proposition that mooring in the four zones is illegal: it is not.

The opposition of the NBTA falls under five heads as follows:

- 1 Subverting the right to moor subordinate to the Public Right on Navigation (“PRN”) on the River Thames
- 2 Subverting the right to moor on Canal & River Trust Water
- 3 Failing to address the needs of BTs, in violation of LBHs obligation under s.124 of the Housing and Planning Act 2016;
- 4 Compromising navigational safety; and
- 5 Pursuing a policy that is socially divisive, objectionable in the extreme, amounts to gentrification, falls generally under the description of “social cleansing”, is contrary to Labour Party policy, repugnant to the general law and is not becoming of a public body.

The NBTA notes that LBH is a Labour administration. The NBTA draws the attention of LBH to page 112 of the Labour Party Manifesto dated 12-05-2017 which states:

“We will end racism and discrimination against Gypsy, Roma and Traveller communities, and protect the right to lead a nomadic way of life”

The NBTA also observes that Ruth Cadbury MP (Brentford and Isleworth) has signed a letter to one navigation authority that challenges the institutionalised persecution of BTs. LBH should be engaging in supporting vulnerable boaters instead of persecuting them. This proposed byelaw does the opposite of that and is therefore betraying the obligation of LBH to members of its constituency.

1 PUBLIC RIGHT OF NAVIGATION ON THE THAMES

- 1.1 LBH is seeking to introduce a new Byelaw to control mooring on land that the Council owns or manages with water frontage and seeks to prevent “unauthorised” mooring.
- 1.2 Art 29 of the Magna Carta of 1215 provides for a public right of navigation (“PRN”) on, among other rivers, the River Thames including that which falls within the jurisdiction of LBH.
- 1.3 The authority of *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”.

- 1.4 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.
- 1.5 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).
- 1.6 Therefore, boats may only be prevented from mooring on the towpath or on a public quay if they "loiter or delay" 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.
- 1.7 "Reasonable" is dependent upon the facts and cannot be laid down in advance (and thus cannot be codified in the Byelaws) (see *Moore v BW* [2013] EWCA Civ 73 [63]).
- 1.8 The Byelaw seeks effectively to rescind the PRN (insofar as it effectively curtails mooring for a reasonable period of time within the jurisdiction of LBH) and thus seek to rescind Art 29 Magna Carta and set aside authorities from Courts of Record. The Byelaws are neither primary nor secondary legislation and therefore this attempt is ultra vires.
- 1.9 The Port of London Authority has powers to regulate mooring including byelaw 56 of the Port of London River byelaws 1978. In addition to these powers specific to the navigation authorities, general criminal and environmental health remedies exist for anti-social behaviour, noise nuisance, dangerous dogs, dog fouling, litter and breach of the peace, which local authorities should already be aware of.
- 1.10 Under s235(3) Local Government Act 1972 a byelaw can only be made if there is no other legislation which governs the nuisance that the byelaw is seeking to cover.
- 1.11 It is clear that (1) LBH is not a navigation authority and (2) there is already legislation that covers mooring on the waterways over which PLA holds jurisdiction.
- 1.12 It follows that the proposed byelaw has no locus in relation to its scope over the waterways that fall within the jurisdiction of PLA. This includes all the areas proposed save Boston Manor Park.

2 PUBLIC RIGHT OF NAVIGATION ON CANAL & RIVER TRUST WATER

- 2.1 London Borough of Hounslow is seeking to introduce a new Byelaw to control mooring on land that the Council owns or manages with water frontage, stating " ...will either fully restrict mooring in these areas or limit this to a temporary period over 24 hours..."

- 2.2 s.17(3)(c)(ii) of the British Waterways Act 1995 refers to a licensee being precluded from staying (moored) in any one place for more than 14 days unless it is reasonable in the circumstances. The inference is that for 14 days or less the Master of a vessel may remain moored without restriction.
- 2.3 s.8(2) of the British Waterways ("BW") Act 1983 permits Canal & River Trust ("CRT") to remove a vessel that is moored without lawful authority.
- 2.4 In 2012 BW gave an undertaking to Parliament that CRT would engage in due process before removing a vessel pursuant to s.8(2) if the vessel was used residentially. This undertaking was one component of the process that meant that BW could become CRT.
- 2.5 Under s235(3) Local Government Act 1972 a byelaw can only be made if there is no other legislation which governs the nuisance that the byelaw is seeking to cover.
- 2.6 It is clear that (1) LBH is not a navigation authority and (2) there is already legislation that covers mooring on the waterways over which CRT holds jurisdiction.
- 2.7 It follows that the proposed byelaw has no locus in relation to its scope over the waterways that fall within the jurisdiction of CRT, specifically Boston Manor Park.

3 HOUSING AND PLANNING ACT OBLIGATIONS

- 3.1 s.124 Planning and Housing Act 2016 requires LBH to conduct Accommodation Needs Assessments that include boats upon which people live ("Bargee Traveller Accommodation Assessments", "BTAAAs"). The Guidance issued by the Department for Communities dated 11-3-2016 requires LBH to consult the NBTA in the conducting of a BTAA.
- 3.2 s.124 requires LBH to execute BTAAAs at the same time as it assesses the housing requirements of the rest of the population. It is then incumbent on LBH to develop a strategy which addresses the need arising from the BTAA, through public or private provision.
- 3.3 In the response to the Freedom of Information Requisition here: https://www.whatdotheyknow.com/request/bargee_traveller_accommodation_n it is clear that LBH has not conducted a BTAA and is therefore in breach of its obligations under s.124.
- 3.4 Elected members have a duty to represent the interests of resident BTs as well as the settled community. In proposing this byelaw, LBH is acting in direct opposition to the interests of BTs. This is unlawful.
- 3.5 At the very least, LBH should be working with CRT and PLA to ensure an adequate provision of temporary moorings (the BTs equivalent of a transit site) - rather than preventing mooring.

3.6 It is in LBHs interests to address these concerns, because preventing boats from mooring and introducing criminal sanctions will result in boat dwellers becoming homeless and becoming dependent on council services and welfare benefits whereas at present they are self sufficient.

4 SAFETY

Navigational Safety

- 4.1 LBH states that the proposed byelaw "... will either fully restrict mooring in these areas...". It must be taken that this includes "even in a navigational emergency".
- 4.2 The master of a vessel is on responsibility for the conduct and safe passage of his crew, passengers, other crews and passengers, his vessel, other vessels, the public, public property and himself. LBH is at all times subordinate to this essential objective.
- 4.3 The tidal range at Teddington is substantial and, because of the specific characteristics of the river, as the tide flows the current can be severe.
- 4.4 Boats wishing to transit between Teddington and Thames Lock at Brentford (onto the Grand Union Canal) (i.e. downstream) or Thames Lock to Teddington (i.e. upstream) are admitted by the EA/Canal & River Trust ("CRT") just before the peak tide and as soon as the rising tide is deep enough respectively. This permits the vessel to ride the flowing tide downstream or ride the incoming tide upstream respectively.
- 4.5 This is because it is dangerous to seek to "buck" the tide especially in low-powered vessels such as narrowboats. These transits are also arranged by liaison between the duty CRT lock keeper at Thames Lock and the EA lock keeper at Teddington (both of whom are on 24-hour call-out).
- 4.6 The transit takes approximately the same time as the tide itself and therefore a small window exists with which to execute the vessel movement. If this goes wrong for whatever reason then the master is obliged to seek safe haven until the appropriate conditions return with the next tide. If a vessel fails to reach its objective before the respective tide is complete, and is obliged to seek safe haven, this has to be executed without recourse to LBH.
- 4.7 In a nutshell transiting between Teddington and Thames Lock comprises sophisticated navigation. In any event the Master has a difficult task to keep his crew, his passengers, members of the public his vessel and himself safe. LBH therefore has no place seeking to intervene through controlling mooring.
- 4.8 In relation to seeking "safe haven" within other jurisdictions this means a suspension of any mooring restrictions until the danger has passed. While this is technically unnecessary (noting the sovereignty of the Master of a vessel) it remains the case that inexperienced skippers may feel obliged to execute dangerous manoeuvres even in the presence of danger if compelled to do so by an authority. The NBT holds records of accidents that have taken place in such an instance.

- 4.9 The suspension of mooring restrictions therefore makes it clear to such a Master that marine safety is paramount. LBH appears to be oblivious of this objective and is therefore acting irrationally.
- 4.10 It is not for LBH to dictate how or where a master can seek safe haven for his vessel on these waters. Therefore if the byelaw were to have force it would be a valid (and compelling) defence for a master to assert his jurisdiction (to which the byelaw would be subordinate) in relation to navigational safety. Given this it is nonsensical (and unenforceable) to preclude mooring at certain locations under any circumstances.

Towpath Safety

- 4.11 The presence on the towpath of residential boats within the jurisdiction of LBH provides passive security for towpath users such as walkers and joggers.
- 4.12 The towpath should be used for mooring boats, not left as a no-go area where anti-social behaviour can flourish due to a lack of neighbourly scrutiny.
- 4.13 Many users of the Thames path, especially lone women, report feeling safer when residential boats are present, especially in urban areas.
- 4.14 If LBH wishes to attract more visitors to the Thames path it must recognise the invaluable contribution to safety made by BTs, in stark contrast to the proposition of the byelaw.

5 EQUALITY

- 5.1 The Public Sector Equality Duty in the Equality Act 2010 (“EA10”) places a duty on public bodies to prevent discrimination and promote equality. The proposed byelaw discriminates against people who live on boats without permanent moorings and will have a disproportionate adverse impact on boat dwellers without permanent moorings. The proposed byelaw therefore amounts to a breach of EA10.
- 5.2 There is a correlation between people who are BTs and the incidence of poor mental health. Although no formalised study has yet been conducted on this effect the NBTA has considerable evidence within its caseworker workload records of a high preponderance of mental ill-health among BTs. This circumstantial evidence is compelling as several influential academics hold the same view.
- 5.3 Mental ill-health is a Protected Characteristic for the purposes of EA 10. it follows that the proposed byelaw will adversely affect these people and is thus discriminatory. The Equality and Human Rights Commission has, when confronted with similar discrimination exhibited by certain navigation authority, examined the prospect of engaging in a conviction of that body, this being a live issue. LBH would be subject to similar scrutiny if the proposed byelaw was promulgated.

- 5.4 LBH has failed to identify the demographic grouping to which the proposed byelaw relates; has failed to identify whether the demographic grouping exhibits protected characteristics within the meaning of EA10; has failed to identify whether the byelaw would have adverse impacts on the demographic grouping and has failed to amend or withdraw the proposed byelaw accordingly.
- 5.5 In addition, as far as the NBTA is aware, no Equality Impact Assessment has been carried out of the effect of the proposed byelaw. This is unlawful. s.149 of EA10 requires a public body to conduct an Equality Impact Assessment before bringing into force a new provision such as this.
- 5.6 The proposed byelaw also discriminates on grounds of age contrary to EA10. It will have a disproportionate adverse impact on children of school age who live on boats without permanent moorings for the reasons stated above.
- 5.7 The proposed byelaw will also create sex discrimination contrary to EA10. It will have a disproportionate adverse impact on the ability of pregnant women and new mothers who live on boats without permanent moorings to gain access to the maternity health care they are entitled to.
- 5.8 LBH also asserts that the proposed byelaw will allow it to "... grant extended mooring allowances in exceptional circumstances and where prior written consent is provided".
- 5.9 Where a Protected Characteristic is present the person experiencing the Protected Characteristic is entitled to requisition Reasonable Adjustments. The public body to whom the requisition is served is usually only entitled to object to the requisitioned Reasonable Adjustments in exceptional circumstances. Put another way, someone with a Protected Characteristic is usually considered to be reasonable and the public body is expected to accede to their requirements unless there are compelling reasons not to.
- 5.10 In the case of a navigator "Reasonable Adjustments" usually implies protracted mooring arrangements and access to and use of a "sharp edge" (for boarding especially if a mobility scooter is employed)
- 5.11 As Protected Characteristics are typically addressed in retrospect the proposition that LBH will (1) permit extended mooring only in exceptional circumstances and (b) this will only be valid if agreed by LBH in advance, gives rise to violation of EA10.

6 GENTRIFICATION

Propagation of Untruths

- 6.1 LBH asserts that the byelaw will "... encourage users to moor at safer, managed areas along watercourses...". The NBTA argues that this is not a valid conclusion from the proposed byelaw and instead the subtext of the proposed byelaw is to purge the jurisdiction of BTs.

- 6.2 LBH asserts that the proposed byelaw will "... discourage anti-social behaviour along its water frontages...". This suggests that it is the BTs who are responsible for anti-social behaviour yet LBC offers not a single shred of evidence to support this proposition. In any event this proposition is highly offensive.
- 6.3 However given the comments in paragraph 4.11 et seq above it follows that in fact the opposite is the case, that BTs look out for members of the community wanting to enjoy the river bank and canal towpaths.
- 6.4 LBH asserts that the proposed byelaw will "... provide a means of regulating the quality of the boats moored on the river...". The subtext to this element is that all BTs have scruffy, unkempt, visually offensive boats. This is not the case. The majority of boats on the navigations of the nation, while may be described in many cases as "quirky", are also described as "attractive and adding to the vibrancy of the community".
- 6.5 Just as in the settled community occasionally one finds a dwelling that is less visually pleasing to the eye. However it is not in the gift of LBH to regulate who uses the navigation. Indeed for LBH to do so is highly offensive in an inclusive democratic society.
- 6.6 LBH also asserts that the proposed byelaw will " ... set criteria such as the ability of the boats to have pump out facilities for discharge and to monitor boats polluting its water frontages and take action as necessary...". The subtext is that BTs use black water disposal techniques that pollute the River. LBH has, again, provided not a single shred of evidence to validate this assertion.
- 6.7 It is unlawful for BTs to discharge black water into the river. The vast majority of BTs understand the antisocial nature of doing such a thing. From opinions gleaned by the NBTA from its membership, the majority BTs are acutely aware of the environment, are fully "in-tune" with it and do not pollute it.
- 6.8 It follows that the proposition of LBH that BTs pollute the waterways with black water is highly offensive. In addition the use of black water tanks (which are emptied using "pump-out" facilities) are more commonly found on large, recreational vessels while smaller, residential vessels are more commonly equipped with "Elsan" cassette toilets which are emptied into an Elsan disposal point. It follows that the subtext of LBH is that recreational boats are welcome while members of the BT community are not. This is discriminatory.
- 6.9 The NBTA notes that LBH does not provide a single facility to enable Elsan disposal. However every boat yard and marina offers this facility. Each navigation authority provides these facilities at regular locations.
- 6.10 One of the properties of a divisive, overbearing, bullying and non-democratic administration is to target a vulnerable demographic, propagate lies as to its habits or description, stir up hatred towards that demographic and then seek to legislate on the strength of adverse feedback from the majority. This is precisely what LBH appears to be doing in this instance.

Criminalisation of the Demographic

- 6.11 The proposed byelaw, if promulgated, would make it a criminal offence to moor within restricted zones and enable LBH to take action against unauthorised vessels.
- 6.12 LBH will be able to serve notices on unauthorised vessels to move on. If the vessels do not move on, their Masters could be taken to court. The Masters could also be given “on-the-spot” fines.
- 6.13 The proposed byelaw will result in homelessness for BTs. BTs are regarded as homeless if they live on a boat but have nowhere to moor it. This is a violation of their right to respect for their homes under Art 8 of the European Convention on Human Rights.
- 6.14 Following *Kay v UK* [2010] ECHR 37341/06 the ECHR determined that “home” was one of the most important aspects of life in a democratic society. While the State is not required to provide a home, once a citizen has established a home then the State is required to respect that home pursuant to Art 8 ECHR.
- 6.15 The consequence of this is that the State is required to demonstrate proportionality in its actions that affect someone's home (see *Canal & River Trust -v- Jones* [2017] EWCA Civ 135). In this context the State is afforded a narrow margin of appreciation in the execution of such actions.
- 6.16 Through the proposed byelaw LBH is, in effect, seeking to purge its jurisdiction of BTs and this is neither respectful of a boat dwellers' homes nor proportionate when considering its declared essential objective of managing its land.
- 6.17 The proposed byelaw also contravenes Arts 8 and 14 ECHR in that the effect of the byelaw will compel BTs to travel in a way that makes it difficult or impossible for them to remain in employment and maintain access to healthcare. This would breach their right to respect for their private and family life under Article 8 and would contravene Article 14 by discriminating against this demographic group by disrespecting their Article 8 rights in comparison to other residents of LBH.
- 6.18 The sanction of a criminal penalty will breach the right to respect for one's home due to the consequent criminalisation of a person for merely living in a particular way and possible forced removal of the boat. This also contravenes Article 14 by discriminating against this demographic group by disrespecting their Article 8 rights in comparison to other residents.

No respect for Property

- 6.19 The proposed byelaw contravenes Protocol 1, Article 1 ECHR. By subjecting the BT to such criminal penalties interferes with the right to peaceful enjoyment of one's possessions. The discriminatory nature of this effect also breaches Article 14.

No respect for the Needs of Children and Education

- 6.20 The proposals contravene A1, P2 ECHR. Subjecting BTs who have children in school to this draconian proposed byelaw breaches their children's right to education. Parents will be forced to withdraw their children from school if this byelaw comes into force and they comply with it. The discriminatory nature of this effect also breaches Article 14.

No respect for the Duty of Care

- 6.21 Local authorities have a duty of care towards all citizens within their boundaries. To deliberately cause homelessness to a group of people is a breach of the duty of care that constitutes gross negligence.
- 6.22 LBH has provided no evidence with this consultation that the nuisances that are cited to justify the proposed byelaw either exist or were committed by BTs. In the circumstances the NBTA can only conclude that this proposed byelaw is driven by prejudice and a lack of understanding of the rights of BTs.

Unfairness

- 6.23 The proposed byelaw is unfair in that it proposes to penalise all BTs for the (alleged) actions of a few. To lose the right to moor on the towpath or on public riparian land for a "reasonable time" is a very great loss to BTs regardless of whether they live on their boats.
- 6.24 It is an example of the extreme lack of understanding of LBH (and leisure boaters, members of the settled and non-boating community and other lobby actors) of the rights and needs of BTs and that the solution proposed to a perceived problem is to restrict mooring for all BTs regardless of whether they have themselves caused a nuisance or not.
- 6.25 In proposing the byelaw LBH would be acting contrary to the requirement on public bodies to exercise power reasonably following the authority of *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1KB 223.
- 6.26 The proposed byelaw amounts to collective punishment; in other contexts collective punishment would be a crime. This is fundamentally unjust.
- 6.27 Adequate remedies already exist to deal with the type of nuisance that the proposed byelaw is purported to prevent. There is no need for any additional legislation.

7 ABOUT THE NBTA

- 7.1 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. This includes anyone whose home is a boat and who does not have a permanent mooring that has planning permission for residential use. Security of tenure for those with residential moorings is also a matter of concern.
- 7.2 The NBTA is a statutory consultee to any local authority performing its duty under s.104 Housing and Planning Act 2016 in the performance of conducting a Bargee Traveller Accommodation needs Assessment.

Nick Brown
Legal Officer, NBTA
3rd November 2017

National Bargee Travellers Association
A: 30 Silver Street, Reading, Berks, RG1 2ST
T: 0118 321 4128
E: secretariat@bargee-traveller.org.uk
WWW: www.bargee-traveller.org.uk