

National Bargee Travellers Association

Response to Elmbridge Council consultation on Green Spaces Public Spaces Protection Order.

Introduction

The National Bargee 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 Bargee 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. The proposed Green Spaces Public Spaces Protection Order will have a severe detrimental effect on the quality of life of Bargee Travellers: people who live on their boats without a permanent mooring. This is a draconian proposal that will punish people for the simple act of living in their homes.

Inaccurate terminology

In its Cabinet report of 8th February 2022 and in the published consultation documents, the Council refers to "illegal" mooring; "unauthorised" mooring; mooring "without permission"; mooring "without consent" and boats "trespassing". The interchangeable use of these terms has served to demonise and misrepresent Bargee Travellers and the rights of people who live on a boat without a permanent mooring. There is no such thing as "illegal" mooring. Mooring a boat is not a criminal offence, regardless of whether the boater has permission from a land owner. Mooring a boat for a reasonable time in the course of navigation is a right that is part of the Public Right of Navigation (PRN) on the River Thames. Therefore, to do so is not "unauthorised" or "trespassing"; authorisation exists by means of the Public Right of Navigation. Permission of or consent by the land owner to exercise the Public Right of Navigation is not required.

Public Right of Navigation

The proposed Public Spaces Protection Order (PSPO) would violate the PRN on the River Thames, which has existed since Time Immemorial and was first codified in Article 29 of the Magna Carta of 1215 and more recently in Section 79 of the Thames Conservancy Act 1932. The PRN 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 the 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 such as 24 hours with no return within 72 hours is also unlawful (see for example *Moore v British Waterways*, [2013] 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, for example on a wharf, 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. Insofar as it would be *ultra vires*, 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.

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.

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. This is precisely why the PRN includes the right to moor for a "reasonable time", "reasonable" not being definable in advance. Has the Council considered what justification of its policies its staff would be required to provide to a Coroner in such circumstances?

In seeking to curtail mooring for a reasonable period of time, any such PSPO 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. Secondary legislation such as a PSPO cannot be used to rescind or usurp rights that derive from common law or primary legislation.

The definition of Anti Social Behaviour

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, and it does not inherently damage or degrade open spaces to the extent that they are not open to all on a continuing

basis. Therefore the conditions in Section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014 are not met.

There is a grave danger that any blanket PSPO that creates a blanket ban on mooring for longer than 24 hours will penalise and criminalise innocent boat dwellers who are not guilty of any Anti-Social Behaviour. The Council has identified littering and noise pollution as the activities that it alleges cause nuisance. Therefore it is disproportionate, contrary to Section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014, to target the activity of allegedly "mooring without permission". Given that the Council has identified the specific problems as littering and noise pollution, the Council already has enforcement powers against these offences under the Anti Social Behaviour Acts and other legislation. It leads to an absurdity in law to identify the problem as "X behaviour" and then to propose that the remedy to this is to penalise "Y behaviour".

The Council claims that "the unreasonable and persistent nature of mooring without consent" has a "detrimental effect on those living in the locality". However, no evidence has been provided of how the quality of life of housed residents has been affected or that that the activity of mooring a boat does indeed have a significant detrimental effect on quality of life. The act of mooring a boat in itself cannot remotely be described as "anti-social". The Anti-Social Behaviour, Crime and Policing Act 2014 only gives Council the statutory power to make a PSPO if activities are persistent and will have a detrimental effect on quality of life. The scale and scope of the PSPO are thus disproportionate to the perceived problems.

The PSPO will cause widespread homelessness amongst the Bargee Traveller community. The Council has previously estimated a total of around 50 to 80 boats moored along the River Thames within Elmbridge at any one time. Previous research shows that for boat dwellers there is an average of 2.1 people living on each boat.

A person 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 Council is proposing a PSPO the effect of which will be to make around 168 people homeless.

At the present time this community relies on mooring for periods considerably longer than 24 hours on each of the named river bank sites in Elmbridge in order to continue to occupy their homes. The consultation has failed to propose any measures that would protect these vulnerable people from being made homeless by the PSPO, and therefore the proposals fail to meet the tests set out in the Anti-Social Behaviour, Crime and Policing Act 2014.

The statutory conditions for making a PSPO have therefore not been satisfied and the proposed PSPO action will be an entirely disproportionate response to the alleged incidents of anti-social behaviour identified in the Cabinet report of 8th February 2022. In addition, in targeting people who are already statutorily homeless in that the Council considers they do not have a place where their homes can be moored, the proposed PSPO would be in breach of the Statutory Guidance issued by the Home Office on anti-social behaviour powers as updated in December 2017.

Equality Act 2010 and welfare issues

The Council states in the Cabinet report of 8th February 2022 that it carried out an Equality Impact Assessment of the proposals in January 2023 but it does not consider that a PSPO will have a disproportionate impact on groups with protected characteristics. However, the

Council has not provided the Equality Impact Assessment with the consultation and therefore insufficient information has been provided, contrary to the Government's Consultation Principles. We dispute that there will be no disproportionate impact on groups with protected characteristics. Boat dwellers who are disabled, elderly or pregnant will be disproportionately affected by the proposals because they are less able to move their boats to comply with the proposed PSPO, and may be moored in Elmbridge specifically because the location enables them to access health care; to get on and off their boats easily without walking along a plank or having to jump over a gap between the boat and the river bank; to access public transport within easy walking distance; or to get mobility scooters on and off the boat easily.

In addition, nowhere in the consultation does the Council propose carrying out welfare assessments of the boat dwellers who will be affected, 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.

The Council 's web site states that "We are also very aware that any PSPO may impact some vulnerable, homeless people and we will work with our partner Rentstart to ensure those impacted are supported". Unless this support consists of providing a network of temporary moorings and/or permanent residential moorings, the people who are vulnerable to being made homeless will not have their needs met; the involvement of Rentstart implies that Bargee Travellers will be forced into bricks and mortar and/or hostels.

The Council should immediately carry out welfare assessments, in a sensitive and measured way, of all the estimated 168 people living on the boats that are to be targeted by the PSPO.

Risk implications and community safety implications

The Council clearly has not considered the risks of the proposed PSPO to Bargee Travellers who may be forced to move or deterred from mooring by the PSPO. Nor has it considered the safety of the itinerant boat dweller community as a whole when proposing the PSPO. We have detailed above the risks of boats sinking and loss of life that the proposed PSPO will cause. We note that the Coroner has not been included in the list of consultees and the Council has not provided an explanation for this omission. The Council has not considered the risk of mass criminalisation of an entire community, which will have significant effects such as increased impoverishment and the restriction of access to employment to an entire community caused by individuals having a criminal record simply for living in their homes.

Article 8 and Article 14

No account has been taken of the right to respect for private, family life and home under Article 8 of the European Convention on Human Rights (ECHR). The PSPO would criminalise and fine itinerant boat dwellers for the simple act of living in their homes. This is a grossly disproportionate act and is a violation of their rights to respect for their home under Article 8. The criminal fines of £100 for anyone caught mooring on the identified locations would impoverish boat dwellers, who are typically on the lowest incomes. 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 proposed PSPO is not an appropriate balance between the needs of those against whom the PSPO will be employed and the wider community. Please note that boat dwellers are amongst those who are “living in the locality”. In failing to consider the risks to and the safety of the itinerant boat dweller community, who are temporarily or permanently also residents of Elmbridge and members of the community, the Council is discriminating against Bargee Travellers contrary to Article 14 ECHR.

In seeking to displace Bargee Travellers in favour of the interests of housed local residents, the PSPO is discriminatory in its effect, contrary to their rights under Article 14 ECHR.

Accommodation Needs Assessment

Section 124 of the Housing and Planning Act 2016 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.

Paragraph 64 of the Cabinet Report of 8th February 2022 states that

“without contacting the individual boat dwellers to carry out some form of assessment of housing need, it is difficult to state definitively what the impact of a potential PSPO would be in terms of duties on the local housing authority.”

This is an utterly disingenuous and untrue statement. We note that Elmbridge Council did contract Opinion Research Services (ORS) to carry out a boat dweller accommodation needs assessment which was completed on 3rd February 2022.

Furthermore, the Council failed to use the Boat Dweller Accommodation Needs Assessment to inform and shape planning policy in its Draft Local Plan for 2022 to 2037, published on 17th June 2022. Therefore the recommendations to provide moorings will not be implemented within the period of the Local Plan. The Draft Local Plan is completely silent on the accommodation needs of boat dwellers. The approach taken by Elmbridge Council lacks fairness, transparency and proper engagement with those most affected by this matter. It is hard to avoid the conclusion that the February 2022 Boat Dweller Accommodation Needs Assessment was deliberately withheld.

The Cabinet report also states that

“The Council’s Housing Service has no recent record of approaches from owners or occupiers of houseboats in relation to actual or threatened homelessness from houseboats on local waterways and is not aware of a significant quantum of expressed housing need (in terms of those occupying said boats being on the Council’s Housing Register).”

This is hardly surprising, given that most boat dwellers wish to continue to live on their boats and do not want to be forced out of their homes into bricks and mortar. Many, especially single men, are extremely fearful of being forced to live in a hostel or a care home. Unless the Council provides temporary and permanent mooring space that genuinely meets the housing needs of boat dwellers, they will be wary of any contact with the Housing Service.

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/>

Council ownership and control of Cigarette Island disputed

It is arguable whether the Council has the power to introduce a PSPO on Cigarette island. Given the history of the 'island', including its customary use going back to the 16th Century by Travellers, caravanners and campers, it would have been wise for the Council to produce evidence to demonstrate both its ownership of the land and additionally its power to introduce a PSPO covering the area marked on the maps in Appendices C and D.

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 *R(Moseley) v London Borough of Haringey* [2014] UKSC 56; and in *R v Brent LBC ex parte Gunning* [1986] 84 LGR 168.

Insufficient time

The consultation gives insufficient time for proper consideration of the proposals and inadequate time to formulate a response. Four weeks is not sufficient for proper consideration of such serious proposals. The duration of this consultation is too short and is not in accordance with good practice. The consequence of an unreasonably short consultation period is that it disenfranchises those whose views ought to be taken into account. This is the case here, as Bargee Travellers who moor their homes in Elmbridge for part of the time may not be in the area during the consultation period and will not have been contacted directly by the Council to take part. The timescale is severely skewed towards enabling the participation of local housed residents and the exclusion of boat dwellers.

Consultation method is not accessible or suitable to those most likely to be affected

The consultation is not easily accessible to those who are most likely to be adversely affected by the proposals, namely Bargee Travellers, and the Council has failed to take into account the most suitable way to consult them. This violates the Government's Consultation Principles 2018. The consultation is online only. It is not clear whether any option to respond by post or telephone has been provided or advertised. Most Bargee Travellers rely on pay-as-you-go mobile broadband for internet access, which is far less reliable and about 10 times the cost of broadband on land. A significant percentage of Bargee Travellers struggle with literacy. The Council has failed to target the consultation to the needs and abilities of the very group it is targeted against.

Insufficient and inaccurate reasons provided

The consultation violates the Government's Consultation Principles 2018 in that it provides insufficient reasons for the proposal to enable intelligent consideration and response. The wording of the proposed PSPO is not provided. The Equality Impact Assessment has not been provided. The evidence provided is virtually non-existent. In this regard the consultation proposal is wholly inadequate.

No reasoning or evidence is provided to explain why the problems identified are those of littering and noise pollution, and yet the proposed PSPO aims to restrict mooring allegedly "without consent". There is no explanation of how mooring without consent might cause, per se, Anti-Social Behaviour. The consultation makes blanket allegations against an entire community, but fails to provide any evidence to support these allegations.

The consultation refers to rubbish left by boats. No further evidence is provided regarding what the rubbish is, what quantity there is, and what evidence there is that the rubbish was left by boat dwellers. There is no explanation of how the Council has differentiated between rubbish allegedly left by boat dwellers, and rubbish left by anglers, overnight campers, or wild swimmers. It appears that the incidence of littering on the river bank has been double-counted and used to demonise both boat dwellers and those using the river bank for fishing and overnight camping. This is highly misleading. In addition, the Council has not explained what steps it has taken to ensure that there is a proper refuse collection service for boat dwellers.

The consultation also refers to noise pollution by moored boats. No evidence regarding the noise levels in decibels, the type of noise, or the times of day noise pollution is heard is provided. No evidence that the noise pollution is caused by boat dwellers is provided. There is no explanation of how the Council has differentiated between noise pollution in the same river bank areas allegedly by boat dwellers, and noise pollution by anglers, overnight campers, or wild swimmers. It appears that the incidence of noise pollution on the river bank has also been double-counted and used to demonise both boat dwellers and those using the river bank for fishing and overnight camping. This is also highly misleading.

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.

Paragraph 40 of the Cabinet report of 8th February 2022 states:

"98 complaints have been received Borough wide relating to unauthorised moorings since 2014, with 13 specifically relating to Hampton Court Bridge/Cigarette Island."

By listing the number of complaints received over a period of almost 10 years, this information is presented in a misleading way to make it appear that there has been an extremely high volume of complaints. This serves to misdirect consultees in favour of the proposals. It is not clear whether or not these 98 complaints over almost 10 years were made by a small handful of people. The substance of the complaints has not been made public, meaning that consultees have insufficient evidence as to whether these are complaints about very serious matters or whether they are unfounded complaints about boaters simply exercising the right to moor inherent in the PRN. The statement that there were 13 complaints "*specifically relating to Hampton Court Bridge/Cigarette Island*" is meaningless and does not enable consultees to form an informed view.

Inaccurate information

The consultation violates the Government's Consultation Principles in that blatantly untrue and misleading information is provided, making intelligent consideration of and response to the proposals impossible.

Paragraph 24 of the Cabinet report of 8th February 2022 states:

"One of the outcomes of the consultation was that the Environment Agency (EA) appointed an enforcement team to patrol the River Thames".

This is not true. The EA has had an enforcement team patrolling on the River Thames at least since 2010 when the Environment Agency (Inland Waterways) Order 2010 became law. The existence of this team has nothing to do with the Elmbridge, Runnymede and Spelthorne Councils' consultation of 2019. The EA brought enforcement of time limits on its own visitor moorings on the Thames back in-house in May 2022. This was not as a result of the consultation of 2019, it was the result of direct complaints about the contract between EA and District Enforcement.

Paragraph 64 of the Cabinet report of 8th February 2022 states:

"without contacting the individual boat dwellers to carry out some form of assessment of housing need, it is difficult to state definitively what the impact of a potential PSPO would be in terms of duties on the local housing authority."

This is an utterly disingenuous and untrue statement. We note that Elmbridge Council did contract ORS to carry out a boat dweller accommodation needs assessment which was completed on 3rd February 2022. As such, the information provided to the public regarding this consultation is inaccurate and untrue, and therefore fails to comply with the Government Consultation Principles.

Consultation violates Anti-Social Behaviour, Crime and Policing Act 2014

The consultation 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.

In addition, it fails to show a detrimental effect on quality of life because no evidence to connect the incidents of littering and noise pollution with moored boats to support the allegations made against boat dwellers in the proposals has been provided.

No alternative options proposed

Paragraphs 28 and 41 of the Supreme Court judgement in R(Moseley) v London Borough of Haringey [2014] UKSC 56 state:

"28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options..."

41. ... Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought."

Despite identifying a number of alternative options, including "do nothing", in the 2019 Consultation, there is not even a brief reference to any possible alternatives to a PSPO in this consultation. Despite the NBTA providing alternative proposals in response to the 2019 consultation, none of these alternative proposals have been mentioned, even in the context that they were rejected. We again provide those alternative proposals below. The omission to provide even brief information about alternatives to a PSPO invalidates the consultation.

Alternative proposals

Instead of a PSPO, Elmbridge and Surrey Council 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. In addition the local authorities should provide facilities for boaters of potable water, rubbish disposal and chemical toilet sewage disposal.

The establishment of a residential temporary mooring permit system would 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.

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.

**National Bargee Travellers Association
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