

National Bargee Travellers Association

Response to Elmbridge Council consultation on draft Unauthorised Mooring Public Spaces Protection Order, November 2023.

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 Unauthorised Mooring 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. Many responsible residents live harmoniously on their boats in the area while maintaining jobs, raising children, and contributing positively to the culture and economy of Elmbridge and the wider Thames area. Restricting mooring time limits to 24 hours would make it impossible to live in the Elmbridge area on a boat. Boaters need longer time to moor to keep jobs, work on our boats, look after our children and everything else that goes along with living in our homes. These restrictions would mean the annihilation of the community in the area which provides such a cultural boon and lowers crime by being a supportive active presence on the river bank.

Public Right of Navigation

The proposed Public Spaces Protection Order (PSPO) would violate the Public Right of Navigation (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. Contrary to the assertions of Elmbridge Council in its draft Order, Section 79 of the 1932 Act does not define mooring for a "reasonable time" as mooring for 24 hours, but rather leaves a "reasonable time" undefined.

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 (ASB). A PSPO is an order issued by a local authority which is designed to tackle activities carried on in a public place which have a detrimental effect on the quality of life of those in its locality and which prohibits specified things being done in a restricted area or requires specified things to be done by persons carrying on specified activities in that area, or does both of those things.

Section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014 states that a local authority may make a Public Spaces Protection Order if satisfied on reasonable grounds that the following two conditions are met:

Firstly, that activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or it is likely that activities will be carried on in a public place within that area and that they will have such an effect.

Secondly, that the effect, or likely effect, of the activities is, or is likely to be, of a persistent or continuing nature; is, or is likely to be, such as to make the activities unreasonable, and, justifies the restrictions imposed by the Notice.

There is nothing inherently anti-social in mooring a boat that is your home on a river bank for an undefined reasonable time. According to the Crime and Disorder Act 1998, Anti-Social Behaviour is action causing "harassment, alarm or distress". Mooring for an undefined reasonable time without the consent of the landowner clearly does not satisfy the statutory definition of Anti-Social Behaviour. The simple act of mooring a boat for an undefined reasonable time 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 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 alleged "unauthorised mooring".

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 or is unreasonable. There is no explanation of how "unauthorised mooring" might cause, per se, Anti-Social Behaviour. The Council states in its Equality Impact Assessment dated 20th October 2023 that it has received 99 complaints since 2014 about a number of issues connected to the unauthorised mooring of boats, but no evidence is provided regarding how the unauthorised mooring of boats is anti-social, or how this has a detrimental impact on the quality of life of local residents.

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 states that the latest count shows 116 boats moored along the River Thames within Elmbridge. 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. To prohibit mooring for longer than 24 hours effectively renders a boat dweller homeless. It is deplorable that the Council is proposing a PSPO the effect of which will be to make around 244 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 and access their employment, their children's education, and any health care they need. 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.

In addition, the *Anti-Social Behaviour, Crime and Policing Act 2014 ASB Powers: Statutory Guidance for Frontline Professionals* is a useful reference point by which to gauge the proposed draft order; PSPOs are dealt with at pages 47 to 57:

“Protecting the vulnerable:

- *Consideration should be given to how the use of this power might impact on the most vulnerable members of society.*
- *Consideration should also be given to any risks associated with displacement, including to where people may be dispersed to.”*

There is no evidence that the Council has considered how the use of this power might impact on the most vulnerable members of society. It will criminalise them with the consequence of subjecting them to financial penalties that either they will not be able to afford to pay or that will subject them to serious financial hardship. There is no evidence that the Council has considered the issue of displacement at all.

- *The terms are expected to be focused, proportionate and necessary.*

The legal tests focus on the impact that ASB is having on victims and communities. A PSPO can be made by the Council if it is satisfied on reasonable grounds that the activity or behaviour concerned, carried out, or likely to be carried out, in a public space:

- *has had, or is likely to have, a detrimental effect on the quality of life of those in the locality;*
- *is, or is likely to be, persistent or continuing in nature;*
- *is, or is likely to be, unreasonable; and*
- *justifies the restrictions imposed.”*

No evidence has been provided to show a detrimental effect on quality of life. It has not been shown that any behaviour is likely to be persistent or continuing or is unreasonable.

Equality Act 2010 and welfare issues

The Council carried out an Equality Impact Assessment of the proposals on 20th October 2023 but this failed to consider that a PSPO will have a disproportionate impact on groups with protected characteristics other than race, such as disability, sex, pregnancy and maternity, and age. We dispute that there will be no disproportionate impact on groups with these 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 assure us that having carried out welfare assessments of the boat dwellers who will be affected, it will consider the welfare needs of boat dwellers before taking steps to evict them and/or impose financial penalties under the PSPO, and will not evict and/or impose financial penalties at all if welfare needs are identified.

The Council states that it will involve Rentstart in the November 2023 consultation. Unless the involvement of Rentstart 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 244 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 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.

The aim of socially cleansing the river of Bargee Travellers is borne out by the Council's statement in the October 2023 Equality Impact Assessment regarding returning the river bank to "24 hour leisure uses". This would remove from the river bank anyone whose boat is their home, as "leisure uses" excludes use by those whose boats are their homes; their use of moorings is not "leisure", it is domestic and thus the proposed PSPO would violate and is designed to violate their Article 8 ECHR rights.

In seeking to displace Bargee Travellers in favour of the interests of housed local residents and "24 hour leisure uses", 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.

We note that Elmbridge Council contracted Opinion Research Services (ORS) to carry out a Boat Dweller Accommodation Needs Assessment which was completed on 3rd February 2022. In paragraph 64 of the Cabinet Report of 8th February 2022 the Council stated 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."

Even though the Boat Dweller Accommodation Needs Assessment was carried out some 21 months before this current consultation, the Council has failed to assess what the impact of a potential PSPO would be in terms of duties on the local housing authority.

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. This is inexcusable given that the Council was well aware of the issue three years earlier and of the need to do boater surveys where, as in the case of Elmbridge, there was a clear case for doing so. This suggests that the Council has no intention to provide moorings for boat dwellers and is simply concerned with clearing the area of Bargee Travellers altogether.

The Council states that the most recent count of vessels moored to the River Bank in Elmbridge is 116. The Boat Dweller Accommodation Needs Assessment of February 2022 claims that there is a need for “a need for 10 licensed permanent moorings” and that there are around 40 live aboard boats on the Thames through Elmbridge. The discrepancy between these two statistics is suspicious and should be investigated.

Elmbridge Council deliberately left the Boat Dweller Accommodation Needs Assessment out of the Local Plan, even though it had the opportunity to include it before the deadline. This suggests that the Council has no intention to provide moorings for boat dwellers and is simply concerned with clearing the area of Bargee Travellers altogether. This aim of socially cleansing the river is borne out by the Council’s statement in its Equality Impact Assessment of the proposals on 20th October 2023 that it aims to “restore the riverbank to 24 hour leisure uses”.

The statement in the October 2023 Equality Impact Assessment that “the proposal does not, by enforcement of a PSPO, lead to the conclusion that a person whose home is a boat becomes homeless or to impact on their way of life which is to rely on the River Thames for purposes of navigation, commerce trade and intercourse” is completely contradicted by the stated aim in the same document that the Council aims to “restore the riverbank to 24 hour leisure uses”.

Bargee Travellers need to be able to moor for at least 14 days in any location. They need mooring stay times of between 14 days and twelve weeks in order to maintain their access to employment, education for their children, and any health care that they may need. To force them to move on after 24 hours is draconian in the extreme, and is disruptive to their lives to the point of making their homes untenable, which will ultimately serve to render them homeless and destitute. The Council states in its October 2023 Equality Impact Assessment that the aim of the PSPO is to control “detrimental effect this behaviour is having on the quality of life of those in the locality”; however, the proposed PSPO will have a highly detrimental effect on the quality of life of Bargee Travellers, depriving them of access to employment, education and health care, thus reducing their quality of life to nothing.

The Council states in the same Equality Impact Assessment that “It is not considered that this will have a high impact due to the small number of locations to be subject to the proposed PSPO and the number of boats moored in these locations”. This assertion contradicts the Boat Dweller Accommodation Needs Assessment of February 2022 which found that boat dwellers need to be in the vicinity of Elmbridge:

“Boat dwellers were asked where on the river they moored most often. All 25 answered, with 16 saying they moored where they are now. Another nine moved between where they are now and other parts of the Thames nearby; Hampton, Walton, Shepperton and Kingston.” Only one cruised regularly. Another 7 travelled on the Thames to local destinations, mostly towards Windsor.”

It is clear that boat dwellers who moor in Elmbridge need to be in the borough due to their need to access employment, education, healthcare and other services and facilities including maintaining their private and family life, as they are entitled to under Article 8 ECHR.

The Cabinet Report of 8th February 2022 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 or with Rentstart.

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

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 evidence provided to justify the proposed PSPO is virtually non-existent. In this regard the consultation proposal is wholly inadequate.

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 Equality Impact Assessment of 20th October 2023 refers to complaints about 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 Equality Impact Assessment 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 number of complainants, to assist consultees to assess whether they are the action of a small number of serial complainers.

The Equality Impact Assessment of 20th October 2023 states:

"99 Complaints from local residents since 2014 have been collated to support the consideration of a PSPO:
Mooring without consent 76
Rubbish left by boats 15
Health and safety 10
Navigation 8
Pollution 9"

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 99 complaints over almost 10 years were made by a small handful of people. It appears that 76 of these are unfounded complaints about boaters simply exercising the right to moor inherent in the PRN. No explanation has been provided of the seriousness or otherwise of complaints about rubbish left by boats or pollution, nor of how it was determined that the pollution and rubbish were caused by boaters. No information has been provided to explain the context of complaints about navigation and health and safety.

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

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 NBT providing alternative proposals in response to the 2019 consultation and the February 2023 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 December 2023

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