

Neutral Citation Number: [2018] EWHC 84 (Admin)

Case No: CO/1259/2017 & CO/4638/2017

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 January 2018

**Before :**

**MRS JUSTICE LANG DBE**

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**Between :**

**THE QUEEN**

**on the application of**

**KP JR MANAGEMENT COMPANY LIMITED**

**- and -**

**LONDON BOROUGH OF**

**RICHMOND UPON THAMES**

**(1) KEW MARINE LIMITED**

**(2) THAMES REGIONAL ROWING COUNCIL**

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**Ashley Bowes** (instructed by **Prospect Law Limited**) for the **Claimant**

**Simon Bird QC and Charles Streeten** (instructed by **South London Legal Partnership**) for the  
**Defendant**

**Jonathan Clay** (instructed by **Richard Buxton**) for the **First Interested Party**

The **Second Interested Party** did not attend and was not represented

Hearing dates: 13 & 14 December 2017  
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**Judgment Approved**

**Mrs Justice Lang :**

**Introduction**

1.

In these two claims for judicial review, the Claimant has challenged the Defendant's response to the residential use of boats moored to a pontoon at Kew Marine, Bush Road, Kew, Richmond TW9 3AN ("the Site"). The Site comprises a walkway, landing stage and mooring pontoon, attached to piles driven into the riverbed. It is stationed in the River Thames, adjacent to Kew Bridge.

2.

The Claimant is a company limited by guarantee which was formed by local residents (who occupy sixteen properties in Kew Park Estate (“the Estate”) near Kew Bridge) to take legal action against the Defendant (“the Council”) which is the local planning authority. Mr Greggains and Mr Karmali, who are directors of the Claimant company, and resident in the Estate, made witness statements on behalf of the Claimant.

3.

The First Interested Party (“Kew Marine”) leases the Site from the Crown Estate. It operates as a business, and lets moorings and boats for residential use, as well as leisure use. The Crown Estate does not regulate the vessels which may be moored at the Site. The Port of London Authority (“PLA”) is the regulatory body which grants licences for moorings, as part of its control of the River Thames.

4.

The Second Interested Party (“IP2”) represents some forty rowing associations between Putney and Twickenham.

5.

The first claim for judicial review (CO/1259/2017) was issued on 13 March 2017. The Claimant challenged the Council’s failure to issue an enforcement notice under [section 172 Town and Country Planning Act 1990](#) (“TCPA 1990”) in respect of an alleged breach of planning control, namely, a material change of use arising from intensified residential use of the Site. Permission was refused on the papers but granted at an oral renewal hearing on 7 June 2017.

6.

On 31 August 2017, the Council granted Kew Marine a certificate of lawfulness of existing use or development (“CLEUD”) in respect of use of the Site, pursuant to [section 191 TCPA 1990](#). It certified that the use of the Site for the mooring of boats for residential and private leisure purposes, as specified, was lawful. The specified use was (1) four boats permanently occupied for residential purposes; (2) two boats occupied from time to time for residential and/or private leisure purposes; and (3) four boats used for private leisure purposes.

7.

In the second claim for judicial review (CO/4638/2017), which was issued on 10 October 2017, the Claimant challenged the lawfulness of the CLEUD. Since permission had already been granted in the first claim, and there was an overlap between the two claims, the second claim was ordered to be heard together with the first claim, at a rolled-up hearing.

8.

It was common ground between the parties that the first claim had been overtaken by the Council’s decision to grant the CLEUD, and so the second claim should be heard first. If the CLEUD was found to be lawful, then the first claim would fall away.

## **Facts**

9.

The Site is within the Kew Green Conservation Area. It is adjacent to Kew Bridge, which is Grade II listed. The Site falls within the “Buffer Zone” of the Kew Gardens UNESCO World Heritage Site. The Council’s World Heritage Site Management Plan (2014) has created a “World Heritage Site Buffer Zone” comprising some 350 hectares, including the River Thames, and its banks, at Kew Bridge.

10.

There has been a mooring at the Site since at least 1916. For many years a marine business operated at the Site, although it was unclear whether or not that business had been abandoned at some stage. A Mr Springate stated in a letter in around 2007 that he had lived in the area for 32 years and throughout that time Kew Marine had operated as a marina and boatyard, and had been occupied by the owners.

11.

In 1986, a Mr Chaplin and his wife purchased the Kew Marine business. According to a letter from Mr Chaplin dated 27 June 2007, the previous owner was a Mr Jeffries who “lived in the offices/ accommodation barge that was there then. We believed he had lived there for about six years”. Mr Chaplin said that, immediately after purchasing the business, they brought a boat on to the moorings and used that as their office and London home (their main home was in Cambridgeshire).

12.

Mr Chaplin went on to say that, in 1990, they brought a Thames Lighter (a flat-bottomed barge, without an engine), called Lambeth Bridge to the Site. They renovated it over a period of six years, and used it as a part-time office and London home. They also said that a caretaker (Mr Freeman) lived at the Site between 1988 and 1994.

13.

The residential use described by Mr and Mrs Chaplin was supported by statements obtained in 2007 from Mr Saunders (who had a mooring at the Site); Ms Penhaligon (who lived on a barge called Admiral Tromp between 1997 and 1998); Mr Piesse (a solicitor and visitor to the Site); Mr Saundeson (commercial estate agent responsible for the sale of the business by Mr and Mrs Chaplin to Mr and Mrs Cronk); Mr Banks (an acquaintance of the Chaplins); and Mr Westcott and Ms Milsted (insurance brokers, who arranged insurance for the Site and Lambeth Bridge from 1991). Photographic evidence from the Council’s geographic information system showed that large boats, including Lambeth Bridge, had been moored at the Site since at least 1991.

14.

The PLA granted a works licence to Kew Marine in 1996, for use of the river for the mooring of recreational boats and the ancillary use of the Lambeth Bridge for office use. According to a letter from the PLA dated 10 March 2006, the licence provided that the Site would “not be used for residential purposes without the prior approval of the PLA (not to be unreasonably withheld)”.

15.

Mr Greggains moved to the Estate in 1999. At that time, Lambeth Bridge and a number of smaller recreational leisure craft were moored to a pontoon. In his view, there was no permanent residential use at that time, because there were no lights on at night, and there was a low level of daytime recreational use.

16.

In 2004, the Chaplins sold the business to Mr John Cronk and Mrs Kate Cronk, who were directors of the company. Mrs Kate Cronk made a statutory declaration dated 25 February 2016 setting out a brief history. The Cronks were separated, and Mr Cronk used Lambeth Bridge as a full time residence. As it had six bedrooms, their four children were able to stay on the boat with him for part of the week. Mr Cronk died in 2012. Their daughter, Georgia, lived on Lambeth Bridge from 2009 to 2011. Another daughter, Phoebe, has lived on Lambeth Bridge since 2010, and continues to do so. She also made a statutory declaration dated 25 February 2016.

17.

At some stage Lambeth Bridge was divided into two separate units. The report from Mrs Cronk's planning consultant (Metropolis Planning & Design), submitted in support of the application for a CLEUD, stated that Lambeth Bridge had been divided into two household units – the "Main Barge" and the "Stern Quarters". The units were separately assessed for Council Tax. According to Mr Greggains' evidence, the vessel has been subdivided into "a separate rental apartment and a HMO, housing in total c. 6 people".

18.

On 20 July 2006, Kew Marine applied for planning permission for the construction of a new pontoon and piles. Mr Greggains, writing on behalf of the Kew Park Management Company, objected to the grant of planning permission, and drew the Council's attention to possible breaches of planning control arising from the use of moored vessels as houseboats, in place of the leisure boats. An Opinion from Mr Harper QC was submitted to the Council in support of the objections. A useful summary of the objections was included in the Officer Report to the Planning Committee, including overlooking of Kreisel Walk; noise and disturbance; refuse and sewage; problems with vehicular access and parking; detriment to the character and appearance of the area, including the setting of Kew Gardens, a world heritage site. There were objections from rowers and rowing associations, about the effect of an enlarged pontoon, and the resulting increase in houseboats, which would obstruct the river and cause sedimentation and narrowing of the river channel. Concerns were expressed by the PLA that large boats moored on the outside of the pontoon could be an obstruction and a navigational hazard.

19.

The Officer Report stated: "[t]here is no planning history authorising houseboat moorings and it is likely that such use would not currently be lawful, since there is no evidence provided of such a use having become lawful by reason of its having persisted without permission for ten years continuously up to the present date".

20.

The Council granted planning permission on 9 February 2007, stating that the "proposed works would enhance the river facility and would not conflict with policies aimed at protecting the river environment, local amenity or conditions or safety on the highway". Kew Marine implemented the planning permission in 2008.

21.

The Council obtained an Opinion from Nathalie Lieven QC on 20 March 2008 on the use of the Site. She advised (1) the planning unit was the extent of the demise from the Crown Estates i.e. the area of the mooring and its immediate surroundings on the bed of the river; (2) that there was strong evidence of more than ten years residential use by two vessels moored at the Site, and so they were immune from enforcement; (3) there had not been any material change in use since Mr Chaplin's ownership. She added, at paragraph 26: "[i]f there was a significant increase in the level of residential use of the site then a fresh question would arise about whether there had been a material change of use".

22.

In her Opinion, Nathalie Lieven QC concluded, on the evidence before her, that the vessel known as Seahorse had been moored at the Site for six or seven years (i.e. since about 2002) and was used as residential accommodation. Mrs Cronk confirmed that Seahorse was moored at the Site when she and her husband purchased the business in 2004, and it was in residential use. On 29 June 2007, the then

owner of Seahorse, Mr Stuart Clarke, wrote a letter confirming that the vessel had been moored at the Site for the past four years. He lived on board for the first two years, and then rented it out to tenants. Mr Clarke sold Seahorse to a Mr Schulenburg in December 2009. Mr Schulenburg made a statutory declaration on 24 January 2016 stating that, since July 2010, he had been living full time and permanently on Seahorse with his wife and young child. Prior to that date they were refurbishing the boat. In January 2010, Kew Marine granted a 5 year licence of a residential mooring for Seahorse to Mr Schulenburg.

23.

Nathalie Lieven QC also concluded, on the material before her, that another vessel called Admiral Tromp was moored at the Site and used for residential purposes from about 1987, since a mooring licence was granted to the Admiral Tromp in 1987 for one year. Ms Penhaligon provided a statement on 6 November 2007 stating "I lived on the Admiral Tromp Dutch barge from 1997 to 1998. To my knowledge the boat had been moored there for at least five years...". It appears that Admiral Tromp occupied the mooring which is now occupied by Seahorse.

24.

On 27 November 2008, on the application of Mr Cronk, the PLA granted Kew Marine a supplemental licence which provided for the mooring of "two residential vessels known as the 'Main Barge' and the 'Seahorse'". Paragraph 21 of Schedule 3 provided that the lessee was not to moor more than two residential vessels at the Site and to apply for the PLA's written consent prior to bringing any substitute residential vessels to the Site.

25.

According to Mrs Cronk, two other barges have been moored at the Site since 2009, and they have been used for residential purposes, though their owners have primary residences elsewhere. One is called Avanti, in respect of which a mooring licence was granted by Kew Marine, on 10 August 2009, for a period of five years. The Claimant believes Avanti is only used at weekends. The other is called Volharding; it has no formal mooring licence.

26.

Since September 2014, a narrow boat called Briar has been moored at the Site and used for residential purposes. The owner has also rented it out for holiday lets on the website Airbnb. It has no formal mooring licence. Since 2015, a Dutch Barge called Maria Elisabeth has been moored at the Site and used for residential purposes. Its owner was granted a five year mooring licence with effect from 1 July 2015.

27.

Kew Marine provides the following services to the moored vessels: electricity, water, sewage disposal, security and a toilet for those using the marina. The residential vessels are separately assessed for council tax.

28.

In addition to the six vessels which are used for residential purposes, there are also smaller boats moored at the Site, which are used for recreational purposes, assessed as four at the date of the application for the CLEUD, following some revision.

29.

In his first witness statement, Mr Greggains described how the increased residential use has had a negative effect on the residential amenity of residents in the Estate. At high tide, occupiers of the

boats are able to look directly into the first floor windows of houses in Kreisel Walk. Some boat occupiers use wood-burning stoves which emit smoke across the Estate. Delivery of wood is one of a number of reasons why traffic and unauthorised parking has increased. Estate residents have had to incur the cost of engaging a private parking enforcement contractor. Sewage was being discharged directly into the river.

30.

On 1 December 2015, the PLA refused an application by Kew Marine to vary the existing licence so as to increase the number of vessels in residential use from two to six. In a letter dated 4 December 2015 to Mr Greggains, the PLA stated:

“There is no evidence that the intensification of residential use at the moorings has the benefit of planning consent and, as the vessels are already located at the moorings, consent would have resulted in a simultaneous breach in the obligations on the licensee to ensure all relevant consents are in place. Such a course of action would be clearly inappropriate. The Committee further resolved that, unless a further application was submitted to the PLA, together with appropriate evidence from the Local Planning Authority, within three calendar months from the date of this letter, further residential use of the vessels numbered 1, 6, 8 and 9 on the attached drawing must immediately cease.”

31.

The PLA also concluded that the continuing discharge of sewage from the vessels into the river was a very serious, longstanding breach of the licence. It required that appropriate action had to be taken within one month to ensure that no sewage was discharged into the river.

32.

In response, Kew Marine installed a floating septic tank between the river wall and Lambeth Bridge in 2016. This has caused further problems to the Estate residents. The tank is emptied about once a month, early in the morning, by a tanker. The operation takes over an hour. The noise of its engine and pump is intrusive. There is an obnoxious smell across the Estate. Hoses are run across the tow path, obstructing users. Initially the tanker parked in an unauthorised area, but it has now moved, following complaints.

33.

On 22 February 2016, Kew Marine applied to the Council for a CLEUD in respect of the residential use. The Officer Report recommended that the application should be granted. Residents of the Estate made representations objecting to the application and Mr Greggains spoke at the meeting of the Planning Committee. On 28 October 2016, the Planning Committee adjourned the decision, in order to obtain further advice from Counsel and any further comments from the PLA.

34.

In January 2017 the Claimant sent a pre-action protocol letter, challenging the Council's ongoing failure to take enforcement action. The Council replied on 1 February 2017, denying that there was any obligation to take enforcement action.

35.

On 9 March 2017, Mr Brian Mitchell, Vice-President of the Thames Regional Rowing Council, made a statement in support of the Claimant's claim for judicial review. The Thames Regional Rowing Council represents forty rowing clubs (including school and youth clubs) between Putney and Twickenham, twenty-five of which regularly pass through Kew Bridge. Because of the nature of the tidal river, rowers must obey a special set of navigation rules which require rowers to pass through the Kew side

arch when going against the stream. They are not allowed to proceed against the stream in the centre of the river. If the arch is unusable, they must not proceed beyond the bridge towards Richmond, and are thus prevented from rowing on one of the best stretches of rowing water on the Thames.

36.

Mr Mitchell explained that, prior to mooring of large houseboats at the Site in about 1995, the navigation channel through the Kew side arch was always clear, even at times of very low river flow. However, the mooring of increasing numbers of houseboats at Kew Marine has led to the accumulation of silt, and debris which is caught up in the silt. This makes the Kew side arch un-navigable at most normal low tides. The debris damages boats as well as blocking the channel. As a result, some rowers have breached the navigation rules by using the centre arch when going against the stream. He gave details of collisions and near-misses which had have occurred, leading him to the conclusion that this was a major safety hazard.

37.

Mr Mitchell confirmed that the Council had been informed of these concerns but, in his view, the Council had little or no understanding of, or consideration for, the safety of rowers.

38.

The Claimant issued the first claim on 13 March 2017.

39.

At its meeting on 31 August 2017, the Planning Committee re-considered the application for a CLEUD, with the benefit of further advice from counsel and comments from the PLA, as it had earlier directed. An Addendum Officer Report was provided which recommended that the application be granted.

40.

The Council granted a CLEUD, in respect of use of the Site, in the following terms:

“ **The [Town and Country Planning Act 1990](#), (as amended)**

#### **Decision Notice**

**Application: 16/0753/ES191**

**Your ref:** Kew Marine, Richmond

**Our ref:** DC/NID/16/0753/ES191/ES191

**Applicant:** Ms Kate Cronk

**Agent:** Mr David Symonds

**WHEREAS** in accordance with the provisions of the [Town and Country Planning Act 1990](#) and the relevant Orders made thereunder, you have made an application received on **26 February 2016** for a **CERTIFICATE OF LAWFUL USE OR DEVELOPMENT** relating to:

**Kew Marine Bush Road Kew Richmond**

for

**The stationing of a pontoon attached to piles driven into the river to which boats that are capable of independent navigation together with one former Thames lighter (which is a boat**

**that is not self-propelled) can be moored for a mixed use for (1) residential and (2) private leisure purposes comprising:**

**(i) Four boats which are permanently occupied for residential purposes**

**(ii) Two boats which are occupied from time to time for residential and/or private leisure purposes; and**

**(iii) Four boats which are used for private leisure purposes;**

**(iv) An ancillary gangway to the pontoon and moored effluent tank.**

You are advised that the above works/use at the premises edged black on the plan attached to this Certificate were/was lawful within the meaning of [Section 191 of the Town and Country Planning Act 1990](#) (as amended) for the reason(s) summarised and detailed on the attached schedule."

#### **" DETAILED CONDITIONS AND INFORMATIVES**

##### **DETAILED CONDITIONS**

###### **U29145 Reason for granting**

It has been satisfactorily proven that two moveable boats in residential use have subsisted at the site for a period of at least 10 years, together with moveable leisure craft and ancillary vessels. It has been adequately demonstrated that the stationing of a pontoon attached to piles driven into the river to which boats that can move independently can be moored for a mixed use comprising both residential and leisure purposes is lawful within the meaning of S191 of the Town and Country Planning Act.

##### **DETAILED INFORMATIVES**

###### **U05460 Decision documents**

For the avoidance of doubt the Drawing(s) No(s)/Documents to which this decision refers are as follows:-

3027-D1000-rev00; 3027-D2101; and Planning Statement (Job Ref: 3027), prepared by Metropolis Planning & Design, dated February 2016 (including Statutory Declarations and further supporting evidence); received on 26 February 2016; information for LBR Counsel received 20/12/2016

###### **U18122 Advice to applicant**

This Certificate relates to the stationing of a pontoon attached to piles driven into the river to which boats that are capable of independent navigation together with one former Thames lighter (otherwise known as a swim-barge) can be moored for a mixed use comprising four of them for full-time residential purposes, two of them for part-time residential purposes and the remaining four for other purposes. The applicant is advised that it is the nature of a mixed use that the precise balance of uses may vary from time to time and this is unlikely to be regarded as a material change of use if there are no material environmental consequences and the overall mix is maintained. The question as to what increase in residential boats would constitute a material change of use is a matter of fact and degree and whilst the use of four boats in residential occupation is considered to come within the existing mix, the Council reserves its position should this number increase."

##### **Grounds for judicial review**



41.

In the second claim for judicial review, the Claimant submitted that the Council's decision to issue the CLEUD was unlawful for the following reasons:

i)

In determining the appropriate planning unit, the Council failed to take account of material considerations and took account of immaterial considerations;

ii)

In considering whether a material change in the use of the land had occurred in the relevant ten year period, the Council adopted an erroneous approach;

iii)

The residential use which the Council certified as lawful was not supported by the evidence.

42.

If the second claim for judicial review succeeded, the Claimant submitted that the first claim for judicial review should be granted, on the following grounds:

i)

The change of use arguably amounted to Environmental Impact Assessment ("EIA") development within the meaning of the [Town and Country Planning \(Environmental Impact Assessment Regulations\) 2017](#) and so the Council was required to obtain an EIA screening opinion;

ii)

The Council's continued failure to decide whether to take enforcement action against the increased residential use at the Site, which was a breach of planning control and contrary to its own adopted byelaws, was irrational and unlawful.

43.

The Claimant did not pursue the other grounds pleaded in the first claim for judicial review.

### **Statutory framework**

44.

[Section 191](#) TCPA 1990 provides, so far as is material:

#### **" Certificate of lawfulness of existing use or development**

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter."

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

.....

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall –

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question.....

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

.....”

45.

By s.171B(3) TCPA 1990, the time limit for enforcement against a change of use (which does not fall within subsections (1) or (2)), is ten years, beginning with the date of the breach.

## **Conclusions**

### **Judicial review**

46.

In a claim for judicial review the Claimant must establish that the Council misdirected itself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

47.

The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. An application for judicial review is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, per Sullivan J. at [6].

### **Officer reports**

48.

Officer reports are directed to an expert readership and those readers should be expected to be familiar with national and local policies, as well as their localities. In *R (Luton BC) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin), Holgate J. helpfully reviewed the authorities, as follows:

“90. A great many of LBC’s grounds involve criticisms of the officers’ reports to CBC’s committee. Accordingly, it is necessary to refer to the legal principles which govern challenges of this kind. I gratefully adopt the summary given by Mr Justice Hickinbottom in the case of *The Queen (Zurich Assurance Ltd trading as Threadneedle Property Investments) -v- North Lincolnshire Council* [2012] EWHC 3708 (Admin) at paragraphs 15-16:

“15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

(i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

(ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

“[A]n application for judicial review based on criticisms of the planning officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken” (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997) 1997 WL 1106 106, per Judge LJ as he then was).

(iii) In construing reports, it has to be borne in mind that they are addressed to a “knowledgeable readership”, including council members “who, by virtue of that membership, may be expected to have a substantial local and background knowledge” (*R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes “a working knowledge of the statutory test” for determination of a planning application (*Oxton Farms*, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

(i) The interpretation of policy is a matter of law, not of planning judgment ( *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13) .

(ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

(iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee ( *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at page 780 per Lord Hoffman).”

91. I would also draw together some further citations:

"[The purpose of an officer's report] is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members, who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail." (per Sullivan J in *R v Mendip DC ex p Fabre* (2000) 80 P&CR 500 at 509).

92. In *R (Siraj) v Kirkless MBC* [2010] EWCA Civ 1286 Sullivan LJ stated at para. 19:

"It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a common sense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee"

93. In *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at paragraph 43 Sales J (as he then was) stated:

"The Court should focus on the substance of a report of officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotations of material, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.""

49.

These well-established principles were approved by the Court of Appeal in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, and developed by Lindblom LJ, at [42], where he said:

"...The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

50.

In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government & Ors* [2017] EWCA Civ 1643, at [7], Lindblom LJ cautioned against "hypercritical scrutiny" of, inter alia, planning officer reports which should not be "laboriously dissected in an effort to find fault".

## **Planning control over the River Thames**

51.

It was common ground before me that planning controls may apply to river operations and activities. In *Thames Heliports Plc v London Borough of Tower Hamlets* (1997) 74 P & CR 164, which concerned the application of planning control to a floating heliport on the River Thames, it was established that, even if there was no physical connection between a structure placed on the river and the riverbed or bank, the use of the structure and the activity which it generates may amount to a material change in use, and thus require planning permission. In arriving at that conclusion, Ward LJ held at pp.177-178 that the ordinary incidental use of the River Thames is “the activity of ships boats and other vessels passing over the water for the purposes of navigation, commerce, trade and intercourse” and that the relevant question was whether the floating heliport was a material change in use from that ordinary incidental use of the River.

52.

Applying these principles, it was common ground before me that the use of moorings for residential use was capable of amounting to a material change in the ordinary and incidental use of the land, and thus potentially may require planning permission. A change of use which is not material is not development within the meaning of section 57 TCPA 1990, and so does not require planning permission.

### **Ground 1: The planning unit**

53.

The Claimant accepted that the identification of the appropriate planning unit was a matter of planning judgment for the decision-maker. However, it submitted that, in this case, the Council had failed to ask itself whether, within the Site, the moored boats comprised separate areas of occupation, and thus it failed to have regard to material considerations when it concluded that the planning unit comprised the mooring and pontoon area as a whole.

54.

The leading authority on the identification of planning units is *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 in which Bridge J. said at pp.1212-1213:

“First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd. v Gloucestershire County Council* [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:

“What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a ‘material change in the use of any buildings or other land’? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.”

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

55.

In *Johnston v Secretary of State for the Environment* (1974) 28 P & CR 424, the Divisional Court upheld the Secretary of State's decision upholding enforcement notices served on individual occupiers of a garage or small group of garages in a block who were impermissibly using their garages for vehicle repairs. The submission that the only appropriate planning unit was the entire block of 44 garages was rejected. Lord Widgery CJ applied Bridge J.'s analysis in *Burdle* stating, at pp.426 -427:

"The important phrase there is the suggestion that one should start with the "unit of occupation," in other words, that prima facie the planning unit is the area occupied as a single holding by a single occupier. I would not for a moment wish to suggest that that is an absolute rule admitting of no exceptions, but that it may be the first step in the approach to this problem I think is clearly right, and it is not without interest that Mr. Hames has not been able to show us any reported case in which the planning unit has been settled as being an area of land comprised in two different holdings or occupations. All that that goes to show, in my judgment, is that in deciding what is the appropriate planning unit the unit of occupation is of great importance, if not of predominant importance, and accordingly, as Mr. Hames accepts, it is clearly a consideration which the Secretary of State or the local authority may take into account in deciding what is the appropriate unit."

56.

In considering a comparison between the garage block and a block of flats, Lord Widgery said obiter at p.428 that:

"I would have thought that in almost every case of a block of flats, the flats being let to separate and different tenants, the planning unit would be the flat in question."

57.

In *Church Commissioners for England v Secretary of State for the Environment* (1996) 71 P & CR 73, Mr R.M.K. Gray QC, sitting as a Deputy High Court Judge, held that, where there were two units of occupation which were both relevant to the identification of the planning unit, it was a matter of fact and degree for the decision-maker to determine the appropriate planning unit, in that case, an individual retail unit within a large shopping centre.

58.

In *Gregory & Rawlings v Secretary of State for the Environment* (1990) 60 P & CR 413, the Court of Appeal upheld enforcement notices which had been served against whole caravan parks, rather than individual caravans, rejecting the submission that the legislation required a separate enforcement notice to be served in respect of each unit of ownership. Whilst typically a planning unit would comprise an area occupied as a single holding, caravan sites had unusual features and characteristics which entitled the inspectors to treat each caravan site as one planning unit.

59.

In my judgment, it is clear from these authorities that the decision-maker has to make a planning judgment as to the appropriate planning unit, which is a matter of fact and degree. Where there is more than one relevant unit of occupation, the decision-maker has to make a judgment accordingly. The Court will not interfere with an exercise of planning judgment, and will only intervene if an error of law is established.

60.

I am unable to discern any unlawfulness in the planning judgment which the Council made in this case. There were two competing views, each supported by legal advice. The Estate residents had submitted an opinion from Mr Harper QC contending that the mooring of each boat should be considered as a separate planning unit but Nathalie Lieven QC, counsel for the Council, and Jonathan Clay, counsel for Kew Marine, both advised that the appropriate planning unit was the mooring and pontoon area, leased by the Crown Estate to Kew Marine. In the exercise of its planning judgment, the Council was entitled to conclude that the mooring and pontoon area as a whole was the appropriate planning unit, for the reasons set out in the reports.

61.

The Officer Report and the Addendum Report gave detailed consideration to the legal and factual issues which the Planning Committee had to consider.

62.

The Officer Report prepared for the meeting on 28 October 2016 set out the evidence in detail, and on the issue of the planning unit, it advised as follows:

“27. ....It is necessary first to identify the “planning unit”, i.e. the area of land to which attention needs to be drawn. This is normally relatively straightforward, e.g. a house, shop or small business premises. However, in some cases it can be more difficult when the boundaries of an area are uncertain or there are a variety of activities.

28. In this case Kew Marine is a relatively defined area being the subject of a lease of the river-bed from the Crown Estate, the lease is vested in Kew Marine Ltd and various individuals have been granted licences to moor boats to the pontoon. It has been submitted by the opponent to the application that each boat should be considered a separate planning unit; the area of land in each case being the part of the river bed over which it floats. This is not considered to accord with the legal principles for defining a planning unit and would not be practical in any event as individual boats can move their positions and the logic of this approach would apply to even very small boats such as skiffs or canoes.

29. It is considered that the correct approach is to regard Kew Marine as one entity for planning purposes where boats that are moored to the perimeter of the pontoon are free to come and go and share the common facilities offered by the pontoon when in situ. The position is akin to a caravan park, a market with a number of stalls and a farm, which may have a number of entities within it, but

which for legal purposes is considered as one planning unit. The Church Commissioners case quoted by Prospect Law concerns the Gateshead Metro, which is a 140,000 square metre shopping mall with over 300 shops and other units and has no comparison with Kew Marine.”

63.

The Addendum Report was drafted by planning officers, following sight of the pleadings and evidence in the first judicial review claim, and with the benefit of further advice from counsel. It stated:

“13. With respect to the definition of the Planning Unit, Counsel agreed with officers in rejecting the suggestion that each houseboat is a separate planning unit, on the basis that planning is concerned with the use and development of land and buildings and not chattels such as a boat which is not physically attached to the land or so permanently on the relevant land that they are properly treated as buildings. In terms of the houseboats, the relevant land will be the river bed and the river banks.

14. In applying the normal tests and in considering whether the site comprises more than one planning unit the relevant considerations include whether each occupier has exclusive possession of the area occupied by their vessel, whether the company provides services to the moored vessels, whether the vessels move to other positions on the mooring and whether or not they can be required to moor in a different location by the company. Further information was therefore requested from the applicant in respect to the agreements with occupiers and the day to day operation of the marina.

15. Some documents supplied by the applicant’s agent since the last committee meeting show that no boat owner has exclusive possession of any part of the marina, their licences include provision for the owner to direct in what position they should moor and subsequently change that location, Kew Marine Ltd has to be informed of all movements, and central services are provided including a toilet for those using the marine. These details together with other information held are considered to demonstrate satisfactorily that as a matter of fact and degree the application site comprises one planning unit.”

64.

The Claimant submitted that the Planning Committee failed to have regard to other “crucial material considerations” namely, that the vessels in residential use rarely moved and when they did, they returned to the same mooring; the occupier of each vessel in residential use was liable to pay council tax and in the case of the Lambeth Bridge there was separate liability for each of the two residential units; and the PLA licences treated each vessel as a separate entity.

65.

As Judge LJ said in *Oxton Farms*, a report by a planning officer to his committee is not required “to repeat each and every detail of the relevant facts to members of the committee .....”. Here the Planning Committee had available to them the documents appended to the application, which included council tax bills to individual occupiers, as well as Kew Marine’s electricity bills for the vessels, and a note from the applicant attaching copies of mooring licence agreements, which provided that the mooring was “in such a location as [Kew Marine] from time to time directs”. Members were aware of the distinctions between vessels used for residential purposes and those used for leisure purposes. The Planning Committee was adequately appraised of the relevant factual and legal issues, in the Officer Report and the supporting documents, and, in my view, it was not significantly or materially misled by the Officer Reports. It was not arguable that inclusion of the matters relied upon by the Claimant in the officer reports would have made any difference to the outcome.

## **Ground 2: Erroneous approach to material change of use**



66.

The Claimant submitted that the Council erred in reaching the conclusion that residential use of the vessels had subsisted for at least ten years prior to the date of the application for the CLEUD (22 February 2016), and by rejecting the Claimant's contention that there had been a material change in the use of the land from about 2009, when additional and larger vessels in residential use were moored at the Site.

67.

First, the Claimant submitted that the Planning Committee had been seriously misled by the Officer Report since it had erroneously addressed the acceptability of the change in the use of the land, instead of confining itself to the question whether or not there had been a material change in the use of the land.

68.

Second, the Claimant submitted that the Officer Report adopted a flawed approach to the evidence. In relation to smoke emissions, it made no difference whether the emissions emanated from the vessels occupied for full time residential use, or from the vessels in occasional residential use. Whilst it was correct to say that navigation issues were matters for the PLA, this did not shut out consideration of Mr Mitchell's evidence on the question whether the increased size and number of vessels in residential use had changed the character of the use of the land.

69.

Third, the Claimant submitted that the Council erred in not considering whether there was a material change in the character of the land by reference to the development plan. Policy CP10 Core Strategy (2009) and DM OS2 Development Management Plan (2011) restricted development within Metropolitan Open Land which did not fall within defined classes of uses including "open recreation and sport". The residential use of moorings not falling within an appropriate use was therefore an inappropriate use of land. Policy DM OS13 Development Management Plan (2011) restricted new houseboat moorings on the Thames. The supporting text explained at 4.1.53 that existing visitor and pleasure craft moorings, which contributed to the recreational use of the river were an established part of the river scene, and would be protected where they meet the criteria outlined in the policy. Accordingly, the loss of pleasure craft moorings in favour of permanent houseboat moorings conflicted with the statutory development plan. Conflict with the development plan was a relevant consideration, which ought to have been drawn to the attention of the Planning Committee.

70.

In my judgment, there was ample evidence upon which the Council could properly conclude that there had been continuous residential use of at least two vessels moored at the Site for more than ten years prior to 22 February 2016 (see the history set out at paragraphs 9 to 25 above). Therefore the ten year time limit for enforcement against a change of use in section 171B(3) TCPA 1990 had expired. [Section 191\(2\)\(a\)](#) TCPA 1990 provides that operations are lawful if no enforcement action may then be taken in respect of them. The Council had earlier obtained an opinion from Nathalie Lieven QC which confirmed the planning officers' advice on this issue.

71.

The Officer Report for the meeting on 28 August 2017 and the Addendum Report correctly advised the Planning Committee that it had to consider whether the introduction of additional vessels in the period 2009 to 2015 had resulted in a material change of use of the marina to residential. They advised that a material change of use of land amounting to development could arise by intensification

of an existing use if it amounted to a change in the character of the use. In arriving at a judgment whether such a change in character had occurred, regard must be had to any offsite impacts. The leading case of *Hertfordshire CC v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1473 was expressly referred to in the Officer Report.

72.

In *Hertfordshire CC*, Pill LJ reviewed the authorities and confirmed the principles to be applied, at [9] to [11]:

“9. It is not disputed that intensification of a use is capable of constituting an MCU [material change of use].....What is necessary however, and accepted by the parties to the present appeal, is that the test for deciding whether there has been an MCU is whether there has been a change in the character of the use. In *East Barnet Urban DC v British Transport Commission* [1962] 2 QB 484 at 491, Lord Parker CJ stated:

“It seems clear to me that under both Acts ... what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier.”

10. In *Lilo Blum* [1987] J.P.L. 278, Simon Brown J, stated, at 280:

“It was well recognised law that the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use.”

.....

11. The general test applied by the Inspector, at [68], is, in my view, in accordance with authority:

“In the light of judicial pronouncements, and after considering the approaches of the parties, it seems to me that what must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site.”

Ouseley J., at [46], correctly referred to:

“...the need to identify a material change in the definable character of the use of the land.””

73.

Pill LJ explained at [25] that in “assessing whether there is a change of character in the use, its impact of the use on other premises is a relevant factor, It is necessary, on the particular facts, to consider both what is happening on the land and its impact off the land when deciding whether the character of the use has changed”.

74.

In my judgment, when applying these legal tests to the particular facts, it was proper for the Council to consider the nature of the changes which had taken place since 2009 and their impact on the surrounding area. In carrying out this exercise, the Council considered the concerns which had been raised by the Claimant and IP2 about the off-site effects (e.g. the character and appearance of the Kew Bridge Conservation Area, Kew Bridge and the River Thames; visual intrusion and loss of privacy;

smoke emissions; sewage disposal; and effects on boats navigating the river). In the exercise of its planning judgment, the Council concluded that the increase in vessels in residential use at the Site had not resulted in such a change in the character of the use that it amounted to a material change of use.

75.

I do not accept the Claimant's submission that the Council's conclusion was vitiated by errors in its approach, and I consider that the Claimant has adopted the type of hypercritical scrutiny of the planning officer's reports which has recently been deprecated by the Court of Appeal.

76.

In respect of the first alleged error, the planning officers expressly advised the Planning Committee in the Officer Report at paragraph 10 that the Council was considering an application for a CLEUD, not an application for planning permission, and therefore the planning merits of the increase in residential mooring or other factors regarding the use of Kew Marine, were not relevant. I do not accept that they confused the task of assessing the on-site and off-site effects of the increased residential use to determine whether there had been a change in the character of the use with the different task of assessing the planning merits of any such effects. It was unfair to pick through the wording of the report with a fine-toothed comb to seek to identify areas where the planning officer may have strayed too far into a qualitative review, as there was inevitably an overlap between the two tasks when considering the evidence on the effects.

77.

In respect of the second alleged error, I consider that the planning officers addressed these issues adequately and appropriately, in respect of smoke emissions at paragraph 23 of the Addendum Report, and in respect of navigation, at paragraphs 11, 31 and 38 of the Officer Report and paragraphs 9 and 23 of the Addendum Report. In my view, there is no substance in the Claimant's criticisms.

78.

In respect of the third alleged error, the Addendum Report correctly advised that the development plan policies were not relevant to this application. It was not necessary for the planning officers to set out in their reports the relevant policies relating to development on the River Thames and its status as Metropolitan Open Land because the Council's policies would have been well known to the Planning Committee. The development plan policies, and the status of Metropolitan Open Land, added nothing to the Council's assessment of whether there was a change in the character of the use of the land because it was not a case where "the loss of an existing use would have significant planning consequences": *R (Royal Borough of Kensington and Chelsea) v Secretary of State for Communities and Local Government* [2016] EWHC 1785 (Admin), per Holgate J. at [8(4)], following *Mitchell v Secretary of State for the Environment* (1995) 69 P & CR 60, and *Richmond LBC v Secretary of State for the Environment Transport and the Regions* [1994] 2 PLR 115. Unlike those cases, the definable character of this Site was not derived from, nor contributed to, by policy and the Council did not fail to consider some significant planning consequence arising from policy.

79.

I agree with Mr Bird QC's submission that the Claimant's challenge to the Council's decision was a thinly-disguised attack on the merits of the Council's planning judgment, with which it profoundly disagreed. The Claimant failed to establish any error of law in the Council's decision.

### **Ground 3: The scope of the certificate**

80.

The Claimant submitted that the use certified as lawful in the certificate was not supported by the evidence. However, it accurately reflected the existing mixed use at the date of the application for the CLEUD which the Council had found to be lawful. In my judgment, the Claimant's submission was misconceived. Residential use by vessels at the Site had become lawful, by virtue of immunity from enforcement action, by the time of the application for the CLEUD. The Council decided that the increase in the number of vessels in residential use, beyond Lambeth Bridge and Sea Horse, was not a material change of use, and so it was lawful. The content and degree of particularisation in the certificate was a matter of judgment for the Council, based on the evidence: see *R (Flint) v South Gloucestershire Council* [2017] JPL 310.

### **Final conclusion**

81.

Because permission to apply for judicial review was granted for the first claim, it is appropriate to grant permission for the second claim too. But for the reasons set out above, the second judicial review claim is dismissed. It follows that the Claimant's first judicial review claim must also be dismissed.