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GRASMERE

LOWTHER ESTATES CLOPUD APPLICATION

URGENT OPINION

SUMMARY:

1. The application should be refused. The introduction of any of

   (i) boats containing holiday *sleeping* accommodation, even if potentially or actually mobile **or**

   (ii) boats of the proposed size **or**

   (iii) any boats permanently or long term based on the water, even when not occupied,

   would involve a material change of use from the present and historic use of the lake. It would constitute development and require planning permission to be lawful.

2. An analogy would be with the introduction, onto a piece of land used for recreational riding by bicycles and wind yachts (even motorised quad bikes), and for sport shooting, of a use by motorized "RVs" (Recreational Vehicles ie motorised caravans) providing holiday sleeping accommodation. Whether the RVs stayed in one part of the site or moved around the use would be materially different from the previous use.

3. Here the boats are likely to be stationed on the planning unit permanently, and unlike the RVs, incapable of being moved away at will for short or long periods of time. The proposed use might well usefully be viewed as a marine RV park.

Introduction:

4. I am asked to advise on the application by Lowther Estates for a Certificate of Lawfulness of Proposed Use or Development ('CLOPUD') under s 192 of the Town and Country Planning Act 1990 ('TCPA 1990'). The application is in respect of

> "the mooring of up to 10 boats …to be used for recreational use and overnight holiday accommodation" [on the lake of Grasmere]

5. The application was made just before the Christmas/New Year winter break.This led to the late delivery of instructions to me, and the need for urgency in response.

6. The specification of the boats is set out in Schedule 2 which the letter of 11th December 2019 and the Planning Statement ('PS') effectively incorporate into application.

7. The Planning Statement ('PS') submitted on behalf of the applicant is evidently intended to be incorporated in the application. Reference is expressly made to it several times on the application form. If it were not intended to be so incorporated then most of it would be irrelevant either as reasoning for grant of the certificate or supporting documentation (as it is stated to be in the answer to Q5).

8. The PS states at [2.1] that the whole lake (which I assume for the purposes of this opinion includes the whole of the lake bed—although this needs to be confirmed) is owned by the Lowther Estates and that the primary use of the lake is for recreational use

> "…such as occasional sailing craft, rowing boats and fishing…"

I am instructed that the lake is also used for some swimming.

9. Each boat is described as a "gentleman's yacht" up to 40ft long (PS [3.4.9]). It will have a kitchen, toilet and sleeping quarters large enough for 6 people (PS [3.4.5]). It will be capable of sustaining itself for about one week before needing new food supplies and will not discharge waste, sewage or grey water into the lake (PS [3.4.6]).

10. The boats may anchor anywhere on the lake. The position of 10 crosses at the SE of the lake shown on Plan 9144/101 "only identifies the commonest point of embarkation, disembarkation and overnight mooring"

11. The bye laws applicable to Grasmere, I am instructed, prohibit the use of internal combustion engine powered boats. I understand that there has been[1] no widespread non compliance sufficient to indicate a use of the lake significant enough for it to be possible to treat them as appropriate comparators. There has not been any significant use on Grasmere of electrically powered vessels.

12. I understand that no boats similar to the ones proposed (either in size, motive power or sleeping accommodation) have been used on Grasmere to any significant extent (if at all, which seems highly doubtful).

The Law:

13. The application must be considered on the basis of the facts and the law, *not* on the basis of an assessment of the *desirability*, of the proposed use. Section 192 (1) TCPA 1990 provides that:

> 'If any person wishes to ascertain whether –
> (a) any proposed use of buildings or other land
> (b) any operations proposed to be carried out in, on or over land would be lawful….'

14. The burden of establishing that the proposed use would not involve development falls upon the applicant insofar as in the absence of information satisfying the authority of the lawfulness of the proposed use the application must be refused. Section 192 (2) provides that:

> 'If …the local planning authority are provided with information satisfying them that the use or operations described in the application would be

[1] I rely on those instructing me as to the factual position. Should any material emerge during the consideration of the application which potentially alters or challenges their understanding of the factual position, I would, of course, be happy to comment on the implications of such material for my Opinion.

lawful….they shall issue a certificate to that effect; and in any other case they shall refuse the application'

The Planning Practice Guidance of the Government is that:

'In the case of applications for proposed development, an applicant needs to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand *exactly* what is involved.' (my emphasis) (Paragraph: 006 Reference ID: 17c-006-20140306 Revision date: 06 03 2014)

15. The Court of Session in Scotland has held that the word "lawful" in the equivalent provision in the Scottish legislation must be understood as referring to compliance with planning law rather than general law. Although this decision, East Dunbartonshire CC v SSS & MacTaggart and Mickel [1999] 1 PLR, is not binding in English law I shall advise on the basis that it is a correct statement of the law of England.

16. It follows that I would attach no *direct* significance to the compliance or otherwise of the proposed use with Grasmere byelaws. The prohibition is however *indirectly* relevant. In a sensitive area such as it is Grasmere extremely likely that there would have been complaints of, if not prosecutions for, any non compliance with the byelaws. The absence of such prosecutions or complaints is a strong indication of compliance. This corroborates the evidence that the comparator for the proposed use is a situation in which use by internal combustion engine powered boats has not to any significant extent taken place.

17. The authority may disaggregate the elements of an application and grant a certificate in respect of only some of them. Section 193 (4) TCPA 1990 provides that:

'A certificate [under s 192] may be issued –
(a) For the whole or part of the land specified in the application; and
(b) Where the application specifies two or more uses, operations or other matters, for all of them or some or one or more of them'

18. The authority may not modify the terms of the application. By contrast in respect of certificates of lawfulness of established use or development ('CLEUDs') the authority may modify the terms of the application. There is express provision for this in relation to CLEUDs in s 19**1** (4) TCPA 1990. As there is no similar provision in the next section relating to CLOPUDs (s 19**2**) the principle of statutory interpretation *expressio unius exclusio alterius* applies. (Where a provision is *expressly* applied to one instance of a category then its application to other instances of the general category cannot be *implied* unless there general round up words bringing all instances of the category within the scope of the provision.) This leads to the conclusion that the absence of an express power in s 192 cannot be supplemented by the implication of a power to modify. A purposive approach to the legislation leads to the same conclusion. The authority can see for itself what is actually happening on the ground and it may be in the public interest for it to draft terms which correspond to, and publicly record for the future, the reality on the ground. Parliament evidently considered that there is no similar public interest in a record of one among the many potential uses or operations which might in planning terms be lawful. The distinction makes sense.

19. The Planning Statement correctly accepts at [4.2] that planning control applies to land covered by water such as the lake of Grasmere. The Court of Appeal so held in Thames Heliport v Tower Hamlets LB [1996] EWCA Civ 1063, (1997) 74 PCR 164.

Discussion:

Would there be a material change of use?

20. The application form surprisingly states in answer to Question 4 (notional 2) that it involves no change of use of the land. This statement seems to me to be wrong. It seems to me that the application does involve a change of use. That is not however an end of the matter, as only *material* changes of use constitute development (s 55 TCPA 1990). It is because opinions often differ as to such questions of mixed fact and law that the application has sensibly been made before introducing the new use.

21. The Planning Statement asserts at [4.3-4.4] that the whole of the lake is one planning unit as it has clearly defined boundaries and is in a single ownership. It derives support from a Planning Inspectorate decision (APP/E3905/C/06/19638) relating to West of Ladies Bridge, Pewsey that the whole of the Kennet and Avon Canal was one planning unit.

22. I express no view on the correctness, or applicability as a precedent, of the Pewsey Inspector's approach.

23. It seems to me however that on the basis of the general principles governing the definition of the planning unit it would be possible to conclude that the relevant planning unit is, in the present context, the whole of the lake of Grasmere. The classic statement is that of Mr Justice Bridge (later Lord Bridge of Harwich) in Burdle v SSE [1972] 1 WLR 1207. Sitting with the then Lord Chief Justice, Lord Widgery he stated that the starting point was that the unit of occupation should generally be treated as the planning unit.

24. The position might well, however, it seems to me, be very different in the case of a larger lake such as Ullswater. Even on Grasmere if there were any evidence (of the existence of which I am unaware) that any boats (especially of the proposed size) were regularly moored on the lake for substantial periods of time (as is proposed between hirings) in excess of any applicable General Permitted Development (England) Order ('GDPO') temporary permission then it might well be, in my view, that the area of the lake where such mooring was located would be a separate planning unit from the remainder of the lake.

25. I can, however, express a concluded overall view on the application without expressing a concluded view on the planning unit. Whether the whole lake or a smaller part of it is considered the proposed use would involve development requiring planning permission.

26. The question posed in the application admits in my opinion of only one answer. The answer is that the introduction of any of

(iv) boats containing holiday *sleeping* accommodation, even if potentially or actually mobile **or**

(v) boats of the proposed size **or**

(vi) any boats permanently or long term based on the water, even when not occupied,

would involve a material change of use from the present and historic use of the lake whether that present use is viewed as being

(a) for rowing, fishing and occasional sailing (as asserted by the applicants) and swimming (as my clients instruct me) **or**

(b) aesthetic, as an ornament to the landscape facilitating the massive tourist business of the area (as some objectors assert) **or**

(c) no significant use at all (as may in reality be the proper analysis)

Planning permission would be needed before it could be lawfully undertaken. It would constitute development under s 55 TCPA 1990 which is defined as:

> ' the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'

27. The introduction of significant holiday sleeping use into buildings or land must be viewed as material (eg use of barn for year round sleeping or land as permanent camp site). The placing of a significant number of caravans whether or not occupied permanently, whether or not for holidays or storage, on land amounts to a material change of use. The proposed use would be analogous to the creation of a caravan park on a farm. Whether one field or the whole farm is considered it would be a material change of use.

28. The number and size of boats would be significant. They would not be ancillary to the present use of the lake however that be categorized.

29. A helpful analogy is with the introduction, onto a piece of land used for recreational riding by bicycles and wind yachts (even motorised quad bikes), and for sport shooting, of a use by motorized "RVs" (Recreational Vehicles ie motorised caravans) providing holiday sleeping accommodation. Whether the RVs stayed in one part of the site or moved around such a use would be materially different from the previous use.

30. Here the boats are likely to be stationed on the planning unit permanently, and unlike the RVs, incapable of being moved away at will for short or long periods of time. The proposed use might usefully be viewed as a marine RV/motorized caravan park.

31. I do not consider herein the objections of many, that the boats would be inappropriate and harmful to both statutory purposes of the National Park, and inconsistent with the inscription of the area as a World Heritage Site. This Opinion is not the place to consider the reasonableness or otherwise of the view of those who consider that features in common with boats traditionally seen on the Thames and Windermere would appear out of place on Grasmere. This Opinion is not, as I have explained above, concerned with the planning merits of the proposal but merely whether it would need planning permission to be lawful. In my view, it would.

British Waterways Act 1971 and Definition of "Houseboats"

32. The Planning Statement attaches importance to an assertion that the boats would not constitute "houseboats" under the British Waterways Act 1971 as they would be excluded on the basis of being "bona fide used for navigation". This would be irrelevant even if correct.

33. First: the question which has to be addressed is not whether the boats are defined as "houseboats". The question is whether there would be a material change of use by their introduction. That does not depend on whether or not they are defined as "houseboats". The BWA 1971 definition would be irrelevant to this question even if it were otherwise applicable.

34. Second: it would be difficult to hold that these boats were "bona fide used for navigation". Their size, accommodation and facilities for a self sufficient week are simply not consistent with the limited scope for bona fide navigation on Grasmere. Each vessel could readily circumnavigate the lake within less than an hour (ie less than 1/100th of the time during which holiday makers are envisaged as spending on the lake). Any navigation would be ancillary to the principal use as holiday accommodation.

35. Third: The context of the British Waterways Act legislation is quite different. Its purpose is different from that of the planning acts. It creates a separate regime not least for charging purposes between houseboats and other vessels. The 1990 does not expressly or by implication apply its definitions. Section 3 BWA 1971 does not apply it to planning legislation. It is simply not applicable.

36. The distinctions set out at PS [4.12. 1-12] between the proposed boats and houseboats are, even if valid, irrelevant to the issues raised by the application.

Would there be operational development?

37. There is no need to consider this question because the proposed mooring would constitute development as a change of use.

38. The application does not expressly state that any permanent moorings would be created at the 10 Xs on the plan. It might however later be said that the plan necessarily implied the creation of such permanent operations. For the avoidance of doubt I therefore express a view on this matter.

39. It is difficult to see how the creation of any permanent moorings would not involve operations which would fall within the relevant definition of operational development for the purposes of s 55 TCPA 1990. The definition is:

> 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'

40. The definition is intended to be wide. The courts have so treated it. My opinion is that the creation of a permanent mooring would be an engineering operation. It is the kind of work undertaken by a marine *engineer*. If it were not an engineering operation it would be an 'other operation'. That expression must be interpreted in accordance with the *ejusdem generis* principle. It must be given a meaning which falls within the general type of things of which the other listed instances are examples. The general category is, in broad terms, that of significant physical intervention by humankind in, on or over land (which includes buildings (s 336 TCPA 1990) and water over land (see above)) capable of having long term effects. A permanent mooring includes physical work with enduring effects on the lake bed as well as on the surface of the water. (The complicated lattice of exceptions to the need for planning permission, covering a wide range of activities, such as, for example, agricultural operations is not applicable here)

41. It follows that I do not agree with the application answer to Q5 (2) if any permanent moorings are proposed.

42. I do not consider whether or not operational development would need to be undertaken to launch the boats onto the lake. It might well be difficult to launch the boats without the undertaking of engineering operations.

Distinction between Canals and the lake of Grasmere

43. The other two Planning Inspectorate decisions cited in PS at [4.6-4.10] deal with different issues in different contexts. They shed no light on the issue herein. For example canals are lengthy stretches of water which have traditionally been navigated

by vessels which need to have sleeping accommodation because journeys thereon, whether with goods or tourists, commonly take more than a day to complete.

CONCLUSION:

44. The application should be refused. The introduction of any of

(vii) boats containing holiday *sleeping* accommodation, even if potentially or actually mobile **or**

(viii) boats of the proposed size **or**

(ix) any boats permanently or long term based on the water, even when not occupied,

would involve a material change of use from the present and historic use of the lake. It would constitute development and require planning permission to be lawful.

45. An analogy would be with the introduction, onto a piece of land used for recreational riding by bicycles and wind yachts (even motorised quad bikes) and for sport shooting, of a use by motorized "RVs" (Recreational Vehicles ie motorised caravans) providing holiday sleeping accommodation. Whether the RVs stayed in one part of the site or moved around the use would be materially different from the previous use.

46. Here the boats are likely to be stationed on the planning unit permanently, and unlike the RVs, incapable of being moved away at will for short or long periods of time. The proposed use might well usefully be viewed as a marine RV park.

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