RESPONSE BY COLIN SEYMOUR
TO THE REBUTTAL OF LEGAL SUBMISSION (ED19 DOC 46) BY ERYC

1 It appears that the Council fails to grasp the main points of the legal submission. These are, that as the plan stands it is, prima facie, unlawful. An AAP must be concerned with "land" and "land" only. It cannot be concerned with an area of open sea which is not "land" by any statutory definition whatsoever. Furthermore, an AAP must fall within the area of administrative jurisdiction of the local authority. The proposed plan falls outside of the limit of that jurisdiction, in this instance defined by the low water mark, and includes an area of open sea which is beyond that mark.

2 The table relating to the "Soundness Issue" simply seeks to divert the reader away from the thrust of the legal issues. It fails to address them and is a smoke screen.

3 At para. 8 the Council state *"Colin Seymour submits that an AAP cannot include land covered with water".* This is totally wrong and is mischievous. It is calculated to mislead the Inspector. What I actually said was that an AAP could include land covered with water (as indeed is the case with the Gypsy Race). The last sentence of my para. 9, when read with para 10, makes it clear that whilst an AAP may include land covered with water it cannot include the open sea: "Therefore, whilst a lake or stream may be included within the definition of "land", the sea bed certainly cannot".

4 Para. 9 of the response is confused and at variance with the law. The Council again seek to mislead by stating that the Planning Acts may rely upon the Interpretation Act 1978 to interpret words specifically defined by Parliament for the purpose of planning legislation. This is nonsense. It is good law that the Interpretation Act does not extend to reading words into a statute to rectify or change that Act. Only Parliament itself may do so. Whilst the Interpretation Act sets out the general meaning of words the Act does not apply where a contrary intention is expressed or implied in any particular statute.

5 Section 336 TCPA 1990 re "Interpretation" makes a very clear statement :- "(i) *In this Act, except in so far as the context otherwise requires and subject to the following provisions of this section - "land" means any corporeal hereditament, including a building and, in relation to the acquisition of land under Part 1X, includes any interest in or over land".* Thus the intention is clear, "in this Act", Parliament intended the word "land" to be defined as per the statutory interpretation clause.

6 However, even if the definition of "land" was to be extended to include "land covered with water" as pleaded by the Council, the rules of interpretation prohibit the meaning of "land" from including the open sea. Following Pepper v Hart (1993) AC 593 a "purposive approach" to interpreting legislation has prevailed in the United Kingdom. European Community law follows such an approach as do the courts in the USA, Canada, Australia and New Zealand. Thus, when the many statutes concerned with "land" are looked at 'purposively', and following the 'literal rule', they draw a distinction between the 'land' and the 'sea'.

7 The introduction of the Thames Heliport case is intended to further confuse the reader. This matter was so completely different from the proposed Marina as to be totally distinguishable from it in law. The head note title in the 'Times Law Report' of December 10 1996 said it all "Change of use of land beneath river". It did not say beneath the sea as is the case at issue. Lord Justice Schiemann said the case raised points of general interest for planning legislation "*on the Thames and other rivers"* (my emphasis).

8 Thus he implied that under planning law “land” included the bed of a river i.e. “land covered with water”. As this was a river bed, with land on either side, it would now fall within sections 130(a) and 132(1)(b) of the Land Registration Act 2002 as “land covered by internal waters”. The Court of Appeal was not considering a heliport upon the sea. It was considering a heliport floating upon a tidal navigable river, which flowed inland through internal waters. Therefore the Thames Heliport case is of no assistance to the Inquiry whatsoever.

9 Of even greater significance is the fact that twelve planning authorities had full planning jurisdiction over bed of the River Thames along which the heliport was to be floated. Thus the “land” in question was within the administrative jurisdiction of the local authorities. Whereas, at Bridlington the proposed Marina falls outside of the low water mark and thus outside of the planning and administrative jurisdiction of the Council. The case is so very different from the matter at issue as to be of no help whatsoever to the Inspector’s consideration of my Legal Submission.

10 Re para.11 of the rebuttal regarding East Yorkshire Borough Wide Local Plan policy BRID 33. I was not aware of the Secretary of State’s direction to allow the policy to expire. The Chief Executive of the Harbour Commissioners confirms that he also has never been informed that the local plan policy which protected the harbour has been extinguished. Nevertheless, the fact that BRID 33 may no longer exist makes no difference whatsoever to the strength of my Legal Submission. As I point out at para. 3 of my Submission the policy took its authority from section 34 Bridlington Harbour Act 1837. This section is still in force and was reconfirmed by Article 1(2) of the Bridlington Harbour Revision (Constitution) Order 2004. Thus both the Council and the Commissioners are bound by its provisions.

11 Finally, I reserve the right to respond to any further legal submissions which rebut my Legal Submission which may be made at the inquiry, as suggested at para. 10 of the Council’s rebuttal.

Colin Seymour 28 November 2011

Change of use of land beneath river

Thames Heliport plc v Tower Hamlets London Borough Council

Before Lord Justice Beldam, Lord Justice Ward and Lord Justice Schiemann

[Judgment November 28]

Helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990.

The Court of Appeal so held in a reserved judgment, allowing an appeal from Sir Haydn Tudor Evans, who, sitting as a High Court judge on December 21, 1994, on a construction summons, held, inter alia, that helicopters landing or taking off from a vessel floating but not moored on the tidal River Thames would not constitute the operational development of land but would constitute a change of use of land for the purposes of section 55 of the 1990 Act.

Mr Michael Fitzgerald, QC and Mr Robert Fookes for Thames Heliport plc; Mr David Widdicombe, QC and Mr Michael Druce for Tower Hamlets, as lead authority for the 11 planning authorities potentially affected by the proposal.

LORD JUSTICE SCHIEMANN said that the case raised several points of general interest concerning the impact of the planning legislation on the Thames and other rivers.

It concerned a proposal to establish a heliport facility on a vessel which would navigate up and down a 10-mile stretch of the Thames stopping from time to time in mid-river at one or other of some 22 sites between Chelsea Harbour and Greenwich to enable helicopters to land and take off from the vessel. A maximum of 22,000 helicopter movements a year was envisaged.

It had to be borne in mind that Parliament had provided in section 192 of the 1990 Act a mechanism for the citizen who wished to discover whether a proposed use of buildings or other land would be lawful under the planning legislation.

In general it would be appropriate to use that method rather than to come to the courts for the answer. However, Mr Fitzgerald and Mr Widdicombe had submitted that the court could, by its judgment at this stage, help the planning process function more smoothly and efficiently.

There were broadly two matters of concern to the parties: was planning permission required for the proposal and, if so, was it granted by the Town and Country Planning (General Permitted Development) Order (SI 1995 No 418), the GDO?

It had been submitted that it was common ground that the proposal could only constitute development if it involved a material change in the use of land.

Did the proposal involve activities which might involve making a material change in the use of the river bed and banks?

His Lordship accepted that it was an accurate analysis to say that the river bed was currently being used for bearing the weight of water in which boats navigated and that the implementation of the proposal might not significantly affect the truth of that assertion.

But he did not consider that it provided an answer to what he considered was the relevant question, namely: did the proposal involve activities which might involve making a material change in the use of the river bed and banks?

It seemed to him that it was an equally correct analysis to say that whereas now the land was used for bearing the weight of water and ships which did not attract helicopter traffic, the proposal was to use the land for bearing the weight of water and ships which would attract helicopter traffic.

The question was which of those analyses was appropriate in the context of the town and country planning legislation? In his judgment, it was the latter because the legislation was designed to regulate questions of the human environment and not questions of physics.

His Lordship considered that the judge went too far although he was not to be blamed for doing so since he was acting at the express request of the parties in declaring not merely that the proposed activities could amount to a material change of use of land but that they would.

Mr Widdicombe had conceded that on the minimal information before the court it was conceivable that one or more of the sites might be in such an environment that it would be legally possible to take the view that the landing of helicopters on a vessel stationed in that part of the river would not amount to the making of a material change of use.

His Lordship would confine any declaration to the following: "Helicopters landing or taking off from a vessel floating but not moored on the tidal River Thames could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990."

Article 3(1) of the GDO granted planning permission "for the classes of development described as permitted development in Schedule 2", which included in Part 4, Class B as permitted development: "The use of any land for any purpose for not more than 28 days in total in any calendar year."

If a declaration were made that permission had been granted by the GDO for helicopters landing or taking off from a vessel wherever on the Thames that vessel happened to be then a considerable number of potential sites would be involved even restricting it to the proposed 22 sites, many of which were close to one another. Between Lambeth Bridge and Waterloo Bridge there were five sites in a stretch of the river which could be walked in a quarter of an hour.

Instinctively, one felt that it would be surprising if Parliament intended that a heliport vessel successively stationed each month on each of those five sites throughout the summer should be regarded as sufficiently transitory not to require the invocation of the planning process.

A declaration that from any particular location a vessel could operate for 28 days as a heliport might be of significant advantage to the appellants if, but only if, the result of making such a declaration would be to ensure that any enforcement notice issued, by a planning authority under section 172, or by the secretary of state under section 182 of the 1990 Act, could be met by the assertion that it had already been bindingly decided by a court that there had been no breach of planning control because the required planning permission had been granted by the GDO.

It was therefore important to consider the enforcement provisions in Part VII of the 1990 Act. The most significant aspect of those so far as the present case was concerned was that an enforcement notice had to specify the precise boundaries of the land to which the notice related.

The fixing of the boundaries of land in relation to which it was proposed to take enforcement action was a matter which Parliament had left initially to the planning authorities subject to control by the secretary of state on appeal.

Parliament had provided in section 285 of the Act that the validity of an enforcement notice was not to be questioned in the courts on any grounds on which an appeal to the secretary of state might be brought under Part VII of the Act except by such an appeal.

One of those grounds was that the matters do not constitute a breach of planning control. The control of the courts was limited by section 289 to appeals from the secretary of state on points of law.

His Lordship considered it inappropriate to attempt to use the mechanism of securing a declaration from the court so as to inhibit the decision makers primarily entrusted by Parliament with the difficult task of deciding those matters from forming their own view.

Lord Justice Ward and Lord Justice Beldam delivered concurring judgments.

Solicitors: Frere Cholmeley Bischoff; Simmons & Simmons.

Re Legal Submission by Colin Seymour (AAP Document ED19 R46)

Summary of Case

The proposals for the Marina and Harbour Top are prima facie unlawful because :-

1 The statutory authority under which the AAP may be delivered is only concerned with "land" as defined in the enabling statutes. The Marina proposal incorporates an area of open sea which falls outside of "the solid portion of the surface of the globe". Thus ERYC seek to use an area of the seabed which no statute whatsoever allows to be considered as "land". The Plan is therefore unlawful on the face of it.

2 There is no statutory authority which allows a local authority to deliver an AAP outside of its own area of administrative and planning jurisdiction. In this instance the limit of that jurisdiction is the low water mark at average tides. ERYC propose to develop an area of open sea and foreshore which is outside of the limit of its planning jurisdiction. The Plan is thus unlawful until new legislation is granted.

3 The ERYC propose to take land from within the Harbour Estate and construct works. Such works are deemed unlawful by section 34 Bridlington Harbour Act 1837. The said section is still in force and was reconfirmed by recent legislation (Bridlington Harbour Acts and Orders 1837 to 2004). Once again, unless Parliament repeals and amends the existing legislation in favour of the ERYC the AAP is not deliverable.

4 The Council propose to seek new legislation (as it did at the former Marina Inquiry) such authority may not be forthcoming given the findings of the Secretary of State in 2003 when he said that the Marina *"cannot be justified in the public interest".*

5 The Council also propose to use powers of compulsory purchase to override the objections of the Harbour Commissioners to the loss of part of their statutory estate. Such powers are only concerned with "land" and thus that part of the Harbour Estate which falls as seabed is outside the scope of that legislation. Furthermore, land belonging to a statutory undertaker cannot be taken by a CPO without special authorisation from the Secretary of State. As the area of jurisdiction of the BHC is defined by section 12 of the Bridlington Harbour Act 1928 any such consent would also require new legislation.

6 The land at the Harbour Top was granted to the Commissioners by the Crown in 1883 *"for the purposes of navigation and for the Public interest".* The Crown reserved the right to enter the land and remove all works which were *"injurious to navigation or the Public interest".* The Bridlington Harbour Commissioners were appointed guardians of that public interest. The Deed of Sale of the Harbour Estate (Crown to BHC) dated 1980, confirms that the 1883 covenant still applies. Such covenants, which apply to a statutory undertaker, are protected by statute and cannot be overruled by ERYC.

7 Therefore, unless new legislation is sought by ERYC, and is then granted by Parliament, the AAP as it stands is UNLAWFUL.

Colin Seymour

Colin Seymour 5 December 2011

RESPONSE BY COLIN SEYMOUR

To Paragraphs 31-32 of the Opening Statement by ERYC rebutting part of Legal Submission (Doc 46)

1 Para. 31 - I refer to my Response, of 28 November 2011, to the rebuttal by ERYC. That rebuttal did not address my objections as I point out in my response.

2 I am well aware of s.72 LGA 1972 - I raised it at para.4 of my legal submission dated 21 October 2011 (Doc 46). In the footnote to para.4 I also raised s.32 of the Bridlington Harbour Act 1837 and s.38 of the Bridlington Harbour Act 1928 - both of which placed the Harbour within the County, Township, and Parish of Bridlington.

3 Thus I have already accepted the principle that accretions from the sea become part of the parish. But the logic of the Council's argument is fatally flawed. Any artificial accretion needs statutory consent before it can lawfully be built. Without such consent any such construction is unlawful. Thus the authority pleaded by the Council, puts the cart before the horse. In the period 1837-1843 the Bridlington Piers only became part of the County after the Act was passed and after they were constructed. Before that time the seabed remained, to quote Lord Coleridge in the Blackpool Case *"beyond the realm of England".* Therefore, until ERYC receive approval from Parliament, the area of sea bed to be occupied by the proposed Marina does not *"fall within the power of the local authority"* despite what it now claims.

4 Para.32 - This is the second law report which I have been referred to which purports to rebut my legal submission. As with the Thames Heliport Case (see first response) the matter of Seaham Harbour does nothing to counter my original submission. Indeed, I had already clearly made the point at issue, with regard to Bridlington Harbour, well before ERYC raised it.

5 Seaham can be distinguished from the proposed Marina because Seaham Harbour had already existed for a hundred years before it was proposed to make it into a conservation area. At Bridlington the Marina does not exist, it is only a proposal. Therefore, there has been no "accretion from the sea" to which s.72 LGA 1972 can apply. The designated area is still open sea and thus falls outside of the jurisdiction of the Council. It can only fall within that jurisdiction after a Marina has been constructed. And it cannot be constructed without statutory authority.

6 Therefore, as it stands the Marina proposal is unlawful. It relies upon something which, more likely than not, may never happen. This is no solid foundation upon which an important local plan should be based.

Colin Seymour 6 December 2011