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# Report to the Secretary of State for Environment, Food and Rural Affairs

by Susan Doran BA Hons MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Date 2 January 2019

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Marine and Coastal Access Act 2009

Objections by [REDACTED], [REDACTED], and [REDACTED]

Regarding Coastal Access Proposals by Natural England

Relating to Whitstable to Iwade

Site visit made on 3 July 2018

File Ref(s): MCA/Whitstable to Iwade/02, 03, 12

**Objection Reference: MCA/Whitstable to Iwade/02**

**Land at and including 12A Waterside Close, Faversham ME13 7AU**

- On 21 June 2017 NE submitted a Report to the Secretary of State under section 51 of the 1949 Act, pursuant to its duty under section 296(1) of the 2009 Act.
- An objection dated 5 August 2017 to chapter 2 of the Report, Whitstable to Iwade, has been made by [REDACTED]. The land in the Report to which the objection relates is route section WSI-2-SO41FP.
- The objection is made under paragraph 3(3)(e) of Schedule 1A to the 1949 Act on the grounds that the proposals fail to strike a fair balance in such respects as are specified in the objection.

**Summary of Recommendation:** I recommend that the Secretary of State makes a determination that the proposals set out in the report do not fail to strike a fair balance.

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**Objection Reference: MCA/Whitstable to Iwade/03**

**Land at Waterside Close, Faversham ME13 7AU**

- On 21 June 2017 NE submitted a Report to the Secretary of State under section 51 of the 1949 Act, pursuant to its duty under section 296(1) of the 2009 Act.
- An objection dated 8 August 2017 to chapter 2 of the Report, Whitstable to Iwade, has been made by [REDACTED] on behalf of Waterside Residents Association Limited. The land in the Report to which the objection relates is route section WSI-2-SO41FP.
- The objection is made under paragraph 3(3)(e) of Schedule 1A to the 1949 Act on the grounds that the proposals fail to strike a fair balance in such respects as are specified in the objection.

**Summary of Recommendation:** I recommend that the Secretary of State makes a determination that the proposals set out in the report do not fail to strike a fair balance.

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**Objection Reference: MCA/Whitstable to Iwade/12**

**Land at 2 Waterside Close, Faversham ME13 7AU**

- On 21 June 2017 NE submitted a Report to the Secretary of State under section 51 of the 1949 Act, pursuant to its duty under section 296(1) of the 2009 Act.
- An objection dated 15 August 2017 to chapter 2 of the Report, Whitstable to Iwade, has been made by [REDACTED]. The land in the Report to which the objection relates is route section WSI-2-SO41FP.
- The objection is made under paragraph 3(3)(e) of Schedule 1A to the 1949 Act on the grounds that the proposals fail to strike a fair balance in such respects as are specified in the objection.

**Summary of Recommendation:** I recommend that the Secretary of State makes a determination that the proposals set out in the report do not fail to strike a fair balance.

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**Procedural and Preliminary Matters**

1. I have been appointed to report to the Secretary of State on objections made to the Report. This report includes the gist of submissions made by the objectors, the responses of NE and my conclusions and recommendation. Numbers in square brackets refer to paragraphs within this report.

### **Objections considered in this report**

2. The Report submitted by NE to the Secretary of State set out the proposals for improved access to the Kent Coast between Whitstable and Iwade. The period for making formal representations and objections to the Report closed on 16 August 2017.
3. Thirteen objections were received to the Report, of which I deemed 9 to be admissible. The 3 objections considered in this report relate to land at Waterside Close, Faversham (WSI-2-SO41FP). The objections relate to similar issues and the circumstances make it expedient to consider these objections together in this report. The other extant objections will be considered in separate reports.
4. In addition to the objections, a total of 53 representations were made in relation to the Report. Sixteen representations relate to the section of the trail subject to this report and I have had regard to these in making my recommendations.

### **Site visit**

5. I carried out a site inspection on 3 July 2018 when I was accompanied by [REDACTED] for NE and [REDACTED] for KCC. I was also joined by some of the objectors, namely [REDACTED], [REDACTED] and [REDACTED], Chairman of Waterside Residents Association Limited at Waterside Close.

### **Main Issues**

6. The coastal access duty arises under section 296 of the 2009 Act and requires NE and the Secretary of State to exercise their relevant functions to secure a route for the whole of the English coast which:
  - (a) consists of one or more long-distance routes along which the public are enabled to make recreational journeys on foot or by ferry, and
  - (b) (except for the extent that it is completed by ferry) passes over land which is accessible to the public.
7. The second objective is that, in association with the English coastal route ("the trail"), a margin of land along the length of the English coast is accessible to the public for the purposes of its enjoyment by them in conjunction with the coastal route or otherwise.
8. In discharging the coastal access duty there must be regard to:
  - (a) the safety and convenience of those using the trail,
  - (b) the desirability of that route adhering to the periphery of the coast and providing views of the sea, and
  - (c) the desirability of ensuring that so far as reasonably practicable interruptions to that route are kept to a minimum.
9. NE's Approved Scheme 2013<sup>1</sup> ("the Scheme") is the methodology for implementation of the England Coast Path and associated coastal margin. It forms the basis of the proposals of NE within the Report.

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<sup>1</sup> Approved by the Secretary of State on 9 July 2013

10. NE and the Secretary of State must aim to strike a fair balance between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land.
11. The objections have been made under paragraphs 3(3)(c) and (e) of Schedule 1A to the 1949 Act.
12. My role is to consider whether or not a fair balance has been struck by NE between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land. I shall make a recommendation to the Secretary of State accordingly.

### **The Coastal Route**

13. The trail, subject to chapter 2 of the Report, runs from Nagden (grid reference: TR 0305 6328 to Hollowshore (grid reference: TR 0179 6360) as shown on maps 2a to 2d. The trail generally follows existing walked routes including public rights of way and promoted routes. The section of trail (WSI-2-SO38FP to WSI-2-SO41FP) runs inland from Faversham Creek, following an existing path around the edge of Brents Industrial Estate and then Waterside Close. As a consequence the land on the creek side of the trail would become coastal margin unless falling within the description of 'excepted land'.
14. KCC has submitted Public Path Orders to the Secretary of State to include the creation of a new public footpath (ZF43) along the Creekside walkways of Waterside Close, and neighbouring Faversham Reach. In the event that a continuous public right of way is created between WSI-2-SO35FP and WSI-2-SO42FP along the Creekside, NE proposes to re-align the Coast Path along it by submitting a variation report to the Secretary of State which would be open to further consultation. The objections include concerns about NE's proposal.

### **The Objections**

#### ***Objection 0/2***

15. Waterside Close is a private gated development with residents owning their individual properties. Waterside Residents Association Limited ("WRAL") owns the common parts – the footways, access roads and gardens - and is responsible for street lighting and cctv. There is no public right of way through the Close and only one vehicular gate for entry/exit together with a pedestrian gate.
16. As a gated development, security is paramount for the residents, many of whom are elderly. Each individual property has a very small garden and the Creekside walkway has a status similar to that of a garden square which is available only to the adjacent households. The area is frequently used as a communal meeting place for the residents and their guests, for celebrations, summer barbecues and Christmas gatherings.
17. If part of the coastal access path, this would breach the residents' rights to the peaceful and secure enjoyment of their homes, gardens and the communal areas which they pay for. Waterside Close should be regarded as excepted land as it is a number of freehold residences standing within an enclosed park to which only the residents have access. Moreover, as Faversham is a long way from the coast there does not appear to be a case to allow access to private land, and it would set a precedent for gated developments throughout England.

### **Objection 0/3**

18. WRAL reiterates points made in objection 0/2. In addition, it considers the benefit to the public of having access to Waterside Close is minimised as on the roadway side (into the estate) there is very little to see of the surrounding environment, and on the creek side, the public would have to retrace their steps to the entrance to exit the development. The slipway represents a danger as it is an attraction for children who are unaware of the danger of the mud in the creek.
19. From the residents' point of view, open unrestricted access would severely reduce the current level of security and enjoyment of communal life. In view of recent experience, it would dramatically heighten the risk of theft and damage to property particularly out of daylight hours and at weekends.
20. A fair balance would be to classify Waterside Close as excepted land (land covered by buildings or the curtilage of such land and land used as a park or garden). This would maintain the current balance of life and would not significantly reduce any benefit to the general public. Security is a major issue for the landowners. There is no direct access to the coast path from Waterside Close for people to continue their walk.

### **Objection 0/12**

21. [REDACTED] support the proposed route, but not Waterside Close being included as part of the coastal margin. In common with objections 0/2 and 0/3, they believe the estate should be considered excepted land. The land falls within 20 metres of a building. The commonly owned land falls within the definition of a garden. The Countryside and Rights of Way Act 2000 ("the 2000 Act") states that land regarded as domestic curtilage falls within the 'excepted land' category.
22. The objectors' ability to carry out maintenance to their property would be limited if the land became coastal access. A wide range of recreational and boat maintenance activities take place on the grassed and paved areas which accordingly must be considered as domestic curtilage associated with the dwelling houses.
23. The proposal is detrimental to security and privacy. The public access area will be very close to their front door. They are concerned about crime and anti-social behaviour, including dog fouling and litter. They echo objection 0/3 as regards health and safety in respect of the creek mud. Residents will be unable to prevent people from accessing the development.

### **The Representations**

#### **Representations R/12 – Faversham Society and R/19 – Kent Ramblers Association**

24. A representation from The Ramblers' Association ("RA") gives full support to NE's report and agrees with the proposed route. The RA welcomes improved access to the banks of the creek at Faversham, but would prefer a temporary arrangement here as they hope NE will support KCC in their attempt to create a public footpath onto and along the Creekside walkways within Waterside Close and Faversham Reach residential estates between sections WSI-2-SO35 and WSI-2-SO42.
25. The Faversham Society also expresses support for the proposals for the Faversham section of the England Coast Path.

**Representations R/14 – [REDACTED]; R/17 – [REDACTED]; R/24 – [REDACTED]; R/25 – [REDACTED]; R/26 – [REDACTED]; R/27 – [REDACTED]; R/28 – [REDACTED]; R/30 – [REDACTED]; R/33 – [REDACTED]; R/43 – [REDACTED]; R/44 – [REDACTED]; R/46 – [REDACTED]; R/51 – [REDACTED]; R/53 – [REDACTED]**

26. In addition to concerns raised above, the following points are made. As a gated 'live and work in' development, the space is both domestic and commercial. Unless Waterside Close is regarded as 'excepted land', privacy, houses and general security will be placed at risk.
27. Currently the residents can challenge third parties entering the estate, but would no longer be able to do so. The whole estate should be considered a park or garden and classed as excepted land. The lack of through access and of views across the countryside on one side of the development severely reduce the benefit of offering public access on foot and will detract from any overall sense of enjoyment.
28. Some residents specifically chose Waterside Close for its private and gated nature, sense of safety and privacy. Further concerns include opening up the fenced end of the walkway and the security of moored boats.

### **Response by NE**

#### **Objections 02, 03 and 12**

29. NE has followed the key principles of alignment and management as set out in the Scheme, in particular coastal margin seaward of the trail (section 4.8.5 to 4.8.7), adopting the least restrictive option in addressing a concern (section 6.3), proximity of the trail to the sea and views of the sea (sections 4.5 and 4.6).
30. A route through Waterside Close residential development was NE's favoured option, but was rejected due to residents' concerns about the slipway and the substantial infrastructure works required. The proposed trail, further inland, has created coastal margin across the estate that would not have arisen with a more seaward trail. NE does not envisage significant new use of the gated development as there is no through route to the countryside beyond.

#### *Seeking a direction*

31. With one main entrance - a pedestrian gate and a vehicular gate (currently mainly left open) - and as a cul-de-sac, Waterside Close is not an obvious through route to access the coast. Although some locals venture into the development, it is unlikely to attract many new walkers or dog walkers seeking a route to the countryside north of Faversham. NE considers informal management techniques would be sufficient to avoid any significant disruption. For example, signs highlighting the residential nature of the area and requesting dogs are kept under control; notices to highlight communal and other activities taking place; temporary roped off areas for events (or any emergency closures required); or signs and fences to request and guide walkers away from specific areas or houses. Alternatively WRAL could close the entrance gates to discourage pedestrian access. Such techniques would be sufficient to alert walkers of any regular communal activities, the residential nature of the area and the need to behave respectfully.

32. The need for a safe and convenient route is highlighted in 4.1.1 of the Scheme, and with the trail some distance inland from the slipway and quayside, NE does not consider significant additional access will be created through the single entrance. Most people understand coastal environments can be dangerous places. A key principle is that people take primary responsibility for their own safety and for their children (section 4.2). NE's approach is risk based and light touch, aiming to minimise any safety measures that would be restrictive on public access or enjoyment.
33. NE recognises that people have got into trouble here, however, there is already signage on the slipway to warn of the hazard and chain railings mark the quayside edge. There will be no new right of access below the Mean High Water mark on the slipway so as not to encourage access onto the mud. NE has proposed a section 25A direction to exclude the new access rights from all the intertidal mud of Faversham Creek due to its dangerous and unsuitable nature. Residents can continue to ask people not to go down onto the mud and NE can provide signage to further highlight this.
34. NE does not consider any further direction to impose local restrictions or exclusions on the use of coastal access rights<sup>2</sup> under any of the available grounds (land management, public safety, fire prevention, nature conservation or heritage preservation) is a valid or necessary response, especially as this area is a cul-de-sac and unlikely to attract many new walkers wanting a through route. NE advises that if concerns arise in the future, then they may be approached to seek a direction on affected parts of the communal areas.

#### *Excepted land*

35. NE has no formal role in identifying or determining what excepted land is; neither do they map such land in their proposals. However, it does not consider all the land within Waterside Close would sit comfortably within the Scheme's definitions of excepted land, or Defra's guidance on buildings and curtilage, parks and gardens. For example, the open spaces and Creekside walkway are clearly separated from the residential gardens by high walls and fences. Neither is it considered the whole of the gated community, as defined by these boundaries, would fulfil the category of 'land covered with buildings or the curtilage of such land'. While the houses and gardens are undoubtedly excepted land, 'curtilage' generally means a small area, forming part and parcel with just one house or building to which it is attached, rather than a collection of houses, as here.
36. Also, the methodology makes it clear private roads are not excepted land (section 8.27.3 of the Scheme). The legislation does not define 'curtilage', and ultimately it would be for the courts to decide whether land is excepted or not.

#### ***Representations R/12 – Faversham Society and R/19 – Kent Ramblers Association***

37. NE welcomes the support expressed in these representations. As regards the RA representation, NE reiterates its intention to submit a variation report subject to the outcome of KCC's proposals to create a footpath along the Creekside.

#### ***Representations R/14 – [REDACTED]; R/17 – [REDACTED]; R/24 – [REDACTED]; R/25 – [REDACTED]; R/26 – [REDACTED]; R/27 –***

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<sup>2</sup> Chapter 2 of Part I of the Countryside and Rights of Way Act 2000

**[REDACTED]; R/28 – [REDACTED]; R/30 – [REDACTED]; R/33 – [REDACTED]; R/43 – [REDACTED]; R/44 – [REDACTED]; R/46 – [REDACTED]; R/51 – [REDACTED]; R/53 – [REDACTED]**

38. In addition to the comments above, NE disagrees that the communal areas form part of the residents' gardens as each house has its own garden that is clearly enclosed land and fits Defra's description in a way the open spaces do not. NE's view is that the communal areas within Waterside Close should not be classed as a 'park' as they are not a municipal recreation ground or play area as defined by Defra's guidance; and the open spaces within it are not the landscaped grounds associated with just one house, such as a country house. NE does not consider the whole of the gated community as defined by its walled boundaries would fulfil the excepted category of 'land covered by buildings or the curtilage of such land'.
39. As regards the security of moored vessels, the proposals do not include any works to open up the walkway to through traffic to the surrounding countryside, as the proposed alignment here is inland of the gated community.

### **Conclusions**

40. Support is expressed in the objections and representations for the proposed trail alignment which passes inland of the Waterside Close gated development. However, the main issues of concern are that, as a result, Waterside Close would become land forming coastal margin and, any future amendment to the trail alignment taking it through the development would negatively impact on the residents and their use of the land, and raise safety concerns.

### **Excepted land**

41. Coastal margin includes land on the seaward side of the trail. However, some land types are 'excepted' and Schedule 1 to the 2000 Act sets out the categories of excepted land, which have been amended to reflect the provisions brought in in 2010<sup>3</sup>. Amongst these are land covered by buildings or the curtilage of such land; and land used as a park or garden.
42. The term building includes most types of structure, but does not include any fence, wall, means of access, or, where land is coastal margin, any slipway, hard or quay. The term curtilage is not defined, but generally means a small area forming part and parcel with the house or building to which it is attached; typically an enclosure around a dwelling containing a garden, garage and side passage<sup>4</sup>. It seems to me that the individual dwellings at Waterside Close are in keeping with this description (a house and in this case a very small adjoining garden [16]) and as such would be excepted land. However, whilst it is appreciated that WRAL owns, manages and maintains the communal areas of the development [15], the grassed or landscaped open spaces, the private access road (which does not fall under an excepted land category [36]) and slipway and the quayside walkway are clearly separated by walls and fences from the buildings and their curtilages. Accordingly, I consider it unlikely that as a whole the Waterside Close development would be classed as land covered by buildings or the curtilage of such land.

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<sup>3</sup> The Access to the Countryside (Coastal Margin)(England) Order 2010, Statutory Instrument 2010 No. 558

<sup>4</sup> Marine and Coastal Access Act 2009 Natural England's coastal access reports: Guidance on the Secretary of State's decision making process December 2012, Department for Environment, Food and Rural Affairs

43. Neither does the land appear to fall within the excepted category of land used as a park or garden, which guidance suggests may typically be regarded as a municipal recreation ground or play area, or the landscaped grounds around a country house [35]. A park may include ornamental gardens, water features or other man-made scenic vistas. A garden is usually enclosed land near a building and typically includes areas of lawn, flower borders and other cultivated plants<sup>5</sup>. A park or garden may include areas open to the public for which an entrance fee is charged. In my view none of these definitions sit comfortably with the circumstances at Waterside Close where the communal areas do not appear to reflect the features described nor are associated with one house such as a country house.
44. Accordingly, the coastal margin at Waterside Close would not appear to fall within the definition of excepted land. Similarly, whereas land within 20 metres of a dwelling would be excluded, this does not apply to land which is coastal margin.
45. The extent to which the coastal margin at Waterside Close would be used is likely to be minimal given there being no through route: the eastern end being fenced. Users accessing the development as coastal margin would need to retrace their steps back through the gated access road as there would be no onward route.

### ***Effect on the estate***

46. As regards privacy and security of the live-work development and the residents' enjoyment of the estate, its communal areas, and slipway and quayside walkway, there is nothing to suggest that as coastal margin there would be any significant adverse effect. It is noted that some residents have experienced problems and there is an expressed concern that incidents of anti-social behaviour and crime will be exacerbated by the public having access rights to the estate as coastal margin [19]. It is further noted that some residents purchased their properties on the basis of it being a gated community [28]. Nevertheless, given that there is no onward route and only one way in and out of the development [18, 20], it is unlikely that large numbers of the public will wish to access the land [30].
47. It is noted that a range of recreational activities associated with the slipway and quayside currently take place and concerns are raised about the safety of the public around such activities. In addition, public safety as regards the slipway and the deep mud of the Creek are concerns raised, in particular for unaccompanied children [18]. As NE points out [31], any potential issues can be mitigated by the use of informal management techniques such as roping off areas, temporary signage and so forth to minimise possible public interference with communal social activities, and as regards other safety concerns [32]. In addition NE in recognising the particular circumstances of the slipway intends to exclude access to the intertidal mud of the creek [33].
48. Residents are currently able to challenge people entering the estate [27] although this would no longer be the case if it were coastal margin.
49. It is argued that Faversham is a long way from the coast and the estate is private land [17]. Nevertheless, the 2009 Act envisages that the trail will include river estuaries subject to their seaward limit, and beyond that discretion for NE to

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<sup>5</sup> Marine and Coastal Access Act 2009 Natural England's coastal access reports: Guidance on the Secretary of State's decision making process December 2012, Department for Environment, Food and Rural Affairs

extend it to the first bridge or tunnel with pedestrian access, or a point between the two. Much of the trail is proposed to cross private land.

### **Other matters**

#### *Variation report*

50. As stated above, it is NE's expressed intention to produce a variation report subject to the creation of a public right of way along a Creekside alignment passing through the Waterside Close development. A Public Local Inquiry into the matter was held on 16 January 2018 and a decision to confirm the public footpath creation and extinguishment orders was issued on 21 February 2018<sup>6</sup>. Accordingly a variation report will likely be forthcoming. The Secretary of State will wish to note this in reaching his decision.

### **Whether the proposals strike a fair balance**

51. It is necessary to consider whether a fair balance is struck between the interests of the public in having rights of access over land and the interests of the owners/occupiers of the land subject to coastal access rights [12]. Having regard to all of the above, the proposed route would create coastal margin which incorporates the Waterside Close development. However, other than the communal areas (open spaces, private access road, quayside walkways and slipway), the estate would fall under the excepted land category. Given there is no through route, there is unlikely to be a significant increase in use. These factors must be weighed against the concerns of the residents as expressed above. Any adverse effects do not in my view outweigh the interests of the public in having rights of access over coastal land. As such I do not consider that the proposals fail to strike a fair balance.

52. Whilst NE has indicated it will produce a variation report if a public right of way is created here, this does not form part of this proposal before the Secretary of State for consideration.

### **Recommendation**

53. Having regard to these and all other matters raised, I conclude that the proposals do not fail to strike a fair balance as a result of the matters raised in relation to the objections within paragraphs 3(3)(e) of the 1949 Act. I therefore recommend that the Secretary of State makes determinations to this effect.

*S Doran*

### **Appointed Person**

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<sup>6</sup> Planning Inspectorate reference ROW/3175170 and ROW/3175171