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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

Objection by [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/01

## **Objection Reference: MCA/Whitstable to Iwade/01**

### **Land forming part of Provender Walk, Belvedere Road, Faversham, ME13 7NF**

- On 21 June 2017 Natural England ("NE") submitted a Coastal Access Report ("the Report") to the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State") under section 51 of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"), pursuant to its duty under section 296(1) of the Marine and Coastal Access Act 2009 ("the 2009 Act").
- An objection dated 24 July 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-SO25, WSI-2-SO26 and WSI-2-SO27.
- The objection is made under paragraphs 3(3)(a) and (c) 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 response 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 objection considered in this report relates to land at Provender Walk, Belvedere Road, Faversham (WSI-2-SO25 to WSI-2-SO27). 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. Two representations relate to land at Faversham and I have had regard to these in making my recommendation.

### **Site visit**

5. I carried out a site inspection on the afternoon of 3 July 2018 when I was accompanied by [REDACTED] for NE, [REDACTED] for Kent County Council ("KCC"), and [REDACTED]. Following the accompanied site visit I viewed a short section of WSI-2-SO28 where it is proposed that the trail continue on the other side of an existing section of wall proposed to be removed.

## **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.
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 objection has been made under paragraphs 3(3)(a) and (c) 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 subject to this objection (WSI-2-SO25 to WSI-2-SO27) runs to the Creekside of the properties on Provender Walk.

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

## The Objection

14. [REDACTED] owns and manages the common parts of Provender Walk Estate. The estate comprises 29 residential properties, roadway, pedestrian access, creek frontage wall, a high boundary wall and extensive ornamental gardens, all managed to a high standard. The proposed trail runs in front of the houses between the houses and creek wall, along a shared access way, 2.5 metres wide, containing bollards, lighting posts and chains. Property owners bought into the estate in the knowledge of it being controlled private access which lies entirely within the central Faversham Conservation Area.
15. The common parts are used for private and 'by invitation' functions including street parties, charity functions, wedding receptions, carol singing, children's parties and family gatherings: the grounds at Provender Walk provide a safe environment for residents' children to play. If approved, [REDACTED] will have to seek permission from NE to hold future events and this would significantly reduce their authority over their own land. The Report shows no recognition that uncontrolled access by strangers could pose dangers to children at play in the grounds and gardens of Provender Walk.
16. [REDACTED] presently has the right to refuse access to persons meaning harm and wishes to retain that right. [REDACTED] wishes to continue to maintain the estate to its present high standards, and to maintain control over what activities take place. There is no public right of way, and the public do not have the right to use the walkway. It is an integral part of the estate jointly owned by the residents and is considered part of the shared gardens, a jointly owned curtilage. Accordingly, it should be 'excepted land' as buildings or curtilages of such land, for example courtyards; or parks and gardens.
17. The Report strikes an unfair balance between any possible public benefit of a coastal path and the rights of the residents to peaceful enjoyment of their property. If a right of way is created it will open up the property not only to genuine walkers but to anyone within the urban community of Faversham and beyond.
18. The route enters the estate across the northern car parking access with the prospect of danger from reversing cars. Alternative use of the pathway alongside No.29 requires pedestrians to cross a private driveway then the access roadway within the estate to the front path. At WSI-2-S026 to WSI-2-S027 the narrow path borders the front curtilage of balcony and garden spaces, the buildings being only 2 metres back from their front low level fence, thereby detrimentally affecting the privacy of the residents.
19. Between WSI-2-S025 and WSI-2-S027 are costly buildings, fixtures and fittings maintained by [REDACTED]. [REDACTED] pays the insurance premiums covering public liability and marine safety. Boat owners take their moorings on the basis there is private access.
20. The trail requires the removal of part of the wall at WSI-2-S027 which requires planning consent. This is an unnecessary, destructive and expensive use of public funds to secure 20 metres of further continuous pathway.
21. The Report makes no mention of the additional cost of repairs which NE suggest be shared by [REDACTED] and KCC, nor does it provide an assurance the integrity of the present surface and fitment qualities would be matched.

22. It is questionable that the tidal creek is 'coastal access'. However, there is an alternative option along Belvedere Road from WSI-2-S025 to WSI-2-S029FW, thus providing spreading room access to the creek frontage at 4 pedestrian access points between the terraced blocks on Provender Walk. This would achieve the aims of the Coastal access without changes to the present rights and duties of [REDACTED]. There would be little cost to the public purse other than the erection of notices that access is permitted at the discretion of [REDACTED] who expect their property to be respected. This would preserve the historical status whilst offering access to the creek frontage in line with NE's remit.

### **Representations**

23. A representation from The Ramblers' Association<sup>2</sup> gives full support to NE's report and agreement with the proposed route, and particularly welcomes improved access to the banks of the creek at Faversham. A representation from the Faversham Society<sup>3</sup> also expresses support for the proposals for the Faversham section of the England Coast Path.

### **Response by NE**

#### ***The Objection***

24. The objections should be dismissed and the proposals in the Report for this section be approved by the Secretary of State without amendment.

25. NE has followed the key principles of alignment and management as set out in the Scheme, in particular a safe and convenient trail (section 4.2 and 4.3) close to the sea/creek (section 4.5) with views of the sea/estuary (section 4.6); the use of existing walked lines (section 4.7); reduced occupiers' liability (section 4.2.2); the use of the least restrictive option (section 6.3) and alignment on the seaward side of private residences (section 8.18.4).

26. NE considers an appropriate balance has been struck between the occupier's and the public's interests in having access rights over land.

#### *Opening up the property to everyone, as well as coast path walkers*

27. The development lies close to the urban centre of Faversham and includes a defined walkway/open space alongside the Quay which provides views of Faversham Creek. Whilst it is not a public right of way (and [REDACTED] takes action to prevent public rights being acquired), some visitors do walk through the open spaces within the development onto the walkway as reported by [REDACTED]. If the proposed route is established it would be signposted from Belvedere Road and linked to the neighbouring residential area.

28. NE has no reason to think that members of the public (including local people who are used to walking along the riverside and familiar with maritime activities) would not respect the residential nature of this section of the trail and keep to the river's edge along the defined walkway. For any behaviour outside the coastal access rights, such as cycling, the residents would be free to continue to ask people to leave the area.

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<sup>2</sup> Representation R/19

<sup>3</sup> Representation R/12

*Danger from cars reversing in the car park*

29. NE understands that residents and sometimes other visitors already traverse the car park at the northern end of the estate, and are not aware of any incidents occurring. Most drivers are cautious when reversing in such areas and the coast path has been aligned through car parks in other parts of the country. If clearly signed, the establishment of the coast path is likely to make both drivers and walkers even more careful. NE does not feel the safety risks here are significant.

*Proximity of walkway to residents' balconies and gardens*

30. NE considers the impact on privacy a key consideration of the balance between public and private interests (Scheme 5.4). It is recognised the proposed trail alignment will bring new walkers close to some of the quayside-facing houses and past the gardens of others. It will pass closest to a group of terraced houses (Nos.11-21) that are built adjacent to the walkway and have raised windows and front doors. The houses at Nos. 1-10 are set back from the walkway behind front gardens bounded by low fences/walls, and the houses at Nos. 22-29 are over 9 metres from the trail, inland of an access road, with balconies overlooking the river. The houses along the quayside are either raised away from eye level or separated from the walkway by a defined garden or road: the original planning application incorporated public access along the walkway. Although not approved, the house and walkway designs were retained and act to reduce any potential visual access into homes.
31. The development is within an urban area, similar to other urban settings where the England Coast Path will use walkways or pavements that run close to gardens and front doors. NE also considered that if the alignment was inland of the development, the whole of the residential area would come within the coastal margin and walkers would still be likely to walk through the residential development and along the Creekside walkway.
32. NE understands that with more people using the walkway this may have some impact on the privacy of residents. However, in view of the design of the houses, the limited but tolerated access that occurs at present and the alternative option of placing the whole area into coastal margin, NE believes the privacy of residents living along the walkway would not be significantly affected by a well-marked trail following this defined walkway. Aligning the trail here would strike a fair balance as it would clearly benefit the public in being close to the creek with excellent views of the estuary.

*Maintenance costs of path surfaces, gardens, fittings; anti-social behaviour; private boat access; and public liability insurance*

33. Given the existing durable paving, NE does not consider that increased footfall resulting from the proposed alignment would have a material effect on the lifespan of the surface. Most walkers are familiar with and respectful of quayside furniture, fittings and boats moored alongside Faversham's many quaysides and pontoons. Coastal access rights do not extend to the pontoons or boats and the creek side walkway is well defined by a post and chain fence along the edge of the quay. Informal management techniques such as roping off the pontoons with private signs could be used if there are concerns about anti-social behaviour. Given the limited and tolerated access along the walkway at present NE does not consider that anti-social behaviour would increase significantly.

34. As regards liabilities, the common hazards associated with any quayside are clearly visible in this area and the coastal access rights along the quayside would benefit [REDACTED] as they confer reduced occupiers' liability. This is considerably lower than the current duty of care owed towards trespassers (or the tolerated walkers) on this private land and the lowest in English law.

*Unnecessary removal of wall for achievement of only 20 metres of additional pathway, Conservation Area status, and quality of maintenance standards*

35. NE considered avoiding creating a small gap in the boundary wall at the southern end of the estate. This option would align the trail through southern open space and a car park and shorten the proposed creek side views by 60 metres. The benefits of joining these Creekside walkways include the continuous alignment close to the estuary and the views offered between Provender Mill (and its restaurant facilities) and the northern end of Belvedere Road. NE proposed this alignment and its associated works as the gap in the boundary wall is set away from the houses in the southern part of the development and would not create any more impacts on the home owners here than the suggested car park option.

36. NE has obtained planning approval for the removal of part of the wall. The wall was initially extended across the walkway to reduce noise from the industrial buildings to the south and this purpose is no longer required.

37. As regards the walkway surface, KCC will be the access authority with the powers to maintain the trail. KCC has agreed that if significant works need to be undertaken here, they will discuss shared costs with [REDACTED]. In assessing repair work KCC would consider a best value solution that is safe for the public to use, but if [REDACTED] wanted to continue their existing financial input this could help support a more expensive design. However, NE does not consider that additional footfall along this stretch of the quayside is likely to have a material effect on the lifespan of this hard surface.

*Alternative proposal along Belvedere Road*

38. Belvedere Road runs parallel with the creek side walkway, inland of the Provender Walk development. The road has narrow pavements in places and only intermittent views of the creek whereas the proposed route is adjacent to the creek and gives direct views of the estuary. Also, by removing a section of wall and joining this section of creek with an adjacent section (WSI-2-S028) which is already publicly accessible, there is the opportunity to create a clear and defined route along a significant length of the creek, with only one new access point off Belvedere Road.

39. [REDACTED] recognises that this option would create spreading room between the trail and creek edge. However, NE believes that a discretionary access policy as proposed by [REDACTED] would not be permitted under the legislation. By following a least restrictive option (section 6.3 of the Scheme), a less restrictive approach to managing access, such as notices to request walkers respect the property and residents, would be the best option.

40. NE considered the road alignment carefully and felt that increasing numbers of people would be likely to access the quayside from Belvedere Road using any of the four open spaces that would fall under the coastal access rights. A better balance of public and private interests would be to establish and manage a clearly marked route to the seaward side of the houses and minimise entry



points to just the northern car park (and at Provender Mill). NE could also provide 'no access' signs to [REDACTED] to help deter access off Belvedere Road and keep people to the trail alignment.

#### *Loss of control of boundaries and activities*

41. Coastal access rights are limited to on foot and do not include other activities that might otherwise impact on residents. In addition, the public would not have a right to walk into the heart of the development and its open spaces. Given the design of the estate, NE considers community activities could co-exist with maintaining an access route along the quayside, as happens across many similar harbour-sides around the country. Most walkers would not want to interfere with events taking place alongside the trail as the attraction is to keep by the waterside. Residents could rope off an area to help show walkers that an event is happening. If occasional events necessitate blocking off the trail, FCMCL could temporarily divert it onto Belvedere Road, with a direction from NE for this type of land management activity. NE would always seek to deal with the request quickly and agree the least restrictive approach for managing the event and access along the trail, and do not consider this type of diversion would be needed outside exceptional circumstances.

#### *Excepted land*

42. There is no public right of way along the creek side but [REDACTED] tolerates some informal pedestrian access on the quayside. NE accepts that the proposed alignment (WSI-2-S026 and S027) is not an existing walked route.
43. Defra's guidance on the term 'curtilage' states it generally means a small area forming part and parcel with the house or building to which it is attached. In most cases the extent of curtilage will be clear – typically an enclosure around a dwelling containing a garden, garage and side passage; a walled enclosure outside a barn, or a collection of buildings grouped around a farm house and farm yard. A garden is usually enclosed land near a building. It typically includes areas of lawn, flower borders and other cultivated plants.
44. NE considers the individual houses and their distinctly defined gardens would commonly be recognised as meeting the excepted land categories of 'building or the curtilage of such land' and 'land used as ... garden'. They are visibly separate from the quayside walkway and other open spaces within the estate which are used by all the estate residents and others. NE believes the open spaces, including car parking areas and quayside would not fit comfortably with the categories of excepted land, nor the whole residential estate be regarded as a 'park or garden' as it is not specifically designed and laid out for the 'exclusive recreation and visual enjoyment of the occupants of the house in question and their guests', nor for the 'recreation and enjoyment of the general public – as in the case of an urban or municipal park' (page 135 of the Scheme).

#### *Danger of uncontrolled access to children*

45. The presence of the England Coast Path will raise the need for vigilance, but as this is not a gated development and members of the public are already physically able to access the grounds and quayside, the parents and carers are no doubt already very mindful of this issue.

### **The Representations**



46. NE welcomes the support expressed in the representations.

## **Conclusions**

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

47. As regards the wide range of private activities enjoyed on the 'communal' land and the safety of the public around such activities, it is noted that [REDACTED] rights over part of its own land would be diminished as they would need to apply to NE for certain events to take place. Nevertheless, as NE points out [28], the public are used to quayside activities, whether recreational or commercial. 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, promote respect for the residential nature of this section, and as regards other safety concerns. Accordingly, communal activities could coexist with public access [41]. Where necessary, NE is able to approve temporary diversions on application. It is also noted that some residents purchased their properties on the basis of controlled private access [14].
48. In terms of privacy [18] the proposed trail would pass in close proximity to some of the dwellings [30], thereby impacting on those residents affected. Whereas land within 20 metres of a dwelling would normally be excluded from access rights, this does not apply to land which is coastal margin. As such, potentially the proposed trail would have an adverse effect on some residents. Some informal public access already occurs [32].
49. It is noted that [REDACTED] is responsible for public liability premiums [19]. However, as regards safety matters and liabilities, NE comments that land subject to coastal access rights attracts the lowest level of occupiers' liability [34]. Accordingly, there is nothing to suggest that the trail would have an adverse impact on insurance premiums. It is noted that there are no provisions for compensation under the coastal access scheme.
50. Planning consent has been granted for the removal of part of a wall at the estate's south-western boundary [20, 35]. It will enable the continuation of the trail alongside the Creek.
51. The Estate is currently managed to a high standard which [REDACTED] wishes to see continue [21]. Maintenance responsibilities for the trail will lie with KCC, and if necessary in conjunction with [REDACTED] [37]. Given the existing hard surfacing, there is unlikely to be a significant impact from an increase in use [33] and consequently of costs. NE proposes to adopt the low key management techniques described above with regard to possible anti-social behaviour.

### ***Excepted land***

52. Some land types are 'excepted' from the coastal access provisions 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>4</sup>. Amongst these are land covered by buildings or the curtilage of such land; and land used as a park or garden.

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<sup>4</sup> The Access to the Countryside (Coastal Margin)(England) Order 2010, Statutory Instrument 2010 No. 558

53. 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>5</sup>. It seems to me that the individual dwellings at Provender Walk are in keeping with this description (a house and adjoining garden) [44] and as such would be excepted land. However, whilst it is appreciated that FCMCL owns, manages and maintains the communal areas of the development [14], the open spaces, walkways, ornamental gardens and roadway are clearly separated by walls from the buildings and their curtilages. Accordingly, I consider it unlikely that as a whole the Provender Walk Estate would be classed as land covered by buildings or the curtilage of such land.
54. 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 [44]. 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>6</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 Provender Walk where the communal areas do not appear to reflect the features described nor are associated with one house such as a country house, or reflect a municipal park.
55. Accordingly, the Provender Walk development as a whole would not appear to fall within the definition of excepted land.

### **Public safety**

56. With regard to the specific safety of the residents' children and possible contact with strangers, as NE states, parents and carers will already be alert to this issue, and it is noted that anyone can walk along the Creekside walkway at present [27], albeit the residents have the right to ask them to leave. No public right of way exists here, but as part of the proposed trail there would be no right to challenge users and ask them to leave unless they were engaged in unauthorised activities, such as cycling [28]. Nevertheless, the remainder of the development not subject to coastal access would remain under the control of FCMCL and the residents of Provender Walk.
57. It is noted that the proposed trail crosses a car park where users would be subject to residents' vehicle movements [18]. No incidents have been identified and with appropriate signage it is unlikely that there will be significant safety risks here [29].

### **Alternative route**

58. It is questioned whether the tidal creek is 'coastal'. Nevertheless, the 2009 Act envisages that the trail will include river estuaries subject to their seaward limit,

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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

<sup>6</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

and beyond that discretion for NE to extend it to the first bridge or tunnel with pedestrian access, or a point between the two.

59. In discharging the coastal access duty there must be regard to the convenience of the trail and the desirability of that route adhering to the periphery of the coast and providing views, in this case, of the estuary/creek. The Scheme provides that the trail will follow existing walked routes wherever possible and these may utilise existing public rights of way and promoted routes.
60. The alternative route suggested by [REDACTED] [22] follows Belvedere Road which runs behind the development and parallel with Faversham Creek. It is further inland, and in my view it would not meet the objectives of the coastal access duty as it considerably reduces or does not provide views. A further consideration in respect of aligning the trail further inland as suggested by [REDACTED] is, as they recognise and NE points out [31], an increase in the extent of coastal margin. Accordingly, the Secretary of State should note that this would mean that all the 'seaward' land, other than that which is excepted land (the houses and gardens), would be subject to the Coastal access provisions. Rather than one access point at the north-east end of Provender Walk, there would be four. In my view this would have an adverse impact on the interests of the residential estate as the public would have access to more of the land including the communal spaces, private road and the walkways than would be the case were the alignment proposed in the Report to be accepted. Further, NE comments that any form of discretionary access to the development as proposed by [REDACTED] is unlikely to be permissible [39]. Having regard to these factors, I consider the alternative alignment along Belvedere Road would not fulfil the coastal access duty.

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

61. 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]. The proposed route will create a right of access over [REDACTED] land and would result in some impacts on the privacy of the residents and their ability to use part of their land as they currently do. However, there is nothing to suggest the trail would have a significant adverse impact with regard to the concerns raised by [REDACTED]. The alternative route suggested does not in my view meet the objectives of the coastal access duty for the reasons given. 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.

### **Recommendation**

62. Having regard to these and all other matters raised, I conclude 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)(a) and (c) of the 1949 Act. I therefore recommend that the Secretary of State makes determinations to this effect.

*S Doran*

### **Appointed Person**