



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

Marine and Coastal Access Act 2009

Objections by [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/06, 07, 11

Objection Reference: MCA/Whitstable to Iwade/06

Land at Faversham Reach, Upper Brents, Faversham ME13 7LA

- 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 10 August 2017 to chapter 2 of the Report, Whitstable to Iwade, has been made by [REDACTED] on behalf of [REDACTED]. The land in the Report to which the objection relates is route section WSI-2-SO36FP and WSI-2-SO37FP.
- The objection is made under paragraphs 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.

Objection Reference: MCA/Whitstable to Iwade/07

Land at Faversham Reach, Upper Brents, Faversham ME13 7LA

- 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 10 August 2017 to chapter 2 of the Report, Whitstable to Iwade, has been made by [REDACTED] on behalf of [REDACTED]. The land in the Report to which the objection relates is WSI-2-SO36FP and WSI-2-SO37FP.
- The objection is made under paragraph 3(3)(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.

Objection Reference: MCA/Whitstable to Iwade/11

Land at 15 Faversham Reach, Upper Brents, Faversham ME13 7LA

- 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 14 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-SO36FP and WSI-2-SO37FP.
- The objection is made under paragraphs 3(3)(c) and (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.

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 Faversham Reach, Faversham (WSI-2-SO36FP to WSI-2-SO37FP). 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. Nine 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 Kent County Council ("KCC"). I was also joined by some of the objectors, namely [REDACTED] (representing [REDACTED]) and [REDACTED].

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 2013¹ ("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 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-SO36FP to WSI-2-SO37FP) runs inland from Faversham Creek, following an existing path around the rear of the Faversham Reach development before joining the road accessing Faversham Reach and Waterside Close and continuing further inland around the edge of Brents Industrial Estate. 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. A public right of way (Footpath ZF5) is recorded as running through the Faversham Reach development but is currently obstructed. KCC has submitted Public Path Orders to the Secretary of State to extinguish parts of this path (ZF5) and create a new public footpath (ZF43) along the Creekside walkways of Faversham Reach, and neighbouring Waterside Close. 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 0/6

15. [REDACTED] supports the proposed route as a fair balance between public and private land, but opposes any future option to vary the route to within the Faversham Reach development. If KCC Orders for a new public footpath are confirmed, [REDACTED] will object to any variation by NE which proposes to realign the path along the Creekside on the grounds it will infringe the privacy and amenity of Nos. 15, 13, 3 and 1 of Faversham Reach by overlooking their ground floor rooms and gardens. In addition, it will endanger the accessibility,

¹ Approved by the Secretary of State on 9 July 2013

safety, security and operation of vessels on the moorings both beside the houses and in the marina area.

Objection 0/7

16. [REDACTED] considers the Faversham Reach estate should be 'excepted land' excluded from the access provision as coastal margin. It is a private development where the residents through the [REDACTED] own the common areas as private garden and access space, meet all costs, and take full responsibility for estate maintenance, lighting and general security. [REDACTED] considers the land is within the curtilage of the 15 houses which comprise the development.

Objection 0/11

17. [REDACTED] also support the proposed route and object to NE's variation proposal for the same reasons as expressed in objection 0/6 and, in addition, as regards the operation of their vessel, which is their business, on the mooring beside their house. The proposed variation route here would provide direct views, at very close quarters, into their ground floor rooms and private garden, leading to a significant loss of privacy and amenity.
18. The commercial operations, viability and safety of their vessel would be adversely affected by the proposed variation footpath. It would be vulnerable to unauthorised access, interference, damage, criminal activity and public liability. There would be unsupervised and unprotected access along the quayside, including across their vessel, to deep water and strong tidal currents, and to deep drops from the quayside to deep mud at low tide, creating a particular risk to unaccompanied children. Movement of the vessel to and from moorings would put the public at risk. A security fence would need to separate the mooring from the footpath thereby restricting mooring operations. The variation route would also prevent the use of other parts of the paved quayside areas for the regular maintenance of sails.
19. They support the grounds of objection 0/7, and regard the communal land within the development as within the curtilage as a garden for recreational use and access for personal and business use which should be designated as excepted land.

Representations

Representations R/5 – [REDACTED]; R/12 – Faversham Society; R/19 – Kent Ramblers Association

20. 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 Faversham Reach and Waterside Close residential estates between sections WSI-2-SO35 and WSI-2-SO42.
21. The Faversham Society also expresses support for the proposals for the Faversham section of the England Coast Path.
22. A representation from [REDACTED] supports the alignment of the trail along a right of way around the boundary of Faversham Reach Estate, as cost effective

and sensible.

Representations R/23 – [REDACTED]; R/34 – [REDACTED]; R/35 – [REDACTED]; R/36 – [REDACTED]; R/38 – [REDACTED]; R/45 – [REDACTED]

23. All express support for the proposed route, but consider the Faversham Reach development should be regarded as excepted land. Representations are it is a gated live/work, open plan development where the estate land is regarded as an extension to homes and gardens for recreational use, including barbeques and children's play areas, and business access. Residents own all the common areas (roads, lawns, walkways) and are responsible for their maintenance and repair. As coastal margin, the security and well-being of the residents, the private/peaceful location and enjoyment of the land and estate is compromised and placed at risk. The obstructed right of way has not existed for almost 100 years.
24. Representation R/45 re-states the objections expressed in objection O/11.

Response by NE

Objections 06, 07 and 11

25. In discharging the coastal access duty, Section 297 of the 2009 Act requires NE to aim to strike a fair balance between the occupier's interests and the public's interest in having access rights over land. NE considers an appropriate balance between these two considerations is struck by their proposals. Support for the proposed alignment is welcomed, but NE disagrees that there should be no option to vary the route within the development in the future.
26. NE has followed the key principles of alignment and management as set out in the Scheme, in particular a continuous trail (section 4.4), proximity of the trail to the sea and views of the sea (sections 4.5 and 4.6), a trail using existing walked lines along the coast (section 4.7), coastal margin seaward of the trail (section 4.8.5 to 4.8.7), and adopting the least restrictive option in addressing a concern (section 6.3).
27. A route through Faversham Reach residential development was NE's favoured option, but was rejected due to 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 an existing right of way into the development but no through route to the countryside beyond.

Future variation report to align the trail along the creek side

28. Whilst not part of the current formal proposals, NE has committed to bring forward a variation report only if and when a new public footpath is established by KCC along the Faversham creek side through both the Faversham Reach and Waterside Close residential developments (Future Changes, Chapter 2.1.25 (Annex O); the Overview under Key opportunities and issues (page 19); Concerns raised by landowners (page 26) and Other Changes (page 35)).
29. A public right of way is currently obstructed where houses and a boundary wall prevent it connecting with the adjacent creek side rights of way. KCC seeks to

extinguish parts of this path and create a new public footpath along the Creekside walkways of Faversham Reach, and neighbouring Waterside Close.

30. When the Report was published, NE considered an alignment inland of the development struck the best balance in terms of criteria described in Chapter 4 of the Scheme, taking into account the significant but unconfirmed costs of a creek side route through the developments. However, if KCC's proposed Creekside public footpath is established, it would create two options for walkers – one along the creek and one inland. In practice, the creek side footpath would be the likely preference, and in NE's view would more clearly meet the criteria as a direct route (section 4.3.2) with views of the sea/creek (section 4.6). In NE's view, the potential to improve the clarity and experience of the trail by moving it to an existing walked route (section 4.7) and minimise the associated margin, warrants a variation report to the Secretary of State. If KCC's orders are approved and ZF43 is established along the Creekside, NE's variation report will require consultation with landowners and other interests affected.

Privacy, amenity and the commercial and operational use of open space and boats

31. With one gated entrance (currently left open) and as a cul-de-sac, Faversham Reach is not an obvious through route to access the coast as the public would need to retrace their steps to the entrance to exit the development. The public right of way (the partially obstructed ZF5) passes through the front gates to the open space by the marina. Although some locals do access the existing public right of way, it is unlikely the coastal access proposals would attract many new walkers or dog walkers seeking a route to the countryside north of Faversham.
32. As regards the residents' quiet enjoyment and security, the existing public right of way already provides some public access to the quayside and it is not envisaged the proposal would significantly increase visitors or anti-social behaviour. NE considers informal management techniques would be sufficient to avoid any significant disruption to the privacy, security or operational use within the development. For example, the use of safety signs, temporary barriers or verbal warnings.
33. Current activity relating to boats in the marina and the commercial boat alongside the quay currently co-exists with both the residents' communal use of the area and the existing public right of way. The type of activity described in the objections is commonly encountered by walkers along quaysides in other parts of Faversham. The informal management techniques described are likely to be an effective solution in reducing these types of risk.
34. NE does not consider a direction to impose local restrictions or exclusions on the use of coastal access rights² is the most appropriate or least restrictive option available, 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.

² Chapter 2 of Part I of the Countryside and Rights of Way Act 2000

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 Faversham Reach 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 which is clearly separated from the residential gardens by walls. Neither is it considered the whole of the gated community, as defined by its walled 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/5 – [REDACTED]; R/12 – Faversham Society; 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/23 – [REDACTED]; R/34 – [REDACTED]; R/35 – [REDACTED]; R/36 – [REDACTED]; R/38 – [REDACTED] and R/45 – [REDACTED]

Faversham Reach development should be considered excepted land

38. For the reasons given above, it is NE's view that whilst much of the estate would be excepted land, the communal open spaces, walkway and private roads are examples where the land would not sit comfortably with the categories laid out in Schedule 1 to the Countryside and Rights of Way Act 2000 ("the 2000 Act") as amended. The statutory methodology also makes it clear that private roads are not excepted land.
39. NE does not consider that the communal spaces form part of the residents' gardens because each house has its own garden that is clearly enclosed land and fits Defra's description in a way the open spaces do not³. Neither is it considered they should be classed as a 'park'. NE's opinion is that they are not municipal recreation grounds or play areas, as defined in Defra's guidance, and the open spaces within it are not the landscaped grounds associated with just one house, such as a country house.

Disturbance to privacy and security

40. In addition to the reasons given above, such concerns can be addressed by the application of informal management techniques should access increase, for example, closing the access gate to the estate, roping off areas where boat maintenance takes place, or alerting people to potential hazards alongside the

³ 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

quay. Most walkers would avoid any obvious communal gatherings and signage may help to alert people to such activities. These techniques should be sufficient to alert walkers to management operations or communal activities and avoid significant disruption or disturbance to the peace, safety and security of the area. Accordingly, NE does not consider a direction to exclude coastal access rights under any of the available criteria (land management, public safety, fire prevention, nature conservation or heritage preservation) is the appropriate or necessary response. Should concerns arise in the future, it would be open for the [REDACTED] or relevant landowner to approach NE to seek a direction to restrict or exclude access to the affected parts of the communal areas.

Future variation report

41. In addition to the comments above, whilst the current trail alignment is inland of Faversham Reach, a variation report is dependent on whether KCC establishes a public footpath along the creek here. In addition, there are deliberations about an obstructed creek side right of way (ZF5) at Faversham Reach and plans for new KCC orders with significant infrastructure investigations required to establish the cost and feasibility of parts of this proposed public right of way.

Public right of way through the development

42. Some residents believe there is no public right of way within Faversham Reach. NE considers public footpath ZF5 enters the residential development and the pedestrian gate at the entrance accommodates this access down to the creek side. However, NE does not consider that coastal access rights will bring about significant new use of this path or impinge in the residents and boat owners' current management and enjoyment of the development.

Conclusions

43. Support is expressed in the objections and representations for the proposed trail alignment which passes inland of the Faversham Reach gated development. The main issues of concern are that, as a result, Faversham Reach itself would comprise 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

44. 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 2010⁴. Amongst these are land covered by buildings or the curtilage of such land; and land used as a park or garden.
45. 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

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

passage⁵. It seems to me that the individual dwellings at Faversham Reach are in keeping with this description (a house and adjoining garden) [35] and as such would be excepted land. However, whilst it is appreciated that the residents own, manage and maintain the communal areas of the development through the [REDACTED] [16], the grassed or landscaped open spaces, the private access road (which does not fall under an excepted land category [36]) and the quayside walkway are clearly separated by walls from the buildings and their curtilages. Accordingly, I consider it unlikely that as a whole the Faversham Reach development, which comprises 15 houses and gardens, would be classed as land covered by buildings or the curtilage of such land.

46. 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 [39]. 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 plants⁶. 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 Faversham Reach where the communal areas do not appear to reflect the features described nor are associated with one house such as a country house.
47. Accordingly, the coastal margin at Faversham Reach would not appear to fall within the definition of excepted land.
48. The extent to which the coastal margin at Faversham Reach would be used is likely to be minimal given there being no through route – the existing public right of way blocked at its south-western end [27, 31]. Users would need to access the public footpath through the estate entrance gate/road and leave by retracing their steps.

Effect on the estate

49. With regard to any effects on security and the residents' enjoyment of the estate, the moorings alongside the quay and their safety, and the live-work status of the development [23], the public already have access to the public right of way, notwithstanding that it is a cul-de-sac at present. There is nothing to suggest that as coastal margin there would be any significant adverse effect or increase in safety or other issues of concern. It is noted that a range of activities associated with the quayside currently take place and concerns are raised about the safety of the public around such activities, and in relation to the deep mud of the Creek. As NE points out [33], the public are used to quayside activities, whether recreational or commercial, and 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 and as regards other safety concerns [40].

⁵ 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

⁶ 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

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 Faversham Reach 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 2018⁷. 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 Faversham Reach development. However, other than the communal areas (open spaces, private access road and quayside walkways), the estate would fall under the excepted land category. Public access is already afforded to the Creekside from the gated access road along a public right of way, which is unlikely to see a significant increase in use given that it is currently blocked and forms a cul-de-sac. These factors must be weighed against the concerns of the residents as expressed above. In my view, any adverse effects do not 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)(c) and (e) of the 1949 Act. I therefore recommend that the Secretary of State makes determinations to this effect.

S Doran

Appointed Person

⁷ Planning Inspectorate reference ROW/3175170 and ROW/3175171