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

by Sue Arnott FIPROW

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

Date 3 December 2018

Marine and Coastal Access Act 2009
Objections by [redacted] & [redacted] and [redacted]
to Coastal Access Proposals by Natural England
Relating to the England Coast Path: Kingswear to Lyme Regis

Site visit made on 6 February 2018

File Ref(s): MCA/Kingswear to Lyme Regis/KLR-1-S011

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Case details:

- On 30 March 2017, Natural England submitted a report to the Secretary of State for Environment, Food and Rural Affairs setting out proposals for improved access to the coast between Kingswear and Lyme Regis under section 51 of the National Parks and Access to the Countryside Act 1949.
 - Natural England submitted its report in accordance with its duty under section 296 of the Marine and Coastal Access Act 2009 to improve access to the English Coast.
 - Nine objections were received to proposals affecting land between Kingswear and Sharkham Point in Devon, three of which related to section KLR-1-S011.
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Objection Reference: MCA\Kingswear to Lyme Regis\O\1\KLR1678

Land between Kingswear Court and Castle Lodge, Kingswear, TQ6 0DX

- An objection dated 10 May 2017 was made by [redacted]. The land to which the objection relates is the coastal margin seaward of route section KLR-1-S011 between Kingswear Court and Castle Lodge as shown on Map 1a in Chapter 1 of Natural England's report.
 - The objection is made under paragraph 3(3)(e) and 3(3)(f) of Schedule 1A to the National Parks and Access to the Countryside Act 1949 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 do not fail to strike a fair balance in relation to the matters within paragraph 3(3)(e) and (f) of Schedule 1A to the 1949 Act.
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Objection Reference: MCA\Kingswear to Lyme Regis\O\2\KLR1001

Land between Kingswear Court and Castle Lodge, Kingswear, TQ6 0DX

- An objection dated 12 May 2017 was made by [redacted]. The land to which the objection relates is the coastal margin seaward of route section KLR-1-S011 between Kingswear Court and Castle Lodge as shown on Map 1a in Chapter 1 of Natural England's report.
 - The objection is made under paragraph 3(3)(e) and 3(3)(f) of Schedule 1A to the National Parks and Access to the Countryside Act 1949 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 do not fail to strike a fair balance in relation to the matters within paragraph 3(3)(e) and (f) of Schedule 1A to the 1949 Act.
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Objection Reference: MCA\Kingswear to Lyme Regis\O\3\KLR2371

Land between Kingswear Court and Castle Lodge, Kingswear, TQ6 0DX

- An objection dated 23 May 2017 was made by [redacted]. The land to which the objection relates is the coastal margin seaward of route section KLR-1-S011 between Kingswear Court and Castle Lodge as shown on Map 1a in Chapter 1 of Natural England's report.
- The objection is made under paragraph 3(3)(e) and 3(3)(f) of Schedule 1A to the National Parks and Access to the Countryside Act 1949 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 do not fail to strike a fair balance in relation to the matters within paragraph 3(3)(e) and (f) of Schedule 1A to the 1949 Act.

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on objections made in accordance with paragraph 4(3) of Schedule 1A to the National Parks and Access to the Countryside Act 1949 (the 1949 Act) to Natural England's Report on the Kingswear to Lyme Regis section of the England Coast Path (the Report).
2. On 30 March 2017 Natural England (NE) submitted to the Secretary of State its Report, setting out proposals for improved access to the Devon and Dorset coast between Kingswear and Lyme Regis. The period for making formal representations and objections to the Report closed on 25 May 2017.
3. Ten objections were received to the Report, all of which I deemed to be admissible. This report concerns three of these objections being those submitted in relation to section KLR-1-S011 between Kingswear and Sharkham Point (to which Chapter 1 of the Report refers). It 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.
4. A further 6 objections relate to sections KLR-1-S005 to KLR-1-S007 to the east of Kingswear (also addressed in Chapter 1 of the Report) and the remaining one to section KLR-5-S017 between Dawlish Warren and Cockwood (addressed in Chapter 5 of the Report). These are considered in two separate reports.
5. In addition to the objections, a total of 225 representations¹ were submitted relating to the Report, six of which concern section KLR-1-S011: from Dart Harbour Stakeholder Group, from [redacted] of Devon County Council (DCC), from the Country Land and Business Association (CLA) and one from each of the three objectors. I shall consider these along with the objections.
6. I carried out a site inspection on 6 February 2018 for which I was accompanied by [redacted] (Senior Advisor for Devon and Cornwall) and [redacted] (Lead Advisor for Coastal Access) for Natural England and objectors [redacted] and [redacted].

Main Issues

7. The coastal access duty arises under section 296 of the Marine and Coastal Access Act 2009 (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.
8. The second objective is that, in association with the England Coast Path (ECP), 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.

¹ When assessing whether the proposals strike a fair balance, only those representations which are relevant to the matters specified in admissible objections can be considered.

9. In discharging the coastal access duty there must be regard to:
 - (a) the safety and convenience of those using the ECP 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.
10. NE's Approved Scheme 2013² (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.
11. 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.
12. The objections have been made under paragraphs 3(3)(e) and (f) of Schedule 1A to the 1949 Act: that Natural England's report fails to strike a fair balance in relation to (e) the inclusion, or failure to include, proposals as to the directions to be made under Chapter 2 of Part 1 of the Countryside and Rights of Way Act 2000 (the 2000 Act) for the exclusion or restriction of a right of access in relation to land to which the report relates or the terms of any such proposal, and (f) the exercise of a discretion conferred on Natural England by section 301(2) or (3) of the 2009 Act, or the failure to exercise a discretion conferred by section 301(3) of that Act, discretions which relate to a case where the continuity of any part of the coast is interrupted by a river (paragraph 3(3)(f)).
13. 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

14. The part of the proposed trail that is the subject of Chapter 1 of the Report runs from Kingswear (grid reference: SX 8813 5102) to Sharkham Point (grid reference: SX 9335 5459) as shown on maps 1a to 1e. The Report describes this as mainly following the coastline quite closely and maintaining good views of the sea "*apart from through Kingswear where the path moves inland to avoid an area affected by erosion and the eastern area of Kingswear where the path is landward of private residences*".
15. For the whole of this length, the trail is proposed to follow the existing South West Coast Path (SWCP) generally along public rights of way or public highways, with only one optional alternative section³.
16. The section of trail to which these objections refer (KLR-1-S011) lies to the south east of the village of Kingswear. Although the sea is visible in places between trees, arguably this stretch lies within the estuary of the River Dart. In fact the trail is proposed to continue westwards to the ferry that operates daily between Kingswear and Dartmouth.

² Approved by the Secretary of State on 9 July 2013

³ At Man Sands, relating to section KLR-1-S046 to KLR-1-S048

17. This section of the trail follows a hard-surfaced vehicular-width road until it meets section KLR-1-S012 and turns to descend through trees along a gravel path. Close to the western end of KLR-1-S011, a private road diverges from the trail, leading down past Kingswear Court and passing in very close proximity to Castle Cottage and Castle Lodge; this road continues northwards to cross the trail route midway along section KLR-1-S012.
18. Although none of the objections challenge the adoption of the South West Coastal Path as the trail route, each objector is concerned about the consequential effect on their respective properties of public access to the coastal margin on the seaward side of the trail.

The Objections

MCA\Kingswear to Lyme Regis\O\1\KLR1678

MCA\Kingswear to Lyme Regis\O\2\KLR1001

MCA\Kingswear to Lyme Regis\O\3\KLR2371

19. The objections submitted by [redacted], [redacted] and [redacted] (including photographs) rely on similar grounds and relate to the same section of the proposed trail, KLR-1-S011. I shall therefore consider these together.
20. These objectors point out that the proposed coastal margin between this section and the sea would include the private drive which services Kingswear Court, Castle Cottage, Castle Lodge and Kingswear Castle (a Landmark Trust property constructed on rocks close to the water's edge). By implication, the drive would be open to public access.
21. This drive is adjacent to and immediately fronts Castle Lodge and Castle Cottage. Photographs are provided to indicate just how close to the drive the buildings are positioned. Not only would public access along this private drive constitute a gross invasion of privacy for the occupiers and raise security risks but would also lead to a diminution in value. Castle Cottage is run as a holiday letting business where privacy, peace and quiet are particularly valued by guests. Allowing public access within inches of the building would result in a serious reduction in its letting value and subsequent financial business loss.
22. The objectors submit that the drive falls within the curtilage of their properties and so consequently should be excluded for the purposes of public access within the coastal margin. In law, "the curtilage of a house or dwelling is the land immediately surrounding it, including any closely associated buildings and structures". It is not acceptable for NE to state that the 'curtilage' of a property is excepted for the purposes of public access within the coastal margin without clearly defining 'curtilage'. NE appears to have concluded that the drive is not within the curtilage of the objectors' properties and has stated it is for the objectors to prove otherwise.
23. It is argued that the terms of reference and methodology set out in the Scheme are seriously flawed, are contrary to natural justice and could be subject to a legal challenge under the Human Rights Act 1998. Further, there is no provision for compensation within the Scheme to address any financial loss arising from the diminution of property values or the loss of business revenue.
24. By proposing, in effect, that the public may access this private drive, NE has not struck a fair balance between private and public interests.

Suggested modifications

25. The objectors suggest that the proposal be modified so as to exclude from the coastal margin the area comprising Castle Cottage, Castle Lodge, The White House and Kingswear Court, showing this on the proposals map either by shading or delineating the area in red so as to indicate that this is not subject to public access.

Response to the objections by Natural England

26. NE considers that the proposals strike a fair balance between the occupier's interests and the public's interest in having access rights over land.
27. Natural England has followed the key principles of alignment and management as set out in the approved Coastal Access Scheme. Particularly relevant in this case are the following principles in the Scheme:
- *Land on the seaward side of the trail automatically becomes coastal margin (section 2.3.4 of the Scheme)*
 - *Excepted land⁴ categories (section 2.3.15)*
 - *Privacy (section 5.4)*
 - *Natural England's estuary discretion (section 10.1.2)*
28. Natural England maintains that an appropriate balance has been struck by its proposals between the occupiers' interests and the public's interest in having access rights over land.
29. NE comments that areas of excepted land are not separately depicted in its proposals or on the accompanying maps. NE has no responsibility for identifying such areas, nor any powers to do so.
30. It considered and rejected more seaward alignments for the ECP which would have made use of the private road in question⁵. The owners of the private drive (Kingswear Court and the Landmark Trust) have not submitted any objections or representations on this issue.
31. NE met with the objectors on 11 October 2016 to discuss the proposals and the implications for the private road. The main issues discussed were the question of excepted land in relation to the private road and whether it would constitute 'curtilage' in this context.
32. The categories of land excepted from coastal access rights are set out in Schedule 1 to the Countryside and Rights of Way Act 2000. Vehicular access tracks of this type are not specified in this list. In general terms if a property owner considers that an area falls within the curtilage of their house, they may assert this by, for example, displaying appropriate signage. Should misleading notices be erected or gates used to prevent public access where coastal access rights apply, the local access authority has powers to deal with such situations in discussion with those concerned.

⁴ Categories of land 'excepted' from coastal access rights as listed in Schedule 1 to the Countryside and Rights of Way Act 2000

⁵ See Table 1.2.3 of Chapter 1 of the Report

33. NE informed the objectors that they could continue to manage the land in question as they do now, that is as a private drive which is excepted from any public access rights if they (the objectors) are of the opinion that it forms part of the curtilage of their respective properties. Therefore NE considers that its proposals do strike a fair balance between public and private interests.
34. NE points out that the objectors indicated on their objection forms that they also challenged NE's estuary discretion⁶ but did not give any explanation of their grounds. Nevertheless, comments are provided on this issue in relation to a more detailed representation which is summarised below.

Natural England's comments on the suggested modification

35. Under the legislation all land seaward of an approved route is classified as coastal margin. Areas of excepted land are not separately depicted in its proposals or on the maps for the reasons given above.
36. NE disagrees with the objectors' suggested modification to its proposals.

The Representations

MCA\Kingswear to Lyme Regis\R\191\KLR2371
MCA\Kingswear to Lyme Regis\R\192\KLR1678
MCA\Kingswear to Lyme Regis\R\193\KLR1001

37. The representations submitted by [redacted], [redacted] and [redacted] rely on similar grounds to their objections. The issues raised have therefore been addressed in full above.

MCA\Kingswear to Lyme Regis\R\197\KLR2374

38. The Dart Harbour Stakeholder Group welcomes the work by NE on the coast path section from Kingswear to Lyme Regis. It will enable local people to more fully enjoy walks along the coast with opportunities for circular routes and the resulting benefits to physical and mental health.

MCA\Kingswear to Lyme Regis\R\195\KLR2373

39. On behalf of the local access authority, Devon County Council (DCC), [redacted] draws attention to this and other vehicular access tracks that connect at both ends with the proposed ECP and which are currently signed as 'private'.
40. As these tracks could offer alternative walking routes within the coastal margin, clarification is sought as to whether these tracks will become part of the 'spreading room' area once the proposals are formalised; alternatively, will they meet the criteria for excluded or exempt land and therefore not a part of the 'spreading room'?
41. If they are deemed to form part of the 'spreading room', clarification is also sought as to the legal implications should the public be prevented from exercising their rights on them, either by the installation of locked gates or by verbal or physical discouragement by occupiers with land adjacent to these tracks.

⁶ NE's detailed rationale for exercising the estuary discretion was mistakenly omitted from the published report although it was subsequently made available.

MCA\Kingswear to Lyme Regis\R\224\KLR0004

42. The Country Land and Business Association (CLA) comments on the length of proposed ECP between Kingswear and Inner Froward Point (KLR-1-S001 to KLR-1-S022).
43. The CLA criticises the implementation process (stage 2) as set out in the Scheme which it says has not been followed. The path and its associated coastal margin have not been walked with landowners in areas where significant changes to access rights are proposed. This has resulted in a failure to provide a fair balance between public and private interests.
44. The CLA also challenges NE's decision to exercise its discretion to extend public access up the Dart Estuary as far as the lower ferry. The Report lacks a full explanation of the rationale for choosing to do so. In simply adopting the SWCP as the coastal trail, NE has failed to make a proper assessment of the impact that extending coastal access could have on affected properties.
45. There has been no evaluation of the difficulty of preventing the public from entering the curtilage of property in situations where no hard boundaries can be established; there has been no assessment of the impact on privacy or security, contrary to the provisions of the Scheme; there is no consideration given to the impact of public access on property values or a property's letting value.
46. The CLA questions why NE did not stop coastal access at the mouth of the river given that much of the coastal margin will be 'excepted' from access rights. Section 301(4)(e) of the 2009 Act requires NE to have regard to the extent to which the land bordering the relevant upstream waters of the river would, if it were coastal margin, be excepted land. Yet, other than a brief sentence⁷, there is no indication in the Report that any assessment has been made.
47. Designating the route as coastal trail through Kingswear raises unnecessary anxieties with landowners over the extent of access rights in relation to land. If continuity was felt to be important, this could be maintained by designating a trail through Kingswear as an alternative route to meet the ferry.
48. Further, the CLA notes the instability of much of the Kingswear coast with recent landslips rendering land within the proposed coastal margin unstable and unsafe. It questions why NE has not pursued a direction to exclude access for public safety reasons under section 25 of the 2000 Act.
49. In summary NE should have made a full assessment of the impact of extending access up the estuary, given the amount of excepted land and significant public danger in having access to the coastal margin. It should have considered implementing an alternative route to provide continuity of access around the estuary. Alternatively, if exercising its discretion to extend around the estuary, it should have made directions to exclude access on public safety grounds, or for land management reasons: the land being unsuitable for public access, impinging on privacy, creating conflict where there are no clear boundaries to define garden and curtilage associated with dwellings and other buildings, leading to an unfair balance, contrary to section 297 of the 2009 Act.

⁷ Quoted at paragraph 14 above

Response to the representations by Natural England

Dart Harbour Stakeholder Group: MCA\Kingswear to Lyme Regis\R\191\KLR2374

50. NE is grateful for the expression of support from the Dart Harbour Stakeholder Group.

Devon County Council: MCA\Kingswear to Lyme Regis\R\195\KLR2373

51. The questions posed by DCC concern vehicular access tracks within the coastal margin that are not highways or public rights of way and whether these would be categorised as excepted land.

52. In response NE advises that if property owners along such tracks consider the area falls under one of the categories listed in Schedule 1 to the 2000 Act, then this qualifies as 'excepted land'. For example, if they believe land near their house forms part of their curtilage, they may assert this, perhaps by displaying appropriate signage. Vehicular tracks such as the one in question here are not explicitly specified in the list.

53. Should misleading notices be erected or should gates be used to prevent public access into areas where coastal access rights do apply, the local access authority has powers to deal with such situations in discussion with those concerned.

Country Land & Business Association: MCA\Kingswear to Lyme Regis\R\224\KLR0004

54. NE does not agree with the CLA's view that landowners were not effectively consulted and that affected land was not properly considered through site visits. A familiarisation visit was undertaken in the area on 12 April 2016 although some areas were viewed from adjacent land because of their current inaccessibility. The Scheme acknowledges that the process may be varied according to circumstances. In this case letters were sent to each affected landowner. NE met or talked with all key owners of significant areas of coastal margin in the Kingswear area with further site visits taking place in July and October 2016. All reasonable measures were taken to discuss the proposals with affected landowners prior to publication of the Report including meeting or holding discussions with all landowners who so requested.

55. Under the 2009 Act there is no requirement for the trail to extend up any estuary further than the seaward limit of the estuarial waters. NE has a discretion to propose that the trail should extend from the seaward limit as far as the first bridge over which, or tunnel through which, there is a public right of way, or a public right of access, by virtue of which the public is able to cross the river on foot, or any specified point in between.

56. The seaward limit of the transitional waters on the River Dart coincides with Combe Point to the west and Inner Froward Point to the east of the estuary. At this point the estuary is around 2km wide. On both sides of the estuary the land is largely rural towards the estuary mouth. Further upstream are the settlements of Dartmouth on the western bank and Kingswear to the east. Both have significant historic and maritime interest and are popular with visitors, offering a variety of facilities and attractions.

57. Much of the eastern shore of the estuary in the Kingswear area is likely to be excepted land, consisting mostly of private houses and gardens. There are areas of foreshore which may become available to walkers under coastal access.

58. Three possible options were considered here.

59. Option 1: Align the trail around the estuary.

This would extend to around 40km and would require substantial additional cost and time to create access although this may present potentially significant local benefits by linking up various settlements along the coast. However the upper reaches of the estuary are not coastal in nature. For these reasons this was not judged to be the best option.

60. Option 2: Stop at the mouth of the estuary.

This alignment would provide no real benefit to the walker and would appear on the ground to be ending or beginning at an arbitrary point with no delineation or point of interest. It would also be at odds with the principles of ensuring continuity of the trail and of following the alignment of an existing national trail if the route is deemed appropriate in terms of the statutory criteria and guidelines set out in the Scheme.

61. Option 3: Align the trail as far as the lower ferry.

The lower ferry between Dartmouth and Kingswear is the first crossing point on the River Dart and falls just over 2km upstream from the seaward limit of the estuarial waters. The ferry operates regularly seven days a week all year apart from Christmas Day. Continuity of the ECP is one of NE's key considerations. Section 4.4.1 of the Scheme refers to the principle in section 297(2) of the 2009 Act: that "*so far as reasonably practicable, interruptions to the route around the English coast should be kept to a minimum*". Choosing this alignment for the ECP would fulfil this core objective in a simple and cost effective way. This alignment and the associated coastal margin would provide significant recreational benefit to the public in being able to access once more the areas of foreshore that were traditionally available to them.

62. The presence of the existing national trail (SWCP) via the lower ferry also informed the decision to propose this alignment. Section 4.7.1 of the Scheme states: "*Where there is an existing national trail along the coast, - or another clear walked line along the coast, whatever its status - we normally propose to adopt it as the line for the England Coast Path so long as it is safe and practicable for the public to use; it can be used at all times; and the alignment makes sense in terms of the other statutory criteria and principles set out in this Scheme.*"

63. The CLA suggests designating a trail through Kingswear as an alternative route to meet the ferry⁸. However it would not be legally possible under the Scheme to implement an alternative route for the ECP where there is no ordinary route. A crossing point or ferry at the mouth of the estuary would be needed for this to be an option.

64. For the reasons given above, NE considers that option 3 is the preferred option and thus is proposed in the Report as the route of the ECP. NE believes this alignment fulfils the principles of the Scheme and strikes a fair balance between public and private interests.

⁸ An 'alternative route' would not give rise to spreading room on the seaward side of the trail.

65. On the matter of public safety, NE highlights the underlying principle of the Scheme that *“visitors should take primary responsibility for their own safety when visiting the coast and for the safety of any children or other people in their care, and should be able to decide for themselves the level of personal risk they wish to take”*⁹. The aim is to minimise any safety measures that would restrict public access or enjoyment. Where there are site specific safety concerns within the coastal margin, NE may monitor these locations, usually through the access authority, and may deem it appropriate to erect signage warning of dangers.
66. The CLA suggests that a direction to exclude access to part of the coastal margin should have been pursued on safety grounds. However such directions cannot be implemented to address dangers from natural features, for example eroding cliffs. NE has no separate powers to exclude access to land, either because of natural hazards or because it is deemed unsuitable for access¹⁰. Coastal access rights within the margin are nonetheless subject to the excepted land categories listed in Schedule 1 to the 2000 Act.
67. As regards the impact of the proposals on landowners, NE recognises that the Scheme states (at section 5.4.1): *“Coastal access rights become available to enjoy open-air recreation on some land which was previously only available for the enjoyment of the owner or occupier or invited guests. However, there are specific provisions under (the 2000 Act) intended to protect privacy in key respects: buildings and the area surrounding buildings (known as curtilage), and land used as a garden or park, are excepted from coastal access rights”*. These provisions afford appropriate protection against any impact on property value.
68. NE acknowledges that it may be difficult for walkers to identify the extent of a property’s curtilage and consequently where spreading room ends. It is for the landowner rather than NE to consider where they believe the curtilage of their property ends; this may be asserted by, for example, displaying appropriate signage (such as ‘private – garden’). This may also help to alleviate issues around privacy and security.
69. NE published its ‘Access and Sensitive Features Appraisal’ to record the conclusions from its assessments of any potential for environmental impacts from the proposals along this stretch of coast. On the basis of objective information it concluded that there is no justification for any direction to exclude or restrict access to this area as a result of nature conservation interests.
70. In summary, NE considers it has followed the key principles of alignment and management as set out in the approved Scheme. Further, it believes that the proposed route in this area is both consistent with the approved Scheme and strikes a fair balance between private interests and the rights of walkers.

⁹ Section 4.2.1 of the Scheme

¹⁰ Except in relation to salt marsh and flats

Discussion

71. The objectors do not directly challenge the route chosen for the ECP, this being the already established line of the South West Coast Path. Their concern arises from the fact that the private drive leading to their respective residential properties, and potentially offering an alternative to the main route, would lie within the resulting coastal margin and therefore could become accessible to the public [20].
72. The objectors do not own this private drive but enjoy rights of way over it [30]. At present signs at the junction with the proposed ECP route make clear the drive is a private one, stating "STRICTLY NO PEDESTRIAN ACCESS" and "NO RIGHT OF WAY EXCEPT TO KINGSWEAR COURT AND RESIDENTS BEYOND".
73. In effect, NE argues that these signs (and the corresponding exclusion of the public from the drive) could continue but only if the land falls into one of the categories specified in Schedule 1 to the 2000 Act [32, 33]. The most likely of these would be in Part 1 Paragraph 2 of the Schedule: "*Land covered by buildings or the curtilage of such land*". However, NE makes clear that "*it is for the landowner rather than NE to consider where they believe the curtilage of their property ends*" [32, 68].

Curtilage

74. If the drive constitutes 'curtilage' of any or all the buildings along its length, then the present (apparently effective) signage could legitimately stay¹¹ [33]. Faced with these notices, the public would be in no doubt that the alternative via the drive was not available to them despite lying within the coastal margin.
75. Thus the matter turns on whether the drive is properly described as 'curtilage'. NE states that it is not its role to determine what does or does not qualify [29, 68]. Landowners must decide for themselves and be prepared to be challenged by the access authority if it takes a different view [32]. The objectors argue that this is a wholly unreasonable approach which leaves the owners of property within the proposed coastal margin with an unjust degree of uncertainty [22]. Indeed the queries posed by DCC suggest that the access authority is itself also seeking guidance as to the extent of curtilage in this context [39-41].
76. No definition of 'curtilage' is to be found in the Scheme¹². There are many instances where the subject has been considered by the Courts at length and in various circumstances. Consequently this leaves a most unsatisfactory situation for the objectors (and others in similar situations).
77. Guidance offered by Defra¹³ on interpretation of the term 'curtilage' acknowledges that it is not defined, but advises that "*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 or side passage; a walled enclosure*

¹¹ Similar signage would also be required at the eastern end of the drive.

¹² In fact Figure 22 of the Scheme lists the criteria to be used to judge whether land is excepted because it is "*used as a park or garden*". No equivalent list is included to assist in determining whether or not land is excepted because it is "*Land covered by buildings or the curtilage of such land*".

¹³ Natural England's coastal access reports: Guidance on the Secretary of State's decision making process; Dec 2012

outside a barn, or a collection of buildings grouped around a farm house and farm yard."

78. The approved Scheme allows for spreading room to the seaward side of the ECP but it does not pass control of this land, or responsibility for it, to NE or the access authority. It is intended that landowners maintain full control to manage their land as they see fit and there is no expectation that this wider corridor should be managed to facilitate public access¹⁴.
79. The Scheme is not intended to be prescriptive insofar as identifying present land uses is concerned and it recognises such use can, and will, change over time. Thus the management of adjacent land remains with the owner(s). Chapter 8 lists 27 different land uses with a detailed explanation of the potential issues likely to arise and offers a range of solutions. Holiday properties are considered at 8.18 but this does not envisage the type of difficulty likely to arise here.
80. Nevertheless, the statutory process anticipates that, in a case such as this, it is for the landowner to decide whether the area of concern should qualify as 'excepted land' and to act accordingly, unless challenged by the access authority. Whilst that leaves the objectors with the difficulty of deciding whether the drive forms part of the curtilage of any or all the buildings it serves, that is the procedure as set out within the Scheme.
81. This does present a problem to the decision-maker in this instance: to reach a fully informed conclusion as regards 'a fair balance' it is essential to know whether the drive is or is not excepted land. Potentially it could be (and in my view might well qualify, at the very least where it runs between the flats at Kingswear Court and its private garages) but it is not my role, or that of the Secretary of State, to make a determination on this point.
82. However, for the purposes of making a reasonably informed recommendation here, there is little alternative but to reach a balanced view on the most likely outcome. NE concluded that "*Much of the eastern shore of the estuary in the Kingswear area is likely to be excepted land, consisting mostly of private houses and gardens*" [57], and the objectors assert that the private drive leading to Castle Cottage and Castle Lodge should qualify likewise. On the basis that it appears to pass through the curtilage of Kingswear Court (which would therefore constitute excepted land), the western end of the drive is unlikely to be accessible to the public as 'spreading room'. As a result, it would not offer a through-route for walkers and could be signed at both ends accordingly.
83. In this scenario, it would be hard to conclude that NE had failed to strike a fair balance between public and private interests.

Other concerns

84. In the alternative, if the drive does not form part of the curtilage of any building along its length, then access by the public might be expected. There is no doubt that pedestrians passing along the drive would affect the privacy of the occupiers at Castle Cottage and Castle Lodge because of the close proximity of the track to the windows of each dwelling; the human rights of the residents have also been questioned in this context [21, 23].

¹⁴ 5.2.4 of the Scheme

85. Concerns over safety and security have been expressed in the objections although this is not supported by evidence. Neither is there proof that the presence of the public along the drive would reduce the appeal of Castle Cottage to holidaymakers and therefore result in reduced bookings with the consequential business losses anticipated although this seems possible, as does a diminution of the property's value.
86. Section 5.3.3 of the Scheme states that NE "*will aim to prevent coastal businesses suffering significant loss of income from the introduction of coastal access rights. If, on the basis of the evidence available at the time, we are persuaded that significant loss of income is likely, we will include specific proposals to prevent it*". However in this case evidence has not been provided to substantiate the anticipated losses.
87. Section 8.18 of the Scheme contains advice specific to holiday accommodation and recognises that there may be exceptional cases where land has previously been reserved for the exclusive enjoyment of people staying in holiday accommodation and that intervention may be necessary to prevent any significant loss of income to the business concerned. No such intervention has been discussed here.
88. Should it prove the case that the public is entitled to enjoy access along the private drive on account of it failing to qualify as excepted land over any part of its length, then, subject to the submission of relevant commercial evidence from the objectors to support their case, I would be inclined to the view that NE had not struck a fair balance in this case.

Comments on the suggested modification

89. As a matter of principle, the Scheme does not intend excepted land within the coastal margin of the kind listed in Schedule 1 to be shown on maps [29]. To accede to the modification suggested by the objectors [25] would set a precedent that would need to be replicated across the Scheme nationally. It would also create difficulties where landownership changes and or where management regimes alter, all of which would require updates to the mapping. Consequently I could not recommend such a modification.
90. Whilst the objectors did not substantiate their objections to NE's use of its discretion to propose extending the ECP beyond the sea limit into the Dart estuary, one representation has challenged this on several grounds [42-49]. NE has set out its reasons for choosing this option [55-64] which is now the route proposed in the Report.
91. Essentially the route chosen, described above as option 3 [61], satisfies several of the criteria for line selection as set out in the Scheme. This adheres to fundamental Scheme principles such as ensuring continuity of the trail, following the alignment of an existing national trail where feasible, utilising an existing daily ferry service, and taking account of other recreational benefits that may accrue from doing so [61-62].
92. Commenting on the alternative suggested by the CLA, (that the ordinary route of the ECP stops at the point where it effectively enters the estuary and instead an alternative route is proposed through Kingswear to the ferry) NE points out that an alternative cannot be proposed unless there is an ordinary route in place [63].

93. Having particular regard to this element of the Scheme, I could not recommend this suggested modification.

Other matters

94. The Secretary of State will be aware that there are no provisions within the Scheme for compensation.

Conclusions

95. The Scheme, as drafted, leaves landowners and occupiers to decide whether or not areas within the proposed coastal margin would be exempt from public access. Local access authorities are likewise required to form a conclusion in such cases since they are responsible for enforcing public rights if access is wrongly barred. Yet there is little guidance offered to facilitate a consistent approach to such decisions. That in itself creates a sense of unfairness that is argued strongly by the objectors in this case.

96. In the absence of any unassailable statement as to the position here, it is my view that the private drive at issue is most probably part of the curtilage of some of the buildings along its length such that the area excluded from the public access obligation would preclude use of the drive as a through-route.

97. Such a conclusion would enable action to be taken by the objectors and other landowners to ensure signs are sufficient to inform the public that the drive cannot be used as an alternative to section KLR-1-S011 of the ECP, thereby deterring access.

98. When balanced against the overall aims¹⁵ to improve access to the coast in general through the provision of coastal margin and the desire to achieve continuity of the trail around the Dart estuary by following the South West Coast Path to the first ferry crossing, the relatively minor inconvenience to the objectors in maintaining suitable signage would be outweighed by the likely benefits to the public.

Recommendation

99. 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) and (f) of the 1949 Act. I therefore recommend that the Secretary of State makes a determination to this effect.

Sue Arnott

APPOINTED PERSON

¹⁵ As noted in general terms at paragraph 9 above