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

**by Alison Lea MA (Cantab) Solicitor**

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

**Date 26 February 2021**

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Marine and Coastal Access Act 2009

Objection by [redacted]

Regarding Coastal Access Proposals by Natural England

Relating to Penzance to St Mawes

File Ref: MCA/PSM8/0/1

**Objection Ref: MCA/PSM8/0/1**

**Parbean Cove, including Lestowder Beach also known as Men-aver Beach**

- On 18 September 2019, Natural England submitted reports to the Secretary of State setting out the proposals for improved access to the coast between Penzance and St Mawes under section 51 of the National Parks and Access to the Countryside Act 1949 (the 1949 Act) pursuant to its duty under the Marine and Coastal Access Act 2009.
- An objection to Report PSM8, Porthoustock to Carne, was made by [redacted] on 24 September 2019. The land in the report to which the objection relates is route section PSM-8-S054 shown on Map 8c.
- The objection is made under paragraph 3(3)(e) of Schedule 1A to the 1949 Act on the grounds that the proposal fails to strike a fair balance for the reasons set out 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 Matters**

1. On 18 September 2019 Natural England (NE) submitted reports to the Secretary of State setting out proposals for improved access to the coast between Penzance and St Mawes. The period for making formal representations and objections to the reports closed on 13 November 2019.
2. There are 3 objections to report PSM8. The other objections are dealt with in a separate report. There are 4 representations relevant to this objection.
3. I carried out a site inspection on 6 October 2020 accompanied by [redacted] and by representatives from NE and a representative from Cornwall Council.

**Main Issues**

4. The coastal access duty arises under section 296 of the Marine and Coastal Access Act 2009 (the 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.
5. 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. This is referred to as the coastal margin.

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6. Section 297 of the Act provides that in discharging the coastal access duty NE and the Secretary of State must have 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.
7. They must also 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.
8. NE's Approved Scheme 2013<sup>1</sup> ("the Approved 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.
9. My role is to consider whether or not a fair balance has been struck. I shall make a recommendation to the Secretary of State accordingly.

### **The Coastal Route**

10. It is proposed that the trail will use the existing alignment of the South West Coast Path, which crosses land within the ownership of [redacted]. That land includes an area of beach seaward of the trail, which is accessed by a gate which [redacted] keeps locked. [redacted] owns a slipway and land up to the high-water mark.

### **The Objection**

11. [Redacted] states that the land seaward of the trail forms part of land used and enjoyed as a garden and is therefore excepted land. He has provided copies of a planning permission dated 8 May 1959 for the erection of a bungalow and a planning permission dated 18 May 1999 for the retention of a wooden shed to be used as a store for maintenance equipment /tools. Both relate to land situated landward of the trail. He states that his land fulfils the definition of a garden, having areas of wildlife and cultivation, pot plants, permanent garden furniture, shed, areas of lawn and fruit trees.
12. He also refers to restrictive covenants which he states allow access to the beach to a very small number of people for specific purposes, a notice under S31 Highways Act 1980 and a high court injunction restricting access. The latter was clarified as a declaration of the chancery division of the high court "that no rights of way either vehicular or on foot exist over any of the said properties for the obtaining of access to foreshore commonly called Penare Beach, Carminow Beach and Men-aver Beach in the Parish of St Keverne". He asks for written confirmation that the covenants have been extinguished and removed from the land registry before access is permitted. He suggests that access to the beach is better from the gate at PSM-8-S052 where there is a concrete slipway.

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

13. He considers that restricting access to the foreshore is important because it is a SSSI, SPA and SAC and it is important for roosting birds and used by many waders, herons and gulls including greater black backed gulls.

### **The response by Natural England**

14. Under the coastal access legislation all land seaward of the trail as far as mean low water automatically becomes coastal margin regardless of land use. However, land used as a garden would be excepted from coastal access rights meaning that the new rights of access do not apply to it. The legislation provides no mechanism for the removal of excepted land from the coastal margin. If land is excepted a direction to exclude access is not appropriate as there is no right of access to exclude.

15. NE refers to a response to [redacted]'s concerns in ministerial correspondence which states "Access provided as part of coastal access rights would override any restrictive covenants in place on [redacted]'s land but would not extinguish the covenant on the areas of land not included within those rights. NE is proposing that the beach at Parbean Cove will become part of the coastal margin, but the beach will not become a highway and there is no requirement under the Countryside and Rights of Way Act 2000 for the owner to facilitate access to the beach by way of ongoing maintenance of the point of access".

16. NE is aware that [redacted] owns the slipway and locked gate that leads on to the foreshore and notes that there have been several representations from other parties about that access point. The new rights give a right of public access to Lestowder Beach but do not place a duty on NE to facilitate access to it as part of their proposals.

17. NE also notes that the Duchy of Cornwall has confirmed that it owns the foreshore at Parbean Cove and that as far as NE is aware [redacted] is not in any other form of occupation of the foreshore.

18. NE is aware that waders, herons, gulls, greater black backed gulls and Mediterranean gulls use the foreshore as a place to rest and preen. However, Parbean Cove is one of a number of locations along this section of coast that may be utilised by the shorebird and gull species listed. Whilst birds may be disturbed by the presence of people, becoming more alert or making short flights away from the disturbing activity, the impact of such behaviour will be transient and unlikely to significantly affect the bird's fitness or survival. NE is therefore not minded to change the conclusions of the Habitat Regulation Assessment (HRA) or Nature Conservation Assessment (NCA).

19. Parbean Cove is within the Falmouth Bay to St Austell Bay SPA, the Fal and Helford SAC, the Meneage Coastal Section SSSI and the Lower Fal and Helford Intertidal SSSI. A full assessment of any potential impacts on wildlife and habitats was undertaken as part of the preparation of NE's proposals and the results are detailed in the NCA (for SSSIs) and the HRA (for European sites such as SACs and SPAs). They were published and made publicly available at the same time as the proposals for Penzance to St Mawes.

20. In the Falmouth Bay to St Austell Bay HRA, NE considered whether the proposals for coastal access might have an impact on the SPA's qualifying

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features. These are black throated divers, great northern divers and slavonian grebes. NE concluded that there were no risks to these features and the proposals would have no likely significant effect on the Falmouth Bay to St Austell Bay SPA site features.

21. In the Fal and Helford SAC HRA, NE considered whether the proposals for coastal access might have an impact on the SAC's qualifying features. These are sandbanks which are slightly covered by sea water all the time, mudflats and sandflats not covered by seawater at low tide, large shallow inlets and bays, atlantic salt meadows, estuaries, reefs and shoredock. NE concluded that there are no risks to these features and that the proposals for coastal access will have no likely significant effect on the Fal and Helford SAC site features.
22. NE is also satisfied that the proposals to improve access to the coast are fully compatible with the duty to further the conservation and enhancement of the notified features of the Meneage Coastal Section and Lower Fal and Helford Intertidal SSSIs consistent with the proper exercise of their functions.
23. NE has therefore concluded that the proposals are not likely to have a detrimental impact on the designated interest features in the area and that a direction to exclude access to the foreshore is not required.

### **Representations**

24. The four representations are from individuals who state that they support the coastal access proposals at Lestowder Beach and the associated slipway access to the beach. They state that the slipway historically provided access to the beach giving enjoyment to local families and visitors. It was closed off with a locked gate in 2018. Photographs of families enjoying the beach and of the locked gate have been provided. The representations state that it is hoped that the coastal access legislation will allow the public the right to regain access to Lestowder beach via the slipway.
25. NE welcomes the positive support for the proposals and notes that slipways, hards and quays are removed from the definition of "building" by paragraph 14 of Schedule 1 to the CROW Act 2000. Therefore, slipways are not excepted from the new rights under paragraph 2 of that Schedule. The new rights give a right of public access to Lestowder Beach but do not place a duty on NE to facilitate access to it as part of the proposals. NE states that given the apparent longstanding use of the beach by the public, details of the situation have been passed to the access authority to consider.

### **Discussion and Conclusions**

26. [redacted] states that the land seaward of the trail is used and enjoyed as a garden and is therefore excepted land. At the time of my site visit there was a table and chairs situated in this area, providing views of the beach and the sea, and I do not doubt that [redacted] uses and enjoys this area of land. However, Defra guidance set out in the Approved Scheme states that "A garden is usually enclosed land near a building. It typically includes areas of lawn, flower borders and other cultivated plants". Neither the land seaward of the trail nor that landward of the trail is associated with a dwelling, the only apparent structure on any of the land being the shed, the planning

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permission for which states that it is for the storage of maintenance equipment/tools. In my opinion the land seaward of the trail does not have the appearance of a garden and neither does the large area of land situated landward of the trail. I therefore do not consider the land to be excepted land.

27. Whether or not the land is a garden and is therefore excepted land is ultimately a matter for the courts. However, if it is excepted land, NE is unable to issue a direction excluding access, as, as stated by NE, there would be no right of public access to exclude.

28. I agree with NE that coastal access rights would override covenants restricting public access. However, although I note that access through the gate and slipway has been possible in the past, I also agree that there is no requirement for either an owner of land or NE to facilitate access.

29. I acknowledge [redacted]'s concerns regarding disturbance of gulls and shorebirds on the foreshore. However, NE has carried out a Habitat Regulation Assessment and Nature Conservation Assessment and has concluded that the proposals are not likely to have a detrimental impact on the designated interest features in the area and that a direction to exclude access to the foreshore is not required. There is no information before me which would lead me to doubt this conclusion.

30. I therefore conclude that the proposals do not fail to strike a fair balance.

### **Recommendation**

31. 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 objection. I therefore recommend that the Secretary of State makes a determination to this effect.

*Alison Lea*

**APPOINTED PERSON**