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

**by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA**  
an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs  
**Date: 16 September 2021**

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Marine and Coastal Access Act 2009

Objections by Savills (On behalf of MDL Marinas Group Ltd)

Regarding Coastal Access Proposals by Natural England

Relating to Calshot to Gosport

**Objection Ref: MCA/CCG1/0/1**

**Objection by Savills on behalf of MDL Marinas Group Ltd.**

**Coastal Access – Calshot to Gosport**

- On 17 July 2019, Natural England submitted reports to the Secretary of State setting out the proposals for improved access to the coast between Calshot and Gosport under section 51 of the National Parks and Access to the Countryside Act 1949 (the 1949 Act).
- Natural England submitted its reports in accordance with its duty under the Marine and Coastal Access Act 2009 (the 2009 Act) to improve access to the English Coast.
- The objection, dated 11 September 2019, concerns Report CCG1, Calshot to Itchen Bridge, as shown on Map 1h. No route sections are specified.

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

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**Objection Ref: MCA/CCG2/0/1**

**Objection by Savills on behalf of MDL Marinas Group Ltd.**

**Coastal Access – Calshot to Gosport**

- On 17 July 2019, Natural England submitted reports to the Secretary of State setting out the proposals for improved access to the coast between Calshot and Gosport under section 51 of the National Parks and Access to the Countryside Act 1949 (the 1949 Act).
- Natural England submitted its reports in accordance with its duty under the Marine and Coastal Access Act 2009 (the 2009 Act) to improve access to the English Coast.
- The objection, dated 11 September 2019, does not specify the number of the report and map to which it relates but appears to concern Report CCG2, Itchen Bridge to Hamble Warsash Ferry, as shown on Map 2e. No route sections are specified.

**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 17 July 2019 Natural England (NE) submitted reports to the Secretary of State setting out proposals for improved access to the coast between Calshot and Portsmouth. The period for making formal representations and objections to the reports closed on 11 September 2019.
  2. There was one objection to report CCG 1 and one objection to report CCG 2, which objections were determined to be admissible. I have been appointed to report to the Secretary of State on the objections. In relation to the Calshot to Itchen Bridge Report CCG1 a total of 10 representations were received and in relation to the Itchen Bridge to Hamble Warsash Ferry Report CCG2 a total of 13 representations were received which have all been considered. Where relevant they are referred to together with NE's comments.
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3. I carried out a site inspection on 27 October 2020 accompanied by Savills, the objector's agent, representatives from NE and from Hampshire County Council (HCC). From my site inspection and consideration of the objections, I am satisfied that the objections relate to route sections SO72 to SO76 (MCA/CCG1/O/1/CCG0119) and SO47 to SO49 (MCA/CCG2/O/1/CCG0119).

### **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 2 objectives.
5. The first objective is that there is 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.

This is referred to in the Act as the English coastal route, but for ease of reference is also referred to as "the trail".

6. The second objective is that, in association with 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 trail or otherwise. This is referred to as the coastal margin.
7. 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 the trail are kept to a minimum.
8. 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.
9. Section 301 of the Act applies to river estuaries and states that NE may exercise its functions as if the references to the sea included the relevant upstream waters of a river.
10. NE's Approved Scheme 2013<sup>1</sup> ("the Scheme") sets out the approach NE must take when discharging the coastal access duty. It forms the basis of NE's proposals within the Report.
11. My role is to determine whether the proposals set out in NE's report fail to strike a fair balance as a result of the matters specified in the objection. I shall set out that determination and make a recommendation to the Secretary of State accordingly.

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

## The coastal route

12. Reports CCG1 and CCG2 propose powers for particular sections of the trail to be relocated through a process known as “roll-back”<sup>2</sup> if this should prove necessary due to future coastal change. The power could only be used due to coastal erosion, geomorphological processes or encroachment by the sea, or to link with other parts of the route that need to roll back in direct response to such changes.
13. NE propose no roll-back for sections CCG-1 S072 to S076 of the trail. For sections CCG-2 S048 and S049 roll back is proposed but details would be subject to compatibility with the Lee-on-the-Solent to Itchen Estuary SSSI (Site of Special Scientific Interest).
14. Sections CCG-1 S072 to S076 of the trail concern the Ocean Village site<sup>3</sup>. The path through Ocean Village is partly on public highway and partly on an existing permissive path. NE has used its discretion to map the landward extent of the coastal margin to the pavement edge or building frontage to make the extent of the new access rights clearer.
15. The alternative route considered was the Solent Way, running inland along Canute Road. NE state that if that route were chosen Ocean Village would then fall within the Coastal Margin in which case a right of access would be created which could no longer be said to be on a permissive basis. NE would consider an outline direction to exclude access when events are taking place.
16. Sections CCG-2 S047 to S049 is a walked route. NE considered aligning along the public right of way seaward of the proposed route (CCG-2-S049). It opted for the proposed route because the public right of way is on lower ground running alongside a drainage ditch. It is extremely boggy, muddy and unsuitable for walking, particularly in winter and wet weather. The right of way would remain available for people to use. The Ramblers made representations that defective sections of the path would be resurfaced and a second route would be unnecessary and lead to a loss of trees and bushes. However NE concluded that overall the proposed route struck the best balance in terms of the criteria described in chapter 4 of the Scheme.
17. The Hamble Conservation volunteers expressed concerns that the section S048 to S050 would impact on territories of Hamble Common’s nesting nightjars. Whilst a designated feature of the New Forest SSSI, nightjars are not designated within the Lee-on-Solent to Itchen Estuary SSSI. The proposed route avoids the area represented by breeding nightjar territories.
18. In section CCG-2-S049, the existing kissing gate would be replaced to make it easier to use, before the new access rights come into force as part of the physical establishment work.
19. Access to the saltmarsh/flat in the coastal margin seaward of route sections CCG-2-S006 to CCG-2-S064 is to be excluded all year-round by direction under s25A of the Countryside and Rights of Way Act (2000) as it is mudflat and

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<sup>2</sup> ie arrangements under s55B of the 1949 Act whereby NE may propose to the Secretary of State in a coastal access report that the route of a specified part of the trail which is subject to significant erosion or other coastal processes, or which links to such a section of trail, should be capable of being repositioned later in accordance with the proposals in its report, without further confirmation by the Secretary of State.

<sup>3</sup> Ocean Village is a mixed development surrounding a marina, managed and owned by the objector, MDL.

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saltmarsh that is unsuitable for public access. The exclusion does not affect the route itself and would not affect land where coastal access rights do not apply.

20. NE propose to exercise its statutory discretion as if the sea included its estuarial waters as far the Hamble Warsash Ferry, as indicated by the extent of the trail shown on map CCG 2e.

### **Objection MCA/CCG1/0/1 and Objection MCA/CCG2/0/1**

21. The objections relate to land at Ocean Village and Hamble Point Marina, and in part they raise similar issues. I will consider the objections together, making it clear where specific locations are referenced.

### **Consultation**

22. The objector has misgivings as to the consistency and thoroughness with which consultation was carried out with those affected. These concerns were set out in Savills' letter of 11 September 2019 under the heading "procedural concerns". The objector, MDL Marinas Group Ltd (MDL) owns the freehold of Ocean Village but there are long leases over land alongside the quay wall. The concern is that these leaseholders may not have been consulted. All leaseholders with a relevant interest in land up to the coast and including the coastal margin who would be affected by this proposal should have been informed or reasonable steps taken to inform them. Further, the residents in the majority of Ocean Village should all have been notified individually.

### *Response by NE*

23. All reasonable steps were taken to identify affected owners and occupiers and apprise them of NE's plans. They were contacted as set out in the Scheme and requested to pass the information in the letter to any tenants or other people with a legal interest in their land and to contact NE if they wished to discuss the plans further.<sup>4</sup>
24. NE wrote to 151 occupiers registered with HM Land Registry in the Ocean Village area informing them of the proposals, and held public drop-ins. NE also publicised on social media and advertised locally. MDL, as owners of the land that the trail would cross was asked to pass details on to their tenants. Several conversations were held with MDL regarding the proposals at Ocean Village and four separate visits made to this site.

### *Discussion and conclusion*

25. The Scheme sets out in detail who must be notified and when, concerning the publication of a coastal access report. Figure 7 gives an overview of the implementation process, the various stages of which provide for, successively, contact with landowners, inviting representations on the finalised report from anyone who wishes to comment, and objections thereto from owners or occupiers of affected land. Section 3.4.9 and Figure 8 provide more detail, including those who must be notified directly, and as a matter of good practice, other individuals or organisations who indicate that they wish to be contacted when the report is published. The Scheme appears to accord with requirements set out in Schedule 1 to the Coastal Access Reports (Consideration and

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<sup>4</sup> Supporting document on page 14 NE Comments – Initial Contact Letter.

Modification Procedure) (England) Regulations 2010 and the enabling legislation.

26. The blocks of flats or office buildings that make up the majority of the Ocean Village site seaward of the route in the coastal margin would be 'excepted land' and therefore unaffected by any new coastal access rights. NE has fully explained the procedures they employed to identify and consult with affected persons. I am satisfied from the information provided by NE that the measures taken fulfil its duty under Schedule 1A to the 1949 Act to take such steps as are reasonable to give notice of its report to persons with a relevant interest in affected land.

**Inconsistency regarding river estuaries and duplication**

27. MDL objects that the proposals do not provide the fullest extent of coastal access that could be secured since there is a well-worn route alongside the River Hamble, particularly on the eastern bank, that could be designated as the coastal path. The proposed use of the Hamble Warsash Ferry crossing at the River Hamble is a commercial ferry with restricted hours of operation. Its use is alleged to be contrary to the aims of the legislation. Whilst ferries can be intermittent, an additional route should be proposed in the event the ferry is not operational.
28. With an existing route already in place via the Solent Way, it is objected that the justification for new routes is unclear and the proposals would duplicate a route and confuse landowners and the public as to their rights. As part of their representations the Hampshire Ramblers consider the ferry is a useful alternative when available but misses the potential to enhance coastal access.

*Response by NE*

29. Each estuary is considered on its own merits having regard to the criteria set out in the Scheme. NE's approach to rivers and estuaries is generally to use the first reliable crossing point, be it a bridge or full-time ferry. It has discretion whether to carry on up a river to the first crossing point, use a ferry or, exceptionally, break the trail. Where a full-time ferry crosses the river downstream of the first pedestrian crossing point NE would normally propose that the trail uses it to cross the estuary. A ferry is treated as full-time if it is a year-round service that runs reasonably frequently in daylight hours. Alignment across the river using the ferry is normally sufficient without the provision of an additional alternative route.

*Discussion and conclusion*

30. The Hamble Warsash Ferry runs regularly throughout the year, except Christmas day, with seasonal timings with a daily but reduced service in the winter. The Overview document for this stretch refers to the Scheme which at paragraphs 10.1.4 and 5 notes the seaward limit of estuarial waters is an arbitrary point from an access perspective. Southampton Water taken together with its tributaries forms an extremely large and convoluted estuary system that a walker would have to travel approximately 30 miles to circumnavigate it fully. I note from representations made by the Solent Recreation Mitigation Partnership and others that routing the trail up the river could cause increased serious disturbance to overwintering and breeding birds.

31. Three options were considered for the River Hamble: align the trail around the estuary via the A27 and Bursledon Bridge; stop at the Hamble-Warsash Ferry terminal on the western side, where there is a regular ferry service; or to stop the trail at the estuarial limits. NE's proposal is to align the trail to the Hamble-Warsash terminal, where walkers may cross by means of the regular ferry. The crossing is recognised as an important link in the existing promoted route, the Solent Way, which the ECP route would follow on this section. The Solent Protection Society in its representations consider that the best of the three options has been chosen at the estuary crossings. I note also the Hamble River Valley Forum's preference for use of the A27 Road Bridge. However NE has made it clear that it would review its trail alignment if the service ceases or becomes less suitable and consider a separate variation report to the Secretary of State to ensure an uninterrupted journey along the trail. This appears to me to be a pragmatic approach in the circumstances.
32. I agree with NE that given the availability of this service, the local benefits of the first option would not justify the substantial additional cost. The selected option would meet a core aim of the legislation to create a continuous route around the coast, in a simple and cost effective way, whilst avoiding the sensitivity of the bird and other features of the protected areas in the saltmarsh, mudflats and creeks of the western side of the river.

**Specific marina operator concerns - marinas and boatyards to be 'excepted' land**

33. Marinas and boatyards are potentially dangerous places with high risk activity, and high value assets such as yachts are secured commercially. They may provide an apparently publicly accessible route or recreation venue but access is often via permissive rights. Aerodromes and racecourses are excepted land but marinas and boatyards are not, yet they present similar issues in terms of ownership and risk. Much of their land is some distance from the proposed trail, most of which would be separated from it by a fence/security gate.
34. It is also objected that the Coastal Margin is shown in a broad-brush annotation on the Ordnance Survey maps which do not show excepted land, so it would be difficult for the public to know what they are able to access. Uncertainty also arises whether private car parks can be "curtilage" and so "excepted land".
35. A further concern is that to compel public access would raise significant additional liability and indemnity issues, in respect of which boatyard and marina operators may have to seek to recover compensation from NE.

*The response by NE*

36. NE may not amend categories of land excepted from coastal access rights under Schedule 1 to CROW. However portions of marinas, boat parks and boatyards may be excepted land under other categories such as buildings and their curtilage. The definition of building does not include any slipway, hard or quay on the coastal margin.
37. The seaward coastal margin extends from the trail to the mean low water mark. Section 8.25 of the Scheme explains that for maritime facilities NE will attempt to align seaward of operational areas to minimise disruption, particularly at smaller marinas, harbours or boatyards. At Hamble Point Marina, the proposals avoid the entire area and route landward, adjacent to, but

- outside of, the Marina. Parts of the site may not clearly be in a category of excepted land but owners can place signs indicating the extent of excepted land where there might be doubt, so long as those signs are not misleading.
38. In its representations the Hampshire Ramblers wished to be involved with the details of the signing of the route which NE is appreciate of and would continue to liaise with them during the establishment phase.
  39. A carpark associated with a building might be excepted land, but whether it is in the curtilage of a building depends on several factors and the facts of the individual case.
  40. The fear of uncontrolled access over the objector's land is noted but access is currently managed through continuing to police against the unlikely eventuality of people trying to climb machinery, cranes, yachts and the like. The fence and security gate would itself be an effective management measure, but NE would consider exercising powers to formally control access if needed, as discussed with the objector<sup>5</sup>. Formal directions to exclude access were not proposed.
  41. Hamble Point Marina has busy yards and boat handling facilities, but NE considers informal management measures are in place to protect workers and visitors. Such measures are often highly effective as the most flexible and least bureaucratic way to manage access.
  42. Unlike the position with CROW 'open access land', coastal margin on OS maps does not show 'access land' per se but rather depicts the status of the land. Coastal margin in some areas has much land not subject to these rights either because it is excepted land or subject to a statutory direction.
  43. On liability concerns, it is understood that the coast can be a dangerous environment and visitors should take responsibility for their own safety and others in their care. Land subject to coastal access rights benefits from the lowest level of occupiers' liability, making it extremely unlikely for occupiers to be successfully sued in relation to injury on land with coastal access rights.

#### *Discussion and conclusion*

44. Natural England does not decide what is or isn't excepted land and ultimately only the courts can give an authoritative interpretation of the legislation. That said there are undoubtedly large portions of the Marina that would fall within one or more of the excepted land categories such as land covered by buildings and their curtilages. Therefore, unless more formal means of exclusion are deployed through exclusion orders, care should be exercised in not misleading the public when using informal management measures to discourage activity that might interfere with legitimate operations in areas adjacent to the trail.
45. From what I saw, the gated entrance to Hamble Point Marina would not entice walkers to enter the industrial work area and there is no reason to suppose they would not stay on the path and avoid conflict with landowners. From the public car park a permissive walk leads round the edge of the site to a slipway, and a restaurant and bar is open to the public. I agree with NE that creating formal access rights over such quasi-public areas would not make it any more or less likely that anti-social behaviour would occur. In any event no right of

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<sup>5</sup> Site visit meeting at Hamble Point Marina on 15 August 2018.



- access would obtain where structures are captured by the buildings and curtilage exception under paragraph 2 of Schedule 1 to CROW Act 2000.
46. I acknowledge that Hamble Point Marina presents particular hazards. As previously described the proposals are unable to alter categories of excepted land, and I note NE's willingness to consider, if needed, a public safety direction to exclude access to some or all of the Marina. This should satisfy the objector's concerns, whilst not restricting its ability to manage its land as it does now.
47. Given the current access restrictions to the pontoons, moored boats and jetties at Hamble Point Marina, I agree it is unlikely that formal action would be necessary to secure public entry into these areas. However it is both necessary and desirable in my view that NE should be prepared to respond to landowners' valid concerns and be prepared to issue formal directions to control access should circumstances alter and it proves necessary to take formal action.
48. From the information available the staging of commercial events is an issue for the objector, especially at Ocean Village. I note that NE is also willing to discuss the need for a direction to exclude or restrict access at times where these events take place. The Scheme explains how special measures may be used for a variety of events and temporary uses, for example music festivals. I am confident that the use of informal management measures and directions to exclude access during events would satisfactorily meet these concerns.
49. Given the difficulty in precise identification of excluded land within the coastal margin, the annotation on OS maps of the trail and coastal margin is understandable, however this does not form part of NE's proposals.
50. On the issues of insurance and liability the government web site addresses landowners and states:
- "your level of occupier liability is reduced when new coastal access rights are created along the ECP or within the coastal margin. You're not responsible for any damage or injury caused by any physical feature on the land, whether it's a natural feature of the landscape or a man-made one."*<sup>6</sup>
51. The liability of owners of coastal access land towards visitors is reduced due to s306 of the 2009 Act and under the Occupiers' Liability Act 1984 as amended, so that the occupier's liability is excluded for "a risk resulting from the existence of any physical feature (whether of the landscape or otherwise)". As set out in paragraphs 4.2.1 and 4.2.2 of the Scheme visitors have primary responsibility for their own safety.
52. The legislation does not provide for compensation to an owner who incurs loss resulting from the actions, accidental or otherwise, of an ECP user who has gained access to potentially hazardous areas. Therefore liability insurance would remain an issue and the government has signposted further guidance on liability in coastal margins developed specifically for landowners.<sup>7</sup>

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<sup>6</sup> <https://www.gov.uk/guidance/manage-your-land-on-the-england-coast-path#:~:text=Your%20level%20of%20occupier%20liability,or%20a%20man%2Dmade%20one.>

<sup>7</sup> <https://www.gov.uk/guidance/open-access-land-management-rights-and-responsibilities>

***Overall conclusion***

53. Taking all these matters into account I conclude that the proposals comply with the duty in section 297 of the Act.

**Recommendation**

54. 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.

*Grahame Kean*

**APPOINTED PERSON**