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

by **D M Young JP BSc (Hons) MPlan MRTPI MIHE**

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

Date

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## Marine and Coastal Access Act 2009

Objections by [redacted], [redacted] and [redacted], [redacted], [redacted] and [redacted], [redacted] and [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted], [redacted], [redacted] and [redacted].

Regarding Coastal Access Proposals by Natural England

Relating to Eastbourne to Camber

Site visit made on 28 June 2021

File Refs: MCA/EBC2/O/11/EBC0590, MCA/EBC2/O/16/EBC0286, MCA/EBC2/O/19/EBC0483, MCA/EBC2/O/3/EBC1839, MCA/EBC2/O/4/EBC0900, MCA/EBC2/O/6/EBC1144, MCA/EBC2/O/7/EBC1602, MCA/EBC2/O/8/EBC1822, MCA/EBC2/O/9/EBC0405, MCA/EBC2/O/10/EBC1975, MCA/EBC2/O/12/EBC1585, MCA/EBC2/O/13/EBC0789, MCA/EBC2/O/14/EBC1495, MCA/EBC2/O/15/EBC1205, MCA/EBC2/O/18/EBC2348, MCA/EBC2/O/21/EBC1076 and MCA/EBC2/O/22/EBC0530.



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MCA/EBC2/O/8/EBC1822, MCA/EBC2/O/9/EBC0405,  
MCA/EBC2/O/10/EBC1975 MCA/EBC2/O/12/EBC1585,  
MCA/EBC2/O/13/EBC0789, MCA/EBC2/O/14/EBC1495,  
MCA/EBC2/O/15/EBC1205, MCA/EBC2/O/18/EBC2348,  
MCA/EBC2/O/21/EBC1076 and MCA/EBC2/O/22/EBC0530**

**362-458 Coast Road, Pevensey Bay to Normans Bay**

- On 27 February 2020, Natural England (NE) submitted reports to the Secretary of State setting out the proposals for improved access to the coast between Eastbourne to Camber 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 objections, dated between 20 April 12 June 2020, concern Report EBC2, Bay View Caravan Park, Pevensey Bay to Herbrand Walk, Cooden and relates to route sections EBC-2-S092, EBC-2-S099-EBC-2-S100 and EBC-2-S070-EBC-2-S073 as shown on Map EBC2d and EBC2c.

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

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## **Procedural and Preliminary Matters**

1. I have been appointed to report to the Secretary of State on objections made to NE's report. This report summarises the submissions made by [redacted], [redacted] and [redacted], [redacted], [redacted] and [redacted], [redacted] and [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted], [redacted], [redacted] and [redacted] (the objectors), the response of NE and my conclusions and recommendation.
2. As the issues raised by the objectors deal with similar issues in the same general location, I have dealt with them in the same report.

## **Objections considered in this report**

3. The report submitted by NE to the Secretary of State sets out the proposals for improved access to the Sussex Coast between Eastbourne and Camber. The period for making formal representations and objections to the report closed on 9 June 2020.
4. 23 objections were received to the report, all of which were deemed to be admissible. The objections considered in this report relate mainly to the section of the trail between 362-458 Coast Road, on the eastern edge of Pevensey Bay. The objections from [redacted], [redacted] and [redacted] relate to the section through Normans Bay.

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## Site Visit

5. I carried out an accompanied site inspection on the morning of 28 June 2021 when I was accompanied by [redacted] and [redacted] for NE, [redacted] for East Sussex County Council (ESCC) and several of the objectors. I viewed the proposed alignment of the trail along Coast Road and the unnamed road which passes through Normans Bay as well as the proposed coastal margin which is seaward of properties owned by the objectors.

## Main Issues

6. 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 two objectives.

7. 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 referred to as "the trail" in this report.

8. 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.

9. 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 the trail 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.

10. 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.

11. [If the objection relates to land by a river estuary rather than the sea] 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. [If NE's use of the estuary discretion is a fundamental part of the objection also add in the estuary criteria which are set out in s301(4)]

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12.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.

13.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.

### **The Coastal Route**

14.The trail, subject to part 2 of the report, runs from Bay View Caravan Park, Pevensey Bay (grid reference: 564876 102546) to Herbrand Walk, Cooden (grid reference: 569786 106115) as shown on maps 2a to 2d. The trail generally follows existing walked routes including public rights of way and promoted routes.

15.Between sections EBC-2-S055 and EBC-2-S075 the trail is aligned on the pavement of Coast Road. At sections EBC-2-S082 and S083 it is aligned on the carriageway of Coast Road.

16.Between sections EBC-2-S090 and EBC-2-S095 the trail is aligned on the carriageway of the unnamed road through Normans Bay. The trail is inland of land owned by Mr Dash.

17.Sections EBC-2-S099 and S100 of the trail are proposed along the top of a shingle beach, across land owned by [redacted] and [redacted]. This part of the beach is already well used by visitors and walkers. The trail follows relatively consolidated shingle near the top of the beach, a route also used by vehicles involved in maintaining the shingle flood defence.

### **The Objections**

18.The majority of objectors point out that they own land up to the Mean High Water Mark (MHWM) which they consider to be part of their residential curtilage. The objectors are concerned that the designation of this land as coastal margin would result in increased use by the general public resulting in a loss of privacy, security and increasing incidents of anti-social behaviour on the beach.

19.In the case of [redacted] and [redacted], it is the alignment of the trail itself across the top of the privately owned shingle beach which is the issue.

20.All the objectors argue that private property should be considered excepted land and excluded from the coastal margin by a direction. Others argue that they may be forced to fence off their land.

21.Other concerns include the potential risks to the public from the Environment Agency's maintenance vehicles and boats being winched up the beach.

### **Response by NE**

#### *Rationale for the route*

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

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22. The position of the route proposed by NE determines that land on the seaward side of the trail would automatically become coastal margin<sup>2</sup>. In the case of section EBC-2-S099 and S100, the shingle north of the trail (up to existing fence lines), would become part of the landward coastal margin (again by default, as it is a coastal land type that is in contact with the trail).

23. NE considered aligning the trail seaward of the houses along Coast Road and at Normans Bay, given the open nature of the beach seaward of the houses and the existing informal use by walkers. However, shingle is difficult to walk upon for any significant distance and given the long-distance nature of the England Coastal Path it is anticipated that users would prefer the firmer road surface, or alternatively choose to walk on the firm sand, when it is exposed at low tide. NE therefore consider that the pavement along Coast Road and the road through Normans Bay is the most appropriate option to provide a firmer walking surface, while the beach would automatically remain available for use by walkers as part of the coastal margin.

24. The trail will be clearly way-marked along its length, especially where it leaves and joins the beach near sections EBC-2-S048, S054 and S078. NE do not however intend to signpost an 'alternative route' along the open beach. Nonetheless, people could choose to walk along the shingle here as they currently do.

#### *Private versus public interests*

25. Coastal access rights may become available over some land which was previously only available for the enjoyment of the owner-occupier and invited guests. This is the case throughout England and is a core component of the legislation. Due to this, Section 297 of the 2009 Act requires NE in discharging the coastal access duty to aim to strike a fair balance between the occupier's interests and the public's interest in having access rights over land.

26. In developing the trail proposals, NE must consider how private interests use the land affected by the potential coastal access rights. Coastal access rights do not interfere with the landowner's freedom to manage and use their land as they wish.

27. The new rights, if approved, will allow the public to, for example, walk and sit on the beach and exercise their common law right to fish in the sea. NE do not envisage a significant change to the current use of the beach by the public – as this land is already accessed informally. NE would expect visitors to respect others using the beach for fishing and relaxing. Although there may be some increase in people choosing to access the beach, NE consider that the ability and rights of residents to the private enjoyment of their land and property will continue to be compatible with public access to the beach.

#### *Coastal Margin and excepted land*

28. If approved by the Secretary of State, new public rights would be created along the trail. All land seaward of the trail would therefore fall, by default, into the coastal margin.

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<sup>2</sup> Paragraph 2.3.4 of the Approved Scheme

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29. A number of the objectors suggest that their property boundaries on the beach constitute 'excepted land' on the basis that it forms part of their residential curtilage. Various categories of land are excepted from coastal access rights to help protect private interests and privacy, as set out in Schedule 1 of the Countryside and Rights of Way (CROW) Act 2000. In considering what is excepted land, NE take account of the Department of Environment, Food and Rural Affairs' (DEFRA) published guidance on defining gardens and curtilage<sup>3</sup>. This highlights that:

- A garden is usually enclosed land near a building. It typically includes areas of lawn, flower borders and other cultivated plants. In practice on the coast there may be some very large areas of enclosed land associated with a dwelling and consisting of areas of lawn, flower borders or other cultivated plants, or similar garden-like cover such as ornamental plantings, garden furniture or vegetable plots.
- Curtilage is not defined, but it generally means a small area, forming part and parcel with the house or building to which it is attached. In most cases the extent of curtilage will be clear: typically, an enclosure around a dwelling containing a garden, garage and side passage; a walled enclosure outside a barn, or a collection of buildings grouped around a farmhouse and farmyard.

30. South of Coast Road, the buildings and gardens close to the houses on the seaward side of the properties (which are more formal looking and often fenced off from the beach) do sit within DEFRA's definitions of excepted land.

31. The beach between these formal gardens and the MHWM as well as Normans Bay, (EBC-2-S099 and S100) is open and unfenced shingle, and in NE's view does not sit comfortably with either of the above definitions of excepted land. The beach appears like other shingle beaches around this part of the coast, and as noted in several objections, the public are likely to expect that they can walk along it – and already do so.

32. The beach seaward of the proposed trail would, if the proposals are approved, lie in coastal margin. Beaches are a category of land that would, by default, be included in coastal margin if located landward of the trail<sup>4</sup> indicating that they are intended to become part of the 'associated margin of land for the public to enjoy'.

33. A number of different definitions of curtilage have been provided. In her objection, [redacted] included an alternative definition for curtilage (from the Office of the Deputy Prime Minister, 2006). There are several different definitions of curtilage but no caselaw that directly applies these to the coastal access legislation.

34. It is up to individual landowners to examine the guidance and to decide whether they consider the land they own in the coastal margin to be excepted or not. NE would not normally way-mark access into the coastal margin or erect signs indicating excepted land. There is nothing in the coastal access legislation that prevents landowners from putting up their own signs about excepted land. However, the legal interpretation of what is 'excepted' would ultimately be a

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<sup>3</sup> See Figure 22 of the Approved Scheme

<sup>4</sup> See paragraph 4.8.8 of the Approved Scheme

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matter for the Courts. However, in order to align the trail across any land, NE are required to take a view on whether that land is excepted or not. For the reasons given above, NE do not consider the open shingle beach constitutes 'excepted' land.

#### *Excluding access rights to the beach*

35. Some of the objections suggest the proposals should be modified to exclude coastal access rights from the open beach area above the MHWL or to the whole shingle beach, on the basis of land ownership or privacy due to the proximity of visitors using the coastal margin affecting quiet enjoyment and family activities.

36. It is important to note that sections EBC-2-S055-S075, EBC-2-S082-S083 and EBC-2-S090-S095 are not aligned along the beach, and waymarking would direct walkers inland along Coast Road. NE would not normally waymark access into the coastal margin and would not expect significant numbers of new walkers to utilise the shingle due to the difficult walking conditions. Therefore, NE would not foresee a high increase in visitors along the top of the beach. Current access on the open beach is tolerated, as mentioned in some objections, and NE consider it is likely that anyone using the area as a consequence of it being coastal margin, would also be respectful of those residents whose properties back onto the beach.

37. Where family activities take place on the beach, NE consider that informal management techniques would be sufficient to avoid any significant disruption such as signs highlighting the residential nature of the area and temporary roped off areas that would allow visitors to pass by activities safely. NE consider that informal management techniques such as these would be sufficient to remind walkers of mixed-use nature of the beach and the need to behave respectfully.

38. [redacted] raises concerns over the family's home-schooling activities on the beach whereas [redacted] will consider fencing off his garden for child safety if the beach becomes accessible through coastal access rights. In line with the Approved Scheme, NE would usually align the trail away from an area where children are known to be present in a formal or accredited setting. In this case, adults would be supervising any home-schooling on the beach, which is already accessible informally. [redacted] can of course choose to fence his garden, however there are many similar situations around the coast of England where gardens without clearly defined boundaries are situated adjacent to beaches without problem.

39. In NE's opinion, an exclusion of coastal access rights either above the MHWL or across the whole beach would not be the least restrictive method of managing access or indeed meet the grounds for such a direction, which are limited to: land management, public safety, nature conservation, fire prevention, heritage preservation and salt marsh and flats<sup>5</sup>. In response to the proposed modification for signs stating that there is no public access to the beach in this area, NE could not erect such signs as they would be misleading.

#### *Health and safety*

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<sup>5</sup> See paragraph 6.6.12 of the Approved Scheme



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40. During the development of our proposals NE discussed the safety and management of the shingle in relation to the existing access on the beach and future coastal access. Pevensy Coastal Defence Ltd, like other operators, are governed by health and safety at work legislation and indicated to NE that they will continue to carry out informal management to secure compliance with such obligations. NE take the view that these steps are adequate to address concerns over hazards within the coastal margin.

41. Regarding concerns over risk or injury to the public using the trail, arising from launching and winching boats from the beach, this type of activity would not be unexpected and would be unlikely to create a significant hazard to visitors. A principle enshrined within the Approved Scheme is that where intervention is necessary to address potential impacts from the coastal access rights, the least restrictive option on public access that strikes an appropriate balance, should be the preferred option. Section 8.25.15 of the Approved Scheme notes that informal management such as signage or lookouts are likely to be effective to manage this type of low order risk.

42. In relation to risk on the trail and in the coastal margin, occupiers' liability is markedly reduced due to coastal access rights. Occupiers normally owe a duty of care to those coming onto their land, which would apply to existing visitors on the beach (invited or not). However, land subject to coastal access rights benefits from the lowest level of occupiers' liability known under English law – considerably lower than the duty of care owed towards trespassers on private land. Occupiers are not therefore normally liable for any damage or injury caused by any physical feature on the land, whether it is a natural feature of the landscape or a man-made one.

### *Conclusion*

43. Overall, the use of the beach by the landowners will be compatible with the new rights of access and NE maintain that in this instance, informal management of access in the coastal margin would be appropriate to balance private interests and public benefits.

### **Conclusions**

44. The proposed coastal path will not necessarily follow existing public rights of way or walked routes. The requirement of the coastal access duty is to secure a route for the whole of the English coast. As is made clear in the Approved Scheme<sup>6</sup> the 2009 Act "*allows existing coastal access to be secured and improved and new access to be created in coastal places where it does not already exist*" (my emphasis).

45. To protect the interests of private landowners, certain categories of 'excepted land' are identified in Schedule 1 to the CROW Act<sup>7</sup>. Amongst these are land covered by buildings or the curtilage of such land and land used as a park or garden. Although it is not my role to adjudicate on what is or is not excepted land, in my view, the open shingle beach at Pevensy/Normans Bay does not fall within any of the specified categories of excepted land set out in the 2009 Act or the Approved Scheme.

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<sup>6</sup> See paragraph 1.2.1

<sup>7</sup> See also in Figure 1 of the Approved Scheme

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46.As the land on the seaward side of the trail would automatically become 'coastal margin', walkers would have the option to continue along the beach as an alternative to Coast Road. However, given that the proposed trail already includes sections of shingle beach and mindful of advice in the Approved Scheme<sup>8</sup>, I consider the proposed alignment along Coast Road would be the most appropriate route.

47.Whilst I can understand the concerns of the objectors about the inclusion of the beach within the coastal margin and in the case of [redacted] and [redacted] about the alignment of the trail itself across the top of the beach, there is simply no evidence before me to support the argument that the trail would result in significant numbers of additional visitors to the beach. That is not to say there would not be some increase but that increase is likely to be modest.

48.My findings about the likely levels of future use pervades the other concerns raised by the objectors. For example, given I am not persuaded there would be any significant uplift in members of the public using or walking along the beach at Pevensey/Normans Bay, it follows that there would not be a significant effect on issues related to health and safety, anti-social behaviour or privacy and security.

49.Putting that point to one side, I consider that members of the public walking the trail or coastal margin are likely to have ample warning of any hazards along the route or within the coastal margin. Beaches are generally notable for having good forward visibility and therefore visitors would have ample time to change their route to avoid a hazard or temporary obstruction. In the unlikely event that was not possible, users could opt instead to take a short break from walking and take in the splendour of the Sussex coastline until the activity or obstruction had moved on. Based on the foregoing, I consider that any safety risks to users of the trail or coastal margin would not be significant.

50.I have no reason to think that visitors to the area resulting from the establishment of the trail would not be respectful of private property or the privacy of local residents. In my experience users of long-distance walking routes, of the kind proposed here, are ordinary law-abiding citizens who are just as likely to respect private property, as any other group of people. If I am wrong about that, then I am satisfied that the erection of signage by the occupiers would help to address any unforeseen issues.

51.A number of objectors have asserted their right to erect fences to delineate the boundaries of their property. I do not intend to stray into these areas in any depth except to highlight comments made by NE that it is for the Courts to decide on what is or is not 'excepted land'. Given the clear guidance in the Approved Scheme, there is a real possibility that the erection of fences across the beach could be challenged. However, were this to occur, it would be a matter for the relevant authority at that time. It is not a consideration to which I can ascribe any degree of weight to in this report.

## **Recommendation**

52.Taking account of all matters viewed on my site inspection, as well as the representations and comments made relating to these objections, I conclude

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<sup>8</sup> Paragraph 7.12.4

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that the proposals do not fail, in the respects specified in the objection, to strike a fair balance as a result of matters within paragraph 3(3)(a), (b), (c) or (e) of Schedule 1(a) to the 1949 Act. I therefore recommend that the Secretary of State makes a determination to this effect.

*Dominic Young*

**APPOINTED PERSON**