

**REGULATION COMMITTEE**

**Tuesday, 27th January, 2015**

**10.00 am**

**Council Chamber, Sessions House, County Hall,  
Maidstone**





## AGENDA

### REGULATION COMMITTEE

**Tuesday, 27th January, 2015, at 10.00 am**      Ask for:      **Andrew Tait**  
**Council Chamber, Sessions House, County**      Telephone:      **03000 416749**  
**Hall, Maidstone**

*Tea/Coffee will be available 15 minutes before the start of the meeting.*

#### **Membership (17)**

- Conservative (9):      Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman),  
Mr A H T Bowles, Mrs V J Dagger, Mr J A Davies, Mr T Gates,  
Mr J M Ozog, Mr C Simkins and Mr J N Wedgbury
- UKIP (3)      Mr M Baldock, Mr H Birkby and Mr A D Crowther
- Labour (4)      Mr C W Caller, Mr G Cowan, Mr T A Maddison and  
Mrs E D Rowbotham
- Independents (1):      Mr P M Harman

#### **UNRESTRICTED ITEMS**

*(During these items the meeting is likely to be open to the public)*

1. Substitutes
2. Declarations of Interests by Members in items on the Agenda for this meeting.
3. Minutes - 9 September 2015 (Pages 5 - 8)
4. Home to School Transport Appeals Update (Pages 9 - 10)
5. Update from the Commons Registration Team (Pages 11 - 14)
6. Update on Public Footpath ZF5 at Faversham (Pages 15 - 68)
7. Update on Planning Enforcement Issues (Pages 69 - 74)
8. Other Items which the Chairman decides are Urgent
9. Motion to exclude the public

That under Section 100A of the Local Government Act 1972 the public be excluded from the meeting for the following business on the grounds that it involves the likely

disclosure of exempt information as defined in paragraphs 5 and 6 of Part 1 of Schedule 12A of the Act.

### **EXEMPT ITEMS**

*(During these items the meeting is likely NOT to be open to the public)*

10. Update on Planning Enforcement cases (Pages 75 - 86)
11. Planning Enforcement issues at Larkey Wood, Chartham (Pages 87 - 90)
12. Update on Planning Enforcement issues at Thirwell Farm, Drove Lane, Hernhill (Pages 91 - 94)

Peter Sass  
Head of Democratic Services  
03000 416647

**Monday, 19 January 2015**

*Please note that any background documents referred to in the accompanying papers maybe inspected by arrangement with the officer responsible for preparing the relevant report.*

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## KENT COUNTY COUNCIL

### REGULATION COMMITTEE

MINUTES of a meeting of the Regulation Committee held in the Council Chamber, Sessions House, County Hall, Maidstone on Tuesday, 2 September 2014.

PRESENT: Mr M J Harrison (Chairman) Mr S C Manion (Vice-Chairman)  
Mr M Baldock, Mr H Birkby, Mr A H T Bowles, Mrs P Brivio (Substitute for Mr T A Maddison), Mr C W Caller, Mr G Cowan, Mr A D Crowther, Mrs V J Dagger, Mr J A Davies, Mr T Gates, Mr J M Ozog, Mr R J Parry (Substitute for Mr C Simkins), Mrs E D Rowbotham, Mr J N Wedgbury and Mr M E Whybrow (Substitute for Mr P M Harman)

ALSO PRESENT: Mr M A C Balfour, Mr B E Clark and Mr R W Gough

IN ATTENDANCE: Mrs S Thompson (Head of Planning Applications Group), Mr R Gregory (Principal Planning Officer - Enforcement), Ms J Hamid (Enforcement Administration Officer), Mr W Forrester (Head of Gypsy & Traveller Unit), Mr G Rusling (Public Rights of Way & Access Service Manager), Ms M McNeir (Public Rights Of Way and Commons Registration Officer), Mrs L Wilkins (Definitive Map Team Leader), Mrs A Hayward (Manager for Primary Admissions & Transport), Mr A Ballard (Senior Democratic Services Officer) and Mr A Tait (Democratic Services Officer)

### UNRESTRICTED ITEMS

#### 17. Minutes (Item 3)

RESOLVED that the Minutes of the Committee meeting held on 13 May 2014 and of the Member Panel meetings held on 3 June (Westgate), 3 June (Margate) and 29 July 2014 are correctly recorded and that they be signed by the Chairman.

#### 18. Dates of meetings in 2015 (Item 4)

The Committee noted the following dates for its meetings in 2015:-

Tuesday, 27 January 2015;  
Tuesday, 12 May 2015; and  
Tuesday, 1 September 2015.

#### 19. Update from the Definitive Map Team (Item 5)

(1) The Committee discussed a report by the Head of Regulatory Services on the background to the Definitive Map and Statement of Public Rights of Way, as well as progress with Definitive Map Team applications. The report also covered the key proposals of the De-Regulation Bill and the Antisocial Behaviour, Crime and Policing

Act 2014. The latter Act would, upon commencement, replace the County Council's power (exercised by the Committee) to make, vary or revoke gating orders with a new responsibility for District Councils to make a Public Spaces Protection Order.

(2) Correspondence from Mr B Caffarey relating to path ZF5 at Faversham had been circulated to all Members of the Committee before the meeting. The PROW & Access Service Manager reported that following a public inquiry, Orders to extinguish the obstructed section of public footpath ZF5 and create a length of footpath (ZF42), made in consequence of a Regulation Committee Member Panel decision, had not been confirmed. He said that it was a matter of some complexity to bring forward an alternative which would be satisfactory to all parties whilst meeting statutory requirements. Members commented that there would be a need to arrange a meeting so that all parties involved could contribute to identifying the best solution.

(3) RESOLVED that the content of the report be noted.

## **20. Update from the Commons Registration Team** (Item 6)

(1) The Public Rights of Way and Commons Registration Officer reported on progress with Village Green applications including the application by the landowner for a Judicial Review of the decision to register land at King Ethelbert School at Westgate as a Village Green. She also updated the Committee on the recent judgement of the Supreme Court in respect of the *R Barkas V North Yorkshire County Council* case.

(2) RESOLVED that the content of the report be noted.

## **21. Update on Planning Enforcement Issues** (Item 7)

(1) Mr R W Gough was present for this item pursuant to Committee Procedure Rule 2.27 and spoke.

(2) The Committee discussed a report by the Head of Planning Applications Group which gave an update on planning enforcement and monitoring work since the May meeting of the Committee. She also referred to the recently published *Openness of Local Government Bodies Regulations 2014*.

(3) The Head of Planning Applications Group reported that Mr Alan Goodison, the Planning Contraventions Officer had retired. His unique skills set meant that it would be impossible in practice to duplicate the contribution he had been able to make. Careful consideration was therefore being given to the best way to replace him.

(4) The Chairman paid tribute to Mr Goodison's contribution to Planning Enforcement and, on behalf of the Committee, wished him well in his retirement.

(5) The Head of the Gypsy and Traveller Unit was also present in order to explain the complexities of dealing with fly tipping at Gypsy and Traveller sites and to answer Members' questions.

(6) The Committee agreed that the Nt Rix Scaffolding Ltd case should not be removed from the Schedules set out in Appendix 1 to the report.

(7) Some Members of the Committee expressed concern that individual enforcement cases were being discussed as open business. The Committee therefore agreed that the conflicting demands of health and safety and open government in respect of enforcement cases should be considered informally by Members and officers in order to identify the best way forward.

(8) RESOLVED that:-

(a) subject to (2) above, endorsement be given to the actions taken or contemplated in the respective cases set out in paragraphs 5 to 21 of the report and those contained within Schedules 1, 2 and 3 as appended to the report; and

(b) consideration be given to the most appropriate mechanism for reporting enforcement cases to the Committee in the light of (4) above.

## **22. Home to School Transport Appeals Update** *(Item 8)*

(1) The Primary Admissions and Transport Manager and the Senior Democratic Services Officer gave an overview of Home to School Transport statistics for the period between 1 January and 20 August 2014.

(2) The Committee agreed that a training session on Home to School Transport would be held during the Autumn and that all Members would be invited.

(3) The Committee noted the non-attendance of SEN Officers for Home to School Transport appeals for SEN Children and agreed that they needed to be available at all such appeals.

(4) RESOLVED that:-

(a) the report be noted;

(b) a training session on Home to School Transport be held during the Autumn to which all Members of the Council will be invited; and

(c) an SEN officer be available to answer Panel Members' questions for each Home to School Transport appeal for an SEN child.

## **EXEMPT ITEMS**

### **(Open Access to Minutes)**

*(Members resolved under Section 100A of the Local government Act 1972 that the public be excluded from the meeting for the following business on the grounds that it involved the likely disclosure of exempt information as defined in paragraphs 5 and 6 of Part 1 of Schedule 12A of the Act.)*

#### **23. Update on Planning Enforcement issues at Larkey Wood Farm, Chartham** *(Item 11)*

(1) The Principal Planning Officer reported on developments at the Larkey Wood Farm site in Chartham, including progress on restoration as well as legal and logistical developments. He recommended an enforcement strategy which was agreed.

(2) RESOLVED that endorsement be given to the enforcement strategy outlined in paragraphs 5 to 19 of the report.

By: Head of Democratic Services  
To: Regulation Committee – 27 January 2015  
Subject: Home to School Transport Appeals update  
Classification: Unrestricted

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Summary: To provide Members with an overview on Home to School Transport appeal statistics for the period between 1 January 2014 to 31 December 2014 and a brief comparison with transport appeals statistics from 2010 to 2013.

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### **1. Home to School Transport Appeal Statistics 2014**

(1.1) For the period between 1 January 2014 to 31 December 2014 a total of 148 individual appeals were considered by Member Transport Appeal Panels of this Committee 51% were upheld at least in part (e.g time limited assistance). A breakdown of these appeals on a month by month basis is set out in Appendix 1 along with a comparison with appeals held in 2010 to 2013.

(1.2) There are a further 13 appeals that are still waiting to be heard. These have been scheduled for January/February 2015.

### **2. Transport Appeal Statistics – 2013**

(2.1) For the period between 1 January 2013 to 31 December 2013 a total of 109 appeals were considered by Transport Appeal Panels. 30% were upheld at least in part (e.g. time-limited assistance).

(2.2) It is interesting to note that in 2014 67% of the total number appeals were heard between August – 31 December 2014.

<b>3. Recommendation</b> Members are asked to note this report.
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Andy Ballard  
Senior Democratic Services Officer  
Tel No: 03000 415809, e-mail: [andrew.ballard@kent.gov.uk](mailto:andrew.ballard@kent.gov.uk)

**TABLE 1**  
**HOME TO SCHOOL**  
**TRANSPORT APPEALS -1 JANUARY – 31 December 2014**

<b>Month</b>	<b>Upheld</b>	<b>Not Upheld</b>	<b>Total</b>	<b>% Upheld</b>
January	8	2	10	80%
February	3	2	5	60%
March	3	4	7	43%
April	2	4	6	33%
May	6	1	7	86%
June	3	4	7	43%
July	4	3	7	57%
August	7	10	17	41%
September	6	13	19	32%
October	17	15	32	53%
November	10	4	14	71%
December	7	10	17	41%
<b>TOTALS</b>	<b>76</b>	<b>72</b>	<b>148</b>	<b>51%</b>

**TABLE 2**  
**HOME TO SCHOOL TRANSPORT APPEALS - 2010-2013**

<b>Year</b>	<b>Upheld</b>	<b>Not Upheld</b>	<b>Total</b>	<b>% Upheld</b>
2010	38	46	84	45%
2011	23	43	66	35%
2012	26	80	106	24%
2013	33	76	109	30%

## Update from the Commons Registration Team

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A report by the Head of Regulatory Services to Kent County Council's Regulation Committee on Tuesday 27<sup>th</sup> January 2015.

### **Recommendation:**

**I recommend that Members receive this report and note its content.**

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### **Progress with Village Green applications**

1. Members have requested that a summary of the current position of applications to register Town and Village Greens be provided at meetings of the Regulation Committee. A copy of the Schedule of Village Green applications is therefore attached at **Appendix A**.
2. During the last twelve months, there have been four Regulation Committee Member Panel meetings and a total of ten Village Green applications have been considered. Of these, one was referred to Public Inquiry, five were registered as new Village Greens and four applications were rejected or otherwise not progressed.
3. Also over the last twelve months, two Public Inquiries have been held and the County Council is now in receipt of the Inspector's report for these cases; they will be referred to the Member Panel for final decision in the coming months.
4. There are currently 10 applications awaiting determination by the County Council, all of which are currently under investigation. Two new applications have been received since the last Committee meeting and, since the previous backlog has now been eliminated, it has been possible to begin work on these applications immediately.

### **Commons Act 2006 – implementation update**

5. At the last meeting, it was reported that DEFRA were in the process of preparing new regulations to replace the previous regulations published in 2008. The Commons Registration (England) Regulations 2014 came into force on 15<sup>th</sup> December 2014. The new regulations are available online at:  
[http://www.legislation.gov.uk/ukxi/2014/3038/pdfs/ukxi\\_20143038\\_en.pdf](http://www.legislation.gov.uk/ukxi/2014/3038/pdfs/ukxi_20143038_en.pdf)
6. The effect of the new Regulations is to add Cumbria and North Yorkshire to the existing list of seven "pioneer implementation authorities" (which includes Kent). The regulations also allow five types of applications to be made across England, including applications to correct mistakes in the Registers (under section 19(2)(a) of the Commons Act 2006) and applications which allow for the removal of certain types of land that was wrongly registered as Common Land or Village Green (under paragraphs 6 to 9 of Schedule 2 of the 2006 Act).
7. Otherwise, the new regulations are substantially the same and the process for considering and determining applications to register new Village Greens is also largely unchanged. The sole exceptions are that the County Council (not the applicant) will be responsible for notifying landowners that an application has been made and the

County Council will be required to advertise an application by way of notices on site, rather than notices in the local newspaper as was previously the case.

8. Further information on the new regulations is available on the .gov website (where copies of the relevant application forms, now published by DEFRA, may also be obtained) at:

<https://www.gov.uk/common-land-management-protection-and-registering-to-use>

### **Village Green VG277 at Westgate**

9. As Members will recall from the previous meeting, an application for permission to apply for Judicial Review had been made in respect of the County Council's decision (following a Public Inquiry before an independent Inspector appointed by the County Council) to register land forming one of the playing fields at King Ethelbert School at Westgate-on-sea as a new Village Green. The application for permission to apply for Judicial Review was made by King Ethelbert School ("the School"), as landowner, which had opposed the registration of the land as a Village Green from the outset.
10. The application for permission to apply for Judicial Review was made on the basis that the County Council had erred in law in respect of the test to be applied in relation to the 'neighbourhood' issue. The School's position was that the neighbourhood relied upon by the applicant (and accepted by the County Council on the basis of the Inspector's advice) was not a 'qualifying neighbourhood' within the meaning of the Commons Act 2006 because it did not possess the requisite degree of cohesiveness, and that the applicant had failed to demonstrate that there was a sufficient 'spread' of users throughout the qualifying neighbourhood.
11. Legal advice was sought, and on the basis of that advice, the County Council proceeded to defend the decision to register the land and formal Grounds of Defence were lodged with the High Court. Subsequently, on 10<sup>th</sup> September 2014, the County Council received notification that the Court had refused the School's application for permission to apply for Judicial Review of the County Council's decision.
12. However, shortly afterwards, the County Council received notification that the School was seeking to renew its application for permission to apply for Judicial Review. The process, in respect of a renewed application for Judicial Review, normally involves an oral hearing and thus, on 21<sup>st</sup> November 2014, all parties attended the High Court for a short hearing in front of Mr. Justice Gilbert.
13. Having heard oral representations, Mr. Justice Gilbert concluded that there was no case to answer and refused the renewed application for Judicial Review. He found that the Inspector's recommendations (upon which the County Council's decision to register the land had been based) were made on the basis of reasoned conclusions, and that the School had not raised any arguable case that the Inspector had not addressed the issue of neighbourhood cohesion correctly. He also added that he had found the School's arguments in respect of their being a spread of users across the qualifying neighbourhood 'profoundly unrealistic'.
14. No appeal has been made against the decision to refuse permission to apply for Judicial Review. Accordingly, Village Green VG277 remains on the Register and there is no further opportunity to challenge its registration.

## **Recommendation**

15. I RECOMMEND Members receive this report and note its content.

### **Background documents:**

Appendix A – Schedule of Village Green applications

### **Contact Officer:**

Melanie McNeir

Public Rights of Way and Commons Registration Officer

Countryside Access Service

Tel: 03000 413421

Email: [melanie.mcneir@kent.gov.uk](mailto:melanie.mcneir@kent.gov.uk)

**APPENDIX A:**  
**Schedule of Village Green applications**

**Applications resolved by the Regulation Committee (Member Panel)  
since last report (2<sup>nd</sup> September 2014)**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Outcome</b>
None			

**Forthcoming Public Inquiries**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Details</b>
Chaucer Field (at the University of Kent campus)	Canterbury	Mr. G. Gibbens	Starts 23 <sup>rd</sup> February at the Westgate Hall, Canterbury

**Outstanding applications to be resolved**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Status</b>
The Downs	Herne Bay	Mr. N. Bond Mr. B. MacDowall	On hold pending Newhaven Beach judgement
The Glebe Field	Goudhurst	Mr. A. King	On hold pending Newhaven Beach judgement
Land at Coldblow Woods	Ripple	Mr. S. Manion	Awaiting further advice
Whitstable Beach	Whitstable	Mr. M. Harrison Mr. M. Dance	Under investigation
Recreation Ground	Hildenborough	Mrs. V. Dagger	Under investigation
Land at West Wood	Hildenborough	Mrs. V. Dagger	Under investigation
Land known as the Old Putting Green	Ramsgate	Mr. A. Terry Ms. Z. Wiltshire	Under investigation
Land at Washford Farm	Kingsnorth	Mr. J. Wedgbury	Under investigation
Land adj to Shadoxhurst Village Green	Shadoxhurst	Mr. M. Angell	Under investigation

By: Head of Public Protection

To: Regulation Committee – 27 January 2015

Subject: Public Footpath ZF5 Faversham

Classification: Unrestricted

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Summary: A report updating the Regulation Committee about proposals to resolve issues relating to public access at Faversham Creek.

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## **1. Background.**

(1.1) On 21 November 2012 a Panel of the Regulation Committee considered a report from the Head of Regulatory Services, recommending the diversion of a long obstructed public footpath, ZF5, at Faversham Reach. The footpath is obstructed by a wall (formerly the boundary to a shipyard) and by five residential properties within the Faversham Reach Estate, an estate built on the site of the former shipyard in 1987.

(1.2) Unusually, Members were asked to consider two proposals, one recommended by Officers and submitted by the Faversham Town Council, sought the diversion of the footpath to an unobstructed alignment providing some creek-side access within the Faversham Reach Estate. The Faversham Reach Residents Association advanced a different proposal involving the extinguishment of the public footpath where it crossed the estate and the creation of a public footpath outside, and following, the boundary wall to the estate. This path had existed on the ground and been in use since 1938 when the shipyard wall was built. The Officer explained in detail in her report the legal and policy reasons why the diversion proposal was preferred. (**appendix 1**)

(1.3) Members viewed the proposals and heard evidence from all of the parties involved and decided that the Residents Associations proposals should be taken forward. This decision was subject to a complaint to the Local Government Ombudsman, who found no fault with the decision making process.

(1.4) In December 2012, the PROW and Access Service made the extinguishment and creation Orders, reflecting the Member Panel decision. Objections to the Orders were received, as anticipated, and the Orders were therefore submitted to the Secretary of State for decision. The Secretary of State held a Public Inquiry at Faversham from 20 - 23 May 2014 to consider the Orders. The Inspectors decision on behalf of the Secretary of State was received on the 2 July 2014. The Inspector concluded that neither the creation Order nor the extinguishment Order should be confirmed on the basis that:-

- The creation Order route was of longstanding and was in effect an existing public highway.
- The extinguishment Order route would be likely to be well used in the future if the obstructions to the route are discounted. As a matter of policy, even obstructions such as houses are considered to be temporary circumstances. The Inspectors decision is provided as— **appendix 2**).

(1.5) The Secretary of State's decision was not challenged.

(1.6) Public Footpath ZF5 therefore remains obstructed; clearly an unsatisfactory situation for both the residents whose properties are affected and members of the public who wish to use it.

(1.7) The PROW and Access Service Manager has worked with Swale Borough Council to consider options to resolve this long standing and unsatisfactory situation , these included:-

- I. Do nothing; this would fail to meet our statutory duty to assert and protect the highway, perpetuate an unsatisfactory position on the ground, blight homes and leave the County Council open to the risk of a challenge through the courts.
- II. Remove all of the obstructions from the path: there was no suggestion at the Public Inquiry that obstructions, other than sections of the shipyard wall, should be removed given that the obstructions include residential properties. I do not believe that the reinstatement of the definitive alignment of the footpath is a realistic or appropriate option.
- III. Diversion of the obstructed section of the public footpath: The Inspector concluded (**appendix 2** – paragraph 60) that "there appears to be no reason why it would not be feasible to divert the route from beneath the houses"<sup>1</sup>. The County Council has already rejected one proposal for diversion and it is most unlikely that a route can be identified that enjoys universal support. Opposition to any diversion proposal may reasonably be anticipated from some residents of Faversham Reach Estate.

(1.8) Swale Borough Council believes that an existing Town and Country Planning Act 1990 section 106 agreement can be implemented the effect of which is to create a public footpath, through the adjacent Waterside Close, beside Faversham Creek, either by agreement or order. It would therefore seem that the diversion of Public Footpath ZF5 from the village green along the creek-side apron through Faversham Reach to link with the created footpath at Waterside Close (A-H) would provide the access sought. Such provision is supported by the Neighbourhood Plan which is currently a submission version. The proposed alignment is shown on the plan (Proposals for Public Footpath ZF5 Faversham Reach and Waterside Close) **appendix 3**.

(1.9) The proposal would provide a clearly legible route, of high amenity that as far as possible minimises the impact on Faversham Reach residents. The proposal does require 2 x ramps at points B & L and a further structure, possibly a cantilevered walkway at point H-I to provide access around the slipway. Survey and design work undertaken by East Kent Engineering Partnership, on behalf of Swale Borough Council, has indicated that the construction of the structures is feasible and have estimated a cost of 42500 for this work. Commitments to meeting the cost of constructing the ramps and walkway, should an order prove successful, are being sought from the interested parties.

(1.10) The ramp at point B-C would be constructed on a registered village green. It is a nuisance, under section 29 of the Commons Act 1876, to erect any structure on a village green other than for the better enjoyment of the green. The construction of any ramp providing greater access to and from the green should be interpreted as adding to the better enjoyment of the green. Further in light of DEFRA's<sup>1</sup> guidance on the subject it is hard to see how the construction of a ramp would cause material harm to the green or interfere with the public recreational enjoyment. It is therefore considered that de-registration of a small area of the village green would not be required to enable the construction of the ramp. There is however a risk that this view could be challenged.

(1.11) While the surface of the public footpath would be maintainable public highway the PROW Access Service has no desire to accept any responsibility for the creek-side retaining wall. The retaining wall has been inspected by a civil engineer and it is not considered that there are any issues with its condition, construction or design. Means of ensuring that the responsibility for the retaining walls remains with the management companies for Faversham Reach and Waterside Close will be investigated further.

(1.12) Should it not prove possible for Swale Borough Council to create a length of footpath through Waterside Close the only practical alternative would be to divert the route along the creek-side and then deviate to the front of numbers 1-3 Faversham Reach before passing through the gates to Faversham Reach Estate and linking with the existing highway at Front Brents. This would provide less creek-side access and impact to a greater extent on the privacy of those and adjacent properties.

## **2. Recommendation**

I recommend that the proposal that Public Footpath ZF5 is diverted to run along the creek-side apron at Faversham Reach (A-H), to link with the footpath to be created by Swale Borough Council H –M is consulted on and that the responses received be reported back to the Regulation Committee.

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<sup>1</sup> DEFRA Management and Protection of Village Greens January 2010.

Contact Officer: Graham Rusling, Public Rights of Way and Access Manager.  
[graham.rusling@kent.gov.uk](mailto:graham.rusling@kent.gov.uk) 01622 69 6995

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## **Application to divert part of Public Footpath ZF5, Faversham**

### **Application to extinguish part of Public Footpath ZF5, and create by Order a new Public Footpath at Faversham.**

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A report by the Corporate Director of Customer and communities to the Kent County Council Regulation Committee on 21 November 2012.

#### **Recommendation:**

##### **I recommend**

- (i) the County Council make an Order under Section 119 of the Highways Act 1980 to divert part of public footpath ZF5 at Faversham, on the grounds it is expedient to divert the path in the interests of the public and, if necessary, submit the Orders to the Secretary of State for resolution;
- (ii) the County Council declines to make an Order under Section 118 of the Highways Act 1980 to extinguish part of public footpath ZF5 at Faversham; and
- (iii) the County Council declines to make an Order under Section 26 of the Highways Act 1980 to create a public footpath at Faversham.

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Local Member:

Mr Tom Gates

Unrestricted

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#### **History of Public Footpath ZF5 Faversham**

1. The National Parks and Access to the Countryside Act 1949 introduced procedures for recording of public's rights on definitive maps, so called because they can be produced in courts as conclusive evidence of those rights. The 1949 Act also provided for a periodic review of the definitive map and statement. The object of this review was to enable authorities to produce a revised Definitive Map by adding any rights of way omitted from the previous map and by showing any changes (creations, diversion, extinguishment). The first part of the process was to produce a Draft Review Map. This was published by the Kent County Council with a relevant date of 01 October 1970.

2. Public footpath ZF5 was added at the 1970 Draft Review stage, which was part of the periodical review required under the 1949 Act. No documentation has been located to explain who requested its inclusion on the map. No objections were received to its inclusion. The Wildlife and Countryside Act 1981 introduced the legal duty to keep the definitive map and

statement under 'continuous review', and as a consequence the periodical reviews were abandoned.

3. When the 1970 Draft Review was partly abandoned, because there had been no objection to its inclusion, public footpath ZF5 was shown on the Definitive Map and Statement prepared by the County Council with a relevant date of 01 April 1987.

4. Public footpath ZF5 also in part forms part of the Saxon Shore Way – a long distance Kent County Council promoted path. The Saxon Shore Way currently uses a route to the rear of Faversham Reach, rather than continuing along ZF5. At the time of providing a long distance coastal path around the coastline of this County in the late 1970s it was envisaged in general the route would follow existing paths beside our main watercourses. In Faversham the Saxon Shore Way had been intended to follow the line of public footpath ZF5. However, from a site visit it was noted that the path in question was obstructed and it was decided at the time in liaison with Swale Borough Council that an alternative path be used in its stead.

### **Introduction**

5. The County Council is under a duty to protect and assert the rights of the public to the use and enjoyment of the highways for which it is highway authority and to prevent as far as possible the stopping-up or obstruction of those highways. The County Council, therefore has a duty to resolve the obstruction of public footpath ZF5 at Faversham Reach. The residents of Faversham Reach and Faversham Town Council are now fully aware of this issue and the need for resolution.

6. The County Council has received two applications to divert part of public footpath ZF5 at Faversham Reach. The first from Faversham Town Council (as shown in **Appendix A**) which has been made in the interests of the public. The diversion of public footpath ZF5 will allow this path to be opened and available for the public and form part of a continuous creekside path as required by the Faversham Creekside Area Action Plan.

7. The second application has been submitted by the Faversham Reach Residents Association to extinguish part of public footpath ZF5 (as shown in **Appendix B**) on the grounds it is no longer needed for public use, because as an alternative route – to the rear of Faversham Reach – has been used by the public for a significant number of years. A creation they submit, by Order will formalise this arrangement.

### **Existing and Proposed Routes**

8. Public footpath ZF5 is approximately 1450 metres long, of this approximately 445 metres runs alongside Faversham Creek, providing direct views of the Creek – with approximately 90 metres running within the Faversham Reach Estate. A further 820 metres runs through agricultural land with the remainder passing through areas of housing and light industrial units.

9. The Faversham Town Council proposal shows the existing route of public footpath ZF5 by a solid black line between points A-B-C and the proposed diversion is shown by black dashes between points A-D-E-F-G-H-J-K-L-M-C on **Appendix A** to this report.

10. The Faversham Reach Residents Association proposal shows the route of public footpath ZF5 to be extinguished by a solid black line between points A-C-B and the proposed new public footpath to be created by Order is shown by black dashes between points A-D-B on **Appendix B** to this report.

### **Procedure**

11. The County Council may make an Order under Section 119 of the Highways Act 1980 to divert a Public Right of Way if it is satisfied that it is expedient to do so in the interest of the public and the route is not substantially less convenient to the public, having regard to the effect of the diversion on the public enjoyment of the route as a whole.

12. The County Council may make an Order under section 118 of the Highways Act 1980 to extinguish a Public Right of Way if it is satisfied that the path or way is not needed for public use.

13. The County Council may make an Order under Section 26 of the Highways Act 1980 where it appears to a local authority that there is a need for a Footpath and the County Council is satisfied that having had regard to a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and also b) the effect which the creation of the path or way would have on the rights of persons interested in the land, with account being taken of provisions to payment of compensation as required, that a path or way should be created.

### **Consultations**

14. Consultations have been carried out as required. No objections have been received to either proposal from the Statutory Undertakers. No response was received from The Open Spaces Society.

15. Objections to the proposal submitted by Faversham Town Council have been received from Faversham Reach Residents Association, 14 residents of Faversham Reach and 5 members of the public. Letters of support for the proposal have been received from Swale Borough Council, Swale Footpath Group, The Ramblers', The Faversham Society and a member of the public.

16. Objections to the proposal submitted by the Faversham Reach Residents Association have been received from The Ramblers', Swale Borough Council, Faversham Creek Consortium, The Faversham Society, Faversham United Municipal Charities, Faversham Town Council, Faversham and Swale east Branch Labour Party and 2 members of the public. Letters of support

have been received from Faversham Reach Residents Association, Waterside Residents Association and 9 residents of Faversham Reach.

17. Residents of Faversham Reach have requested that copies of letters of objection and support be attached to this Officers Report. Therefore responses to the Faversham Town Council proposal are attached at **Appendix C**, and responses to the Faversham Reach Residents Association are attached at **Appendix D**.

### **View of Members**

18. Mr Tom Gates and District Councillor Mr Mike Henderson have been consulted. No formal response has been received from either party.

### **The Case - proposed diversion of public footpath ZF5 (Appendix A)**

19. In dealing with the application to divert a Public Right of Way, consideration must be given to the following criteria of Section 119 of the Highways Act 1980:-

- a) Whether it is expedient in the interests of the owner of the land that the right of way in question should be diverted;*
- b) Whether the point of termination of the path will be substantially as convenient to the public given that it is proposed to be diverted to another point on the same or a connecting highway;*
- c) Whether the right of way will not be substantially less convenient to the public;*
- d) The effect that the diversion would have on public enjoyment of the path as a whole;*
- e) The effect on other land served by the existing right of way;*
- f) The effect of any new public right of way created by the order would have on land over which the right is so created and any land held with it.*

I will now take these points and offer my conclusions on them individually:-

- a) Whether it is expedient in the interests of the public that the footpath in question should be diverted;*

20. It is considered expedient to divert the path in the interests of the public. Public footpath ZF5 is currently obstructed by a number of residential dwellings, landscaping and a large concrete wall. This severely restricts the public in exercising their rights. The Faversham Creek Neighbourhood Plan, which following extensive public consultation, workshops and information displays has highlighted a continuous creekside path as one of its main goals. Those using public footpath ZF5 – as it passes through Faversham Reach – are forced to make a detour away from the Creek in order to avoid the obstructions. Diverting the public footpath will remove the path from 5 residential dwellings thereby opening up the route to the public and going some way to providing the continuous creekside path they desire, also complying with the Kent County council's duty to assert and protect.

21. The majority of the objectors state the diversion of public footpath ZF5 is not in the interest of the public for a number of reasons. Firstly that the availability of an alternative route – which forms part of the Saxon Shore Way – running alongside the rear boundary of Faversham Reach provides a better option for the public and the public would therefore be better served if public footpath ZF5 were to be diverted onto this route.

22. This is not considered to be the case and is contrary to the findings of the stakeholder consultation which was held as part of the preparation of the Faversham Creek Neighbourhood Plan, which calls for the “creation of a continuous walking route around the whole creek, extending to connect Upper Brents with the sea wall”.

23. Many of those objecting to the proposal by the Faversham Reach Residents Association have confirmed that they have indeed used the path to the rear of Faversham Reach, however this is not necessarily through choice. The rights of the public have been impaired by the obstruction of public footpath ZF5 for a considerable number of years.

24. It is important to remember that the public already have a right to pass and re-pass on foot using public footpath ZF5 as it passes through Faversham Reach and so the diversion of the public footpath will not create any new rights. These rights already exist. The lack of access between Crab Island and Faversham Reach has meant the public do not necessarily exercise their entitlement to deviate from the line of the public footpath in order to circumnavigate the obstructions and as such do not walk through Faversham Reach. Misleading notices – stating “No public right of way” - at the entrance to Faversham Reach have exacerbated this situation.

25. A number of the objectors have stated that the proposed diversion is not in the public interest because the proposal will only provide an additional 50 metres of creek side walking. Once again this is not considered to be the case. As previously outlined above public footpath ZF5 is currently obstructed in several places by a concrete wall, 5 residential dwellings and areas of landscaping. Therefore diverting public footpath ZF5 will not only open up this route for public use, but will also fulfil the objectives of the Faversham Creek Neighbourhood Plan of a continuous creek side route for the public.

26. This is borne out by the Swale Borough Council who state in their letter of support for this proposal that at every stage of the consultation for the Faversham Creek Neighbourhood Plan both residents and stakeholders expressed a desire to have a continuous circular path that allows residents to walk around the entire head and basin of Faversham Creek, by the waters edge.

**b) Whether the point of termination of the path will be substantially as convenient to the public given that it is proposed to be diverted to another point on the same or a connecting highway;**

27. The common points of termination (Points A and C) will not be altered and are therefore considered as convenient.

28. It should be noted that the test is '**substantially as convenient**'. This can be seen as meaning 'as good as' or as close to as makes no difference, with convenience meaning 'ease of use'. The proposed route of ZF5 is considered to be 'as good as' the current definitive line. In fact it could be argued that the proposed new route is a vast improvement, as it will make this route available to the public, which is not the case at present.

**c) Whether the right of way will not be substantially less convenient to the public;**

29. The existing route measures approximately 198 metres (A-B-C) and the proposed measures approximately 230 metres (A-D-E-F-G-H-J-K-L-M-C). The overall increase in length is therefore 32 metres. Public footpath ZF5 – were it to be open and available for public use – is likely to be used primarily as a recreational route, providing the continuous creek side route required by the Faversham Creek Neighbourhood Plan. The additional 32 metres is therefore seen as a relatively small increase being *de minimus* when actually walking the route, adding less than 1 minutes walking time.

30. The majority of the objectors state that the proposed diversion is substantially less convenient to the public because using the new route will involve traversing a ramp.

31. This is not considered to be the case. The current definitive line of ZF5 is obstructed in several places, however the only point at which the public are unable to exercise their entitlement to deviate from the line of the public footpath in order to circumnavigate an obstruction is at the point where the footpath connects with Crab Island. At this point there is a large concrete wall coupled with a drop in ground level of approximately 1 metre. The required ramp will have a gradient of 1 in 12, therefore providing a gentle slope up to the point at where the proposed route enters Faversham Reach and will open up the path to all potential users including people with disabilities and parents with young children in buggies. The 1 in 12 gradient complies with the County Council's obligations under the Equality Act 2010, DEFRA's good practice guidance for local authorities on compliance with the Equality Act 2010 and BT Countryside for All, Standards and Guidelines. A copy of the proposed ramp design is attached at Appendix E.

32. In addition one of the objectors has stated that the proposed route affects the resident's rights to operate the main gates to the estate and which would pose a serious problem for unaccompanied wheel chair users and exposes them to considerable road safety issues immediately outside the gates to Faversham Reach.

33. DEFRA's good practice guidance for local authorities on compliance with the Equality Act 2010 states "A Highway Authority has a duty, under the Highways Act 1980, to assert and protect the right of the public to use and enjoy a highway. The equality Act 2010 – formally Disability Discrimination Act 1995 (DDA) – adds a further dimension, by requiring broadly – that in carrying out their functions, public authorities must make reasonable adjustments to ensure it is not impossible or unreasonably difficult for people with disabilities to benefit from those functions as others would do, or to show that there are good reasons for not doing so."

34. It is worth taking into consideration the reason for the line of the proposed route leading up to and through the entrance of Faversham Reach. The definitive line currently passes through the centre of a number of parking spaces – making them unusable, without further obstructing the line of the footpath – across an area of planted shrubs and through the wall adjacent to the vehicular entrance to Faversham Reach. The proposed new route has been aligned to avoid these obstructions and remove the necessity of creating another gap in the boundary wall of Faversham Reach. Any gate on a proposed right of way should be two-way and easily operated by all users. The gate in question is rather imposing and designed to deter the public from entering Faversham Reach. The objection in this case is a valid one and as such the County Council will require the removal of the pedestrian gate should the application ultimately prove successful.

35. Although the kerb is not particularly high it is accepted that this could cause problems for those with limited mobility it is therefore proposed that it should be replaced by a drop kerb conforming to the obligation under the Equality Act 2010, DEFRA's good practice guidance for local authorities on compliance with the Equality Act 2010 and BT Countryside for All, Standards and Guidelines.

36. The concerns raised, in relation to the potential for the public to come into contact with large vehicles is a valid one. The current definitive line is currently obstructed at this point by a large concrete wall. Between Points M-C on the original proposed route there is a narrow walkway, however this does narrow considerably towards its end and then stops at the old boat yard entrance. The proposed route reconnects with the unaffected section of ZF5 on the outside of this entrance. As an alternative to this option a gap could be created in the obstructing concrete wall, with the proposed diversion reconnecting with ZF5 at this point, thus removing any safety concerns.

37. It should be noted that the "substantially as convenient" test and the "not substantially less convenient" test above differ materially, in that the former test requires the new point of termination to be at most only marginally less convenient, whereas the latter allows a greater degree of inconvenience, albeit not a substantial one, with convenience meaning 'ease of use'.

***d) The effect that the diversion would have on public enjoyment of the path as a whole;***

38. Public enjoyment of the path as a whole will not be affected, in fact it could be easily argued that the mere fact that the diversion will open up the route to the public will therefore make the proposed route more enjoyable. The current route of public footpath ZF5 runs through Faversham Reach providing – on that section which remains unobstructed – superb views of Faversham Creek, these views will continue to be available on the proposed route

39. The majority of the objectors have stated the proposed diversion has a negative impact on public enjoyment for a number of reasons. Firstly that the public would prefer to walk along the route running to the rear of Faversham Reach – along which the promoted Saxon Shore Way long distance route runs and that the proposal will only increase the public's view of the creek by approximately 50 metres.

40. This is not considered to be the case and is contrary to the findings of the stakeholder consultation which was held as part of the preparation of the Faversham Creek Neighbourhood Plan, which calls for the "creation of a continuous walking route around the whole creek, extending to connect Upper Brents with the sea wall". This shows a clear desire by the public for a continuous creekside walk.

41. It should be noted that any comparison must be made between the line of public footpath ZF5 recorded on the Definitive Map and the line on which it is proposed to divert public footpath ZF5. The fact that there is an alternative route being used by the public is not relevant in terms of applying the tests as laid down in the Highways Act 1980.

42. As previously stated the public already have a right to pass and re-pass on foot using public footpath ZF5 as it passes through Faversham Reach and so the diversion of the public footpath will not create any new rights through Faversham Reach. What the diversion will do is open up this path and re-establish the public's rights to pass and re-pass in this area.

43. Many of the objectors have stated that the proposed diversion will place users of the route into direct conflict with vehicles within Faversham Reach as there are no specified walkways. Users of public rights of way are expected to do so with due care and attention, as are those in charge of motor vehicles when entering an area of shared use with pedestrians - as is the case with many of the rights of way in Kent. It is important to remember when considering the implications of the proposed diversion on the public's contact with vehicles that the public already have the right to pass and re-pass on foot within Faversham Reach. There are no new rights being created by this proposal.

44. Many of the objectors have raised concerns for the safety of the public and in particular children who are brought into close proximity with the Marina

and deep water. At this point (Point G-H) the proposed diversion only deviates slightly from the definitive line. This is in fact one of the only sections of ZF5 as it passes through Faversham Reach that remains unobstructed. There is therefore no additional risk to users of the proposed route compared with the definitive route. Public footpath ZF5 as a whole has over 440 metres of creek side path.

***e) The effect on other land served by the existing public right of way;***

45. The effect of the diversions will have no impact on other land served by the existing right of way.

***f) The effect of any new public right of way created by the order would have on land over which the right is so created and any land held with it;***

46. No additional new rights would be created by the Order, those rights are merely being diverted – public footpath ZF5 already passes through Faversham Reach. There will therefore be no effect on land over which the right is so created.

***Other objections***

47. In addition to the objections detailed above some of the objectors have also commented on the fact that Crab Island – on which the ramp will be constructed – is a registered Village Green and as such the construction of the ramp would be unlawful. This is not considered to be the case, legislation allows for any works to be undertaken as long as they provide for the better enjoyment of the green. The erection of the ramp will ultimately provide the public with direct access from public footpath ZF5 onto the Village Green – and vice versa – as part of the desired continuous creek side route.

48. Many of the objectors have stated that the overall cost to the public of this proposal should prohibit it from being considered as an option. The overall cost is not a matter for the County Council to take into consideration when determining this application. All costs – including those associated with bringing the new route into a condition suitable for public use – will be borne by the applicant.

49. Some of the objectors are concerned that the proposal will add a public footpath through a private and quiet residential estate, which is likely to increase instances of noise, security and vandalism. Many are particularly concerned with the security of boats moored in the marina – which they say was not constructed with the anticipation of public access. As previously detailed above there are no new public rights being created through Faversham Reach, the rights already exist – and did so prior to the construction of the residential properties and the associated marina - albeit that those rights are obstructed and the public deterred from exercising them by the unwelcoming gates and notices stating “Private. No public right of way”.

50. One of the objectors has provided photographs of some recent vandalism where a hedge adjacent to another section of public footpath ZF5 has been set fire. Although the County Council understands and sympathises with the concerns of the residents of Faversham Reach it is important to remember that the County Council has a duty to assert and protect the public rights, including those rights through Faversham Reach. The nature of the obstructions to public footpath ZF5 mean that to make the public's rights available on the definitive line would be practically impossible.

51. Finally several of the objectors have raised concerns about how the proposed diversion will impact on the value of their properties. As understandable as this is to the property owners, this cannot be taken into consideration when considering this proposal. As previously stated public rights already exist through Faversham Reach, in fact, 5 of the residential properties have been built directly on the line of the public footpath and as such these properties could be considered to be blighted.

**The Case – proposed extinguishment of public footpath ZF5 (part)**

52. In dealing with an application to extinguish a Public Right of Way, consideration must be given to the following criteria of section 118 of the Highways Act 1980:

- (a) Whether it is expedient to extinguish the path on the ground that it is not needed for public use;***
- (b) The extent to which it appears that the path would, apart from the Order, be likely to be used by the public;***
- (c) The effect which the extinguishment would have as respects land served by the path or way.***

I shall now take these points and conclusions upon them individually:

- (a) Whether it is expedient to extinguish the path on the grounds that it is not needed for public use;***

53. The applicants have submitted that part of public footpath ZF5 is not needed for public use because there is an alternative route running to the rear of Faversham Reach – along which the Saxon Shore Way is aligned – and that this – alternative - path has been used by the public for a significant number of years.

54. The objectors, however, have made it clear that this section of public footpath ZF5 is most definitely needed by the public. Many of the objectors have stated that the only reason for using the alternative route – to the rear of Faversham Reach – is because the definitive route has been obstructed by a number of residential dwellings and concrete walls and they have therefore been “pushed away from the creek side alongside a high concrete wall, creating an extensive loop around industrial works to regain the creek side path.”

55. The majority of the objectors, including Swale Borough Council, have stated that during the consultations, workshops and information events held as part of the preparation of the Faversham Creek Neighbourhood Plan the one initiative most strongly supported by both stakeholders and Faversham residents was the desire for a continuous circular path that allows residents and visitors alike to walk around the entire head and basin of the Creek by the waters edge.

56. It is therefore very clear that this section of public footpath ZF5 is not only needed by the public but there is also great public demand for it to be made available for them to use.

***(b) The extent to which it appears that the path would, apart from the Order, be likely to be used by the public;***

57. Public footpath ZF5 is currently obstructed – as it passes through Faversham Reach – by five residential dwellings, a concrete wall, a brick wall and areas of landscaping. This coupled with the lack of access between Crab Island and Faversham Reach has meant the public do not necessarily exercise their entitlement to deviate from the line of the public footpath in order to circumnavigate the obstructions and as such do not walk through Faversham Reach. Misleading notices – stating “No public right of way” - at the entrance to Faversham Reach have exacerbated this situation.

58. An alternative route does exist and has been used by the public for a significant number of years, as a means of circumnavigating Faversham Reach and the obstructions on ZF5.

59. The majority of the objectors have stated that although they do use the alternative route – to the rear of Faversham Reach – this is only because they have been “forced” to do by the obstruction of ZF5. They further add that the alternative route is behind an ugly concrete wall, and for 25% of its length is behind industrial building, residential garages and the concrete wall. All have expressed the desire to use ZF5 were it to be open and available to the public.

60. It should be noted that despite the alternative route not being recorded on the Definitive Map and Statement as a public footpath, there is no doubt that public rights exist over this route. This has been almost unanimously acknowledged by all parties.

***(c) The effect which the extinguishment would have as respects land served by the path or way;***

61. The extinguishment of public footpath ZF5 would not have a negative impact upon land served by the right of way.

### **The Case – proposed creation by Order of public footpath**

62. In dealing with an application to Create by Order a Public Right of Way, consideration must be given to the following criteria of section 26 of the Highways Act 1980:

*(a) The extent to which the path would add to the convenience or enjoyment of a substantial section of the public or convenience of persons residing in the area;*

*(b) The effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation.*

I will now take these points and my conclusions upon them individually: -

*(a) The extent to which the path would add to the convenience or enjoyment of a substantial section of the public or convenience of persons residing in the area;*

63. The proposed new route is currently used by the public, and has been for a considerable number of years, this has been acknowledged by all parties. It is therefore considered that the new route will undoubtedly enhance the convenience and enjoyment of the public and persons residing in the area, but it's not an addition to what they already have, albeit unformalised.

*(b) The effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation;*

64. The landowners – Faversham Reach Residents Association – has stated it would defray any claims for compensation.

### **Recommendations**

65. Despite there being a number of objections to the proposal I recommend the County Council makes an Order under Section 119 of the Highways Act 1980 to divert; part of Public Footpath ZF5 at Faversham, on the grounds it is expedient to divert the path in the interests of the public and, if necessary, submit the Orders to the Secretary of State for resolution.

66. I recommend the County Council declines to make an Order under Section 118 of the Highways Act 1980 to extinguish part of Public Footpath ZF5 at Faversham and declines to make an Order under Section 26 of the Highways Act 1980 to create a Public Footpath at Faversham.

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**Appendix A - Map showing the route and proposed diversion of public footpath ZF5**

**Appendix B - Map showing the route proposed extinguishment of public footpath ZF5 and the proposed creation by Order of a new public footpath.**

**Appendix C – Responses to the proposal submitted by Faversham Town Council**

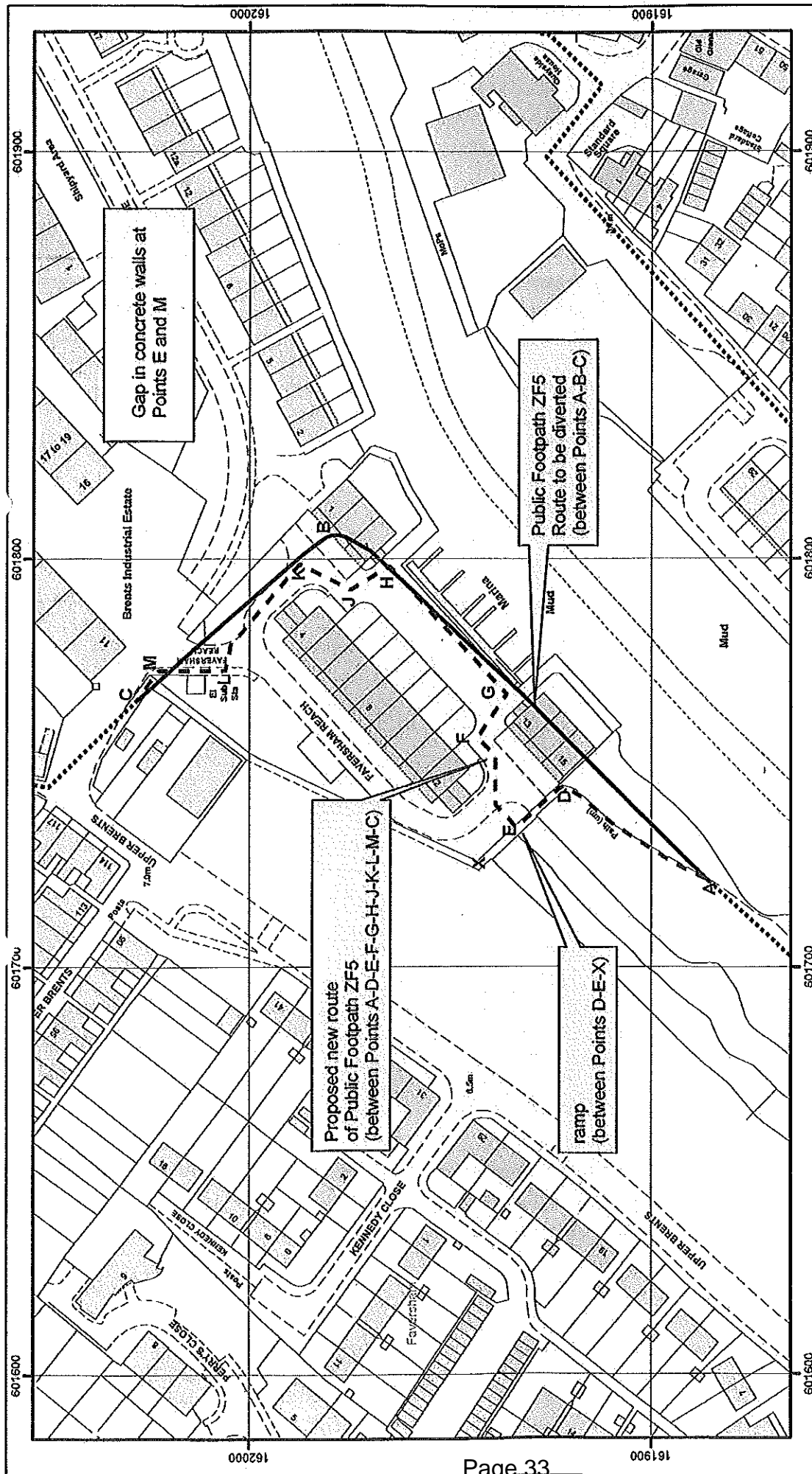
**Appendix D – Responses to the proposal submitted by Faversham Reach Residents Association.**

**Appendix E – Proposed ramp design.**

**Contacts:      Sonia Coventry      01622 221512**

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<p><b>Key</b></p> <ul style="list-style-type: none"> <li>Route to be diverted</li> <li>New length of route</li> <li>Unaffected Routes</li> </ul>	<p><b>Highways Act 1980, Section 119</b></p> <p><b>Proposed diversion of Public Footpath ZF5 (part) Faversham</b></p>	<p><b>APPENDIX A</b></p> <p>0 Kilometres 0.0425 0.085</p> <p>0 Miles 0.03 0.06</p> <p>Produced by the KCC Countryside Access Service © Crown Copyright and database right 2012. Ordnance Survey 100019238</p> <p>Created by: SC Checked by: SC Reference: PROW/ZF5/1340</p>
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## KENT COUNTY COUNCIL

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### REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Guildhall, Market Place, Faversham ME13 7AG on Wednesday, 21 November 2012.

PRESENT: Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr M J Angell, Mr S J G Koowaree and Mr R A Pascoe

ALSO PRESENT: Mr T Gates

IN ATTENDANCE: Mr C Wade (Countryside Access Principal Case Officer), Ms S Coventry (Public Rights Of Way Officer ( Definition )) and Mr A Tait (Democratic Services Officer)

### UNRESTRICTED ITEMS

#### **17. Public Footpath ZF5, Faversham** (Item 3)

(1) The Panel Members visited the site of the application prior to the meeting. They walked the two proposed routes under discussion. The visit was also attended by representatives from Faversham TC and some 20 local residents.

(2) Two additional papers had been made available to the Panel and interested parties prior to the meeting. These were Appendix B to the report, which showed the route proposed by the Faversham Residents Association as well as a letter dated 18 July 2012 from the Faversham Residents Association objecting to the Faversham Town Council proposal.

(3) The Chairman opened the meeting by explaining that the Panel's only remit was to consider the two routes under discussion. No other issues would be considered as the Panel wished to ensure that it made its decisions unencumbered by issues that were irrelevant to the matter in hand.

(4) The PROW Officer introduced the report and its recommendations. Two applications had been received in respect of Public footpath ZF5 at Faversham. The first of these (set out at Appendix A to the report) had been made by Faversham TC to divert the existing route along a similar route to that which currently existed but with detours to avoid the properties which it ran through.

(5) The second application (set out at Appendix B) had been made by the Faversham Reach residents Association. It was in effect a diversion which took the path along the front of Faversham Reach, avoiding the Marina along Faversham Creek. For legal reasons, it needed to be treated as an Order

under Section 118 of the Highways Act 1980 to extinguish part of Public Footpath ZF5 and a complementary Order under the same Act to create a new public footpath.

(6) The PROW Officer then set out the case for the proposed diversion. She did so by considering the six criteria set out in the Highways Act 1980. The first of these was whether it was expedient to divert the path in the interests of the public. In her view, it was expedient because the footpath was currently obstructed by a number of residential dwellings, landscaping and a concrete wall. People using the path through Faversham Reach were forced to make a detour away from the creek. She reminded the Panel that the public already had the right to use the footpath through Faversham Reach and that the diversion would not create any new rights. The lack of access between Crab Island and Faversham Reach meant that the public did not necessarily exercise its right to deviate from the line of the public footpath in order to avoid the houses, and therefore did not walk through Faversham Reach. Diverting the footpath would therefore would not only open up the route by avoiding the obstructions that currently discouraged people from following its route; it would also provide a continuous creek side route for the public (a goal of the Faversham Creek Neighbourhood Plan).

(7) The PROW Officer said that the Town Council application also met the second criterion because the point of termination of the path would not be altered and would therefore be just as convenient to the public.

(8) The PROW Officer then considered the third criterion (whether the right of way would not be substantially less convenient to the public). She said that there would be a minimal increase in the length of the route from 198 to 230 metres. The majority of objectors had objected that it would be less convenient because it would involve using a ramp. She did not consider this to be the case because the large concrete wall between Crab Island and Faversham Reach was the only point at which the public was unable to exercise its entitlement to circumnavigate an obstruction. The ramp would have a gradient of 1 in 12, providing a gentle slope which would open up the path to all potential users including people with disabilities and parents with young children in buggies, in full compliance with the Equality Act 2010, and the BT Countryside for All Standards and Guidelines.

(9) The PROW Officer added that the kerb would be replaced by a drop kerb to assist those with limited mobility. It was also proposed to create a gap in the obstructing wall to remove safety concerns over the public coming into contact with large vehicles, and to remove the large, imposing pedestrian gate at Point L of the map at Appendix A.

(10) The fourth criterion was the effect of the proposed diversion on public enjoyment of the path as a whole. The PROW Officer said that public enjoyment would not be affected because the path would enable the creation of a continuous walking route along the whole creek and open up the path along Faversham Reach without creating any new health and safety concerns. She asked the Panel to bear in mind that the objections raise on

health and safety and convenience grounds related to parts of the route which were already in existence.

(11) The PROW Officer said that the final two criteria were met because there would be no impact on other land served by the existing right of way and because no new rights would be created by the Order.

(12) The PROW Officer went on to say that some of the objectors had noted that the ramp was to be constructed in Crab Island which was a registered Village Green, and had questioned the legality of doing so. She responded to this concern by saying that legislation allowed works to be undertaken if they provided for the better enjoyment of the Village Green. The erection of the ramp would ultimately provide the public with direct access from public footpath ZF5 onto the Village Green as part of the desired continuous creek side route.

(13) Another objection raised was that the overall cost to the public of The proposal should prohibit it from being considered as an option. The PROW Officer said that this was not a matter for the County Council to take into consideration when determining this application. All costs – including those associated with bringing the new route into a suitable condition would be borne by the applicant.

(14) The PROW Officer then said that she noted concerns that the proposal would add a public footpath through a private and quiet residential estate, increasing the number of instances of noise, reduced security and vandalism. Many were particularly concerned with the security of boats moored in the marina. However, the rights were already in existence, so it could not be claimed that the proposed diversion would cause any of these problems.

(15) The PROW Officer then referred to photographs of some recent vandalism where a hedge adjacent to another section of the public footpath had been set on fire. She said that it was important to remember that the County Council had a duty to assert and protect the public rights, including those rights through Faversham Reach. The nature of the obstructions to public footpath ZF5 currently meant that to make the public's rights available on the definitive line was practically impossible.

(16) Several objectors had raised concerns that the proposed diversion would impact on the value of their properties. The PROW Officer said that this could not be taken into consideration. Public rights already existed through Faversham Reach. She added that the five residential properties which had been built directly on the line of the public footpath could be considered to be blighted at this time.

(17) The PROW Officer next considered the case for the proposed extinguishment put forward by Faversham Reach Residents Association. This involved consideration of three criteria. The first of these was whether it was expedient to extinguish the path on the ground that it was not needed for public use. The applicants had submitted that part of public footpath ZF5 was

not needed for public use because there was an alternative route running to the rear of Faversham Reach (along which the Saxon Shore Way was aligned) and that this, alternative, path has been used by the public for a significant number of years.

(18) The PROW Officer responded to this view by saying that objectors to the application had stated that the only reason for using the alternative route to the rear of Faversham Reach was that the definitive route had been obstructed by the residential dwellings and concrete walls. She quoted an objector as saying that they had therefore been "pushed away from the creek side alongside a high concrete wall, creating an extensive loop around industrial works to regain the creek side path."

(19) The PROW Officer then said that the majority of the objectors, including Swale BC, had stated that during all the consultation events held for the preparation of the Faversham Creek Neighbourhood Plan the most strongly supported initiative had been for a continuous circular path that allowed residents and visitors alike to walk around the entire head and basin of the Creek by the waters edge. She said it was therefore clear that this section of the footpath was not only needed by the public but that there was also a great demand for it to be made available.

(20) The second criterion was the extent to which it appeared that the path would be likely to be used by the public. The PROW Officer said that due to the current obstructions and the lack of access between Crab Island and Faversham Reach, the public did not necessarily exercise its entitlement to deviate from the line of the public footpath and walk through Faversham Reach. An alternative route had been used by the public for a significant number of years, as a means of circumnavigating Faversham Reach and the obstructions on the public footpath. The majority of the objectors had stated that although they did use the alternative route to the rear of Faversham Reach, this was only because they had felt forced to do by the current obstructions. They had pointed out that the alternative route was behind a concrete wall, and that for a quarter of its length, it was behind an industrial building, residential garages and the concrete wall. All of the objectors had expressed the desire to use the path were it to be open and available to the public.

(21) The PROW Officer asked the panel to note that there was no doubt that public rights existed over the alternative route even though it was not recorded on the Definitive Map and Statement as a public footpath. This had been acknowledged by nearly all parties.

(22) The PROW Officer confirmed in respect of the third criterion that the extinguishment of public footpath ZF5 would not have a negative impact upon land served by the right of way.

(23) The PROW Officer moved on to consideration of the Case for the proposed creation by Order of the public footpath. There were two criteria which had to be met. The first was the extent to which the path would add to

the convenience or enjoyment of a substantial section of the public or convenience of persons residing in the area. She said that the proposed new route was currently used by the public, and had been for a considerable number of years. She therefore considered that the new route would undoubtedly enhance the convenience and enjoyment of the public and persons residing in the area. However, it did not represent addition to what was already informally available.

(24) As Faversham Reach Residents Association (the landowners) had stated it would defray any claims for compensation there would be no negative effect on the right of persons interested in the land when taking into account provisions for compensation.

(25) The PROW Officer summed up her presentation by setting out the recommendations contained in paragraphs 65 and 66 of the report.

(26) Mr David Simmons (Mayor of Faversham) spoke in favour of the Town Council application. He said it had long been the ambition of the Town Council to see a creek side walkway and that he considered that the route set out in Appendix A seemed to be the most acceptable route as it took Footpath ZF5 away from the five houses and required little work at either end. The creek side walk would also remain in place for a large portion of the route. The only affected parts of the footpath to be diverted would therefore be the sections which currently ran through the five houses.

(27) Mr Simmons went on to say that the Town Council's application was part of the Faversham Creek Streetscape Strategy which aimed to create a creek side footpath along the length of the creek. This Strategy had now been formerly endorsed by the Swale Joint Transportation Board. He therefore commended Appendix A to the Panel.

(28) Mr Andrew Osbourne addressed the Panel; in support of the Town Council application. He said that he was born 350 metres from the footpath and could remember the sheets being torn down so that the gate could be installed in order to maintain it. He had been a Member of Faversham BC in 1970 when the decision was taken to add the footpath to the definitive map. He considered that it was essential to ensure that the crossing point between Crab Island and Faversham reach needed to be at the same level. This would be achieved by the installation of the ramp and Faversham Municipal Charities had sufficient funds to develop the proposal. He added that the current footpath was the only access to 35 properties along Waterside Close.

(29) Mr Mike Maloney (a resident of Faversham reach) spoke in favour of the Faversham reach Residents Association proposal. He said that Faversham Reach was sited on what had been a private shipyard built in 1916, and had continued to operate until 1970. He went on to say that the shipyard had never been accessible to the public because of the very nature of its business. He explained that he was a filmmaker and that in 2008 he had produced a film about the shipyard entitled "A Sideways Launch" in conjunction with the community in Faversham. It had taken him two years to

research and complete the filming and editing. The documentary evidence he had obtained through filmed interviews, together with the substantial collection of still photographs made available to him were conclusive evidence that the shipyard had been very tightly controlled by the Pollock family, and that nobody had gained entrance to it without their full permission. No right of way existed on this busy and dangerous industrial site, through a period which had included two world wars, and it was inconceivable that the general public would have been allowed access to such a heavily-industrialised and secure area.

(30) Mr Maloney went on to say that the land had continued to be inaccessible to the public after the shipyard closed in 1970 and that it had continued to remain so until now.

(31) Mr Maloney then said that planning permission had been given in the 1980s to build residential properties on the area now known as Faversham Reach. The documentation provided to the developers by Swale Borough Council had contained no reference to any existing footpath on this location. Nor had Footpath ZF5 emerged in over 35 conveyancing processes when properties in Faversham Reach had changed ownership. ( )

(32) Mr Maloney went on to compare the two applications. He said it would be difficult to define a footpath within Faversham Reach as the area had been specifically designed as an access road for residents only. The environment of the proposed path would be less attractive to walkers as it went through a residential development and traffic areas. In contrast, the existing unpaved and natural footpath that followed the Creek and the public open space maintained the desired line towards the Saxon Shore Way and was perfectly in keeping with its country aspect.

(33) Turning to health and safety concerns, Mr Maloney said that all corners of the circular road within Faversham Reach were tight and unsighted and that a proposed footpath would therefore represent an increased hazard for both residents and the public. The proposed footpath was longer and more tortuous than the current existing route and potentially more dangerous. The entrance into Faversham Reach was a busy access road which was used constantly by the residents as well as by delivery and public utility vehicles. The danger presented by the siting of this footpath represented an unnecessary risk to pedestrians, including unsupervised children and wheel chair users who were more used to traffic free areas. He believed that the applicant had not given sufficient thought to the safety issues that were particularly relevant to the disabled. The current Saxon Shore Way path removed a significant aspect of this proposed dangerous route. ( )

(34) Mr Maloney then said that at this time the residents were able to easily monitor movements of both people and traffic as there was only one entrance/exit. The proposed footpath would increase the opportunities for vandalism and theft to properties and affect the security of the boats moored in the adjacent marina.

(35) Mr Maloney said that the number of Anti Social Behaviour offences had been increasing every year in Faversham Reach. Kent Police had provided the Residents Association with figures from 2004 which had now been made available to the Panel. He asked the Panel to note that in the period from January 2011 until August 2012, 44 separate offences had been committed. Many of these offences had involved criminal damage and theft.

(36) Mr Maloney said that the Residents Association had needed to have fences erected at both ends of the quay at Faversham Reach in response to Anti Social Behaviour committed by young people. This fencing had been erected in 2005 at a cost of almost £7,000.

(37) Mr Malooney then gave some recent of Anti Social behaviour. As recently as October 2012, a substantial stretch of hedge adjacent to the properties had been set alight. The ensuing fire had endangered the nearby houses. In 2009, some fifty paving stones had been torn up adjacent to the moorings and thrown into the Creek. Fortunately no vessels had been damaged. That same month had also seen an attempt to release two of the boats from their moorings. The theft of a winch handle and electrical torches from another boat had also very recently been reported.

(38) The floating pontoons on the moorings present a real hazard at high tides to children and others not accustomed and not authorised to use them. Therefore a permanent security fence would need to be erected between the 'deep water' marina and the proposed path together with appropriate safety warnings and lighting. This would minimise any claims made by the Town Council regarding the enhancement of public enjoyment resulting from their application. Agreement would certainly need to be reached with the landowner about public liability insurance.

(39) Mr Maloney added that there would be a compensation claim if the Town Council's application were to be successful. The Residents Association had been led to believe that the value of the properties would fall by as much as 15%. It was estimated that any claim for Faversham Reach would be in the region of £900,000.

(40) Mr Maloney then turned to the original planning and development stages of Faversham Reach. He said that Faversham TC had met on 14 September 1987 (17 years after the 1970 definitive map had mysteriously appeared) to debate (and approve) the proposed development of the West Yard of the shipyard, now known as Faversham Reach. The minutes of that meeting stated "*This is an inauguration scheme if carried out in all detail as presented could be an amenity of value to the area*". The only rider mentioned by the Town Council had been concern over the flooding risks. No footpath or right of way had been mentioned or debated. He believed that an existing PROW must have been known about and would have been or should have been discussed, as this was a pioneering development for Faversham at the time. Yet neither the Town Council nor Swale Borough Council had raised the issue of Footpath ZF5.

(41) Mr Maloney then referred to recent correspondence from Mr Chris Wade (Principal Case Officer for Public Rights of Way for KCC) stating that Footpath ZF5 was not shown on the 1952 map and that the first time it had appeared had been in draft in 1970. Mr Wade had also confirmed that no documentation could be found at KCC to substantiate the reason for the appearance of this path on a map. He had gone on to say that at that time Swale Borough Council had been responsible for all Highway matters. Mr Wade had also confirmed that KCC had indicated in 2008 that it would be seeking a diversion of Footpath ZF5 away from the Creekside and on to the Saxon Shore Way.

(42) Mr Maloney concluded his remarks by saying that the application by the Town Council, the mystery surrounding missing files and some dubious lines on a map plus the discovery of the Faversham TC minutes of 1987 struck him as the basis for an Agatha Christie novel.

(43) Mr Mike Cosgrove (Chair of the Faversham Creek Consortium) said that the need for a joined-up route footpath route had been discussed at the Consortium's Annual General Meetings for a number of years. The proposal by Faversham TC would reinstate the creek side line with no detrimental effects for the local residents.

(44) Ms Natalie Earle (Planning Officer from Swale BC) said that the Borough Council supported the proposed new route as part of the overall Faversham Creek Neighbourhood Plan.

(45) Mr Tom Ben-Joseph (Chairman of the Faversham Reach Residents Association) said that he had moved into the area 20 years earlier. He had often walked along the river. He said that it was remarkable that no one had heard of Footpath ZF5 before 2004, particularly as Kent County Council had a duty to protect and maintain public rights of way.

(46) Mr Ben-Joseph went on to say that Faversham TC's suggestion of a ramp between Crab Island and Faversham Reach was both dangerous and potentially difficult for elderly people to ascend. It would also attract further trouble. He did not consider that the Town Council's proposed route would give people a beneficial river experience. Its only effects would be to waste public money and spoil the existing walkway along Saxon Shore Way.

(47) The PROW Officer said in response to Mr Ben-Joseph that the slope of the ramp would be 1 in 12. This would comply with DEFRA guidance and with the provisions of the Equalities Act 2010.

(48) Ms Anne Salmon (Chair of the Faversham Society Planning Committee) spoke in favour of the Faversham TC application. She said that the report showed that the only difference in the current route and that proposed by the Town Council was that the latter route avoided running under the houses on the creek frontage of Faversham Reach, which had been built over the official line. Faversham Society supported the Town Council's

intention to create a footpath which would enable access to the creekside for the greatest distance possible.

(49) Ms Salmon then said that the Faversham had some minor questions about the proposal. She asked why the ramp had a return slope towards the Upper Brents when there was no need for access to the north side of the former shipyard wall. She said it would also be preferable for the access from Faversham reach into the former shipyard to be closer to the entrance to Waterside Close, reducing the potential conflict with vehicles at the point of exit.

(50) Ms Salmon continued by saying that the footpath proposed by the Faversham Reach Residents Association had already been identified by the consultant, Richard Guise as being of poor quality with regard to its environment and its legibility as a route around the creek. It was not maintained in a good condition and took the walker away from the creek frontage. It was an unofficial line which had only been used because the official line had been obstructed.

(51) Ms Salmon went on to say that the revised line proposed by the Town Council, when added to the footpath along the creek side of Waterside, would complete a footpath along the full length of the Brents bank of the creek from Brent Road to the sea wall. The Faversham Society understood that works to connect the Waterside Close footpath to the sea wall via a ramp were likely to be the subject of a planning application in the near future. A footpath along the full length of the creek on one side would be a tremendous asset to the town and would represent a substantial achievement ahead of the completion of the Faversham Creek Neighbourhood Plan.

(52) The Chairman confirmed that the Waterside Close footpath was not part of the Panel's considerations in respect of the applications that it was being asked to determine.

(53) Mr Mike Palmer spoke on behalf of the Residents Association application. He said that he believed those who supported the Town Council's proposal had a hidden agenda of wanting to link the route to Waterside Close. He also considered that the proposed ramp was completely dangerous. He asked for the proposed construction details.

(54) The PROW Officer said that if the Faversham TC proposals were agreed, the details of the ramp would be considered by Jacobs (the County Council's consultants) for assessment and approval.

(55) Mr Andrew Culham (the local Town Councillor) said that he fully supported the local residents, who had paid for their houses in good faith. He affirmed that there was a problem of vandalism on the boats and jetties. He asked the Panel to treat the local people's concerns very seriously.

(56) Mr Mike Henderson (Local Swale Borough Councillor) said that he had lived in Faversham for 33 years. He had chaired the Committee in the 1990s

that had steered the production of the Swale Borough Local Plan. Consideration had been given at that stage to having a footpath on both sides of the creek.

(57) Mr Henderson asked the Panel to note that there had not been a problem in respect of the existing informal footpath arrangement. The main concern that people had was to be able to reach Point C on the two Appendix maps in order to get to the Marshes. There were in fact a number of areas where there were problems in getting the paths close to the creek. He therefore suggested that as there was no difference between the two proposed routes for the average walker, the decisive factor should be the convenience of the residents (for whom the outcome made a great deal of difference). He said he believed the route proposed by the Town Council would cost a lot of money and achieve very little, and that things should be left as they were.

(58) Mr William Alberry spoke as the applicant for the Faversham residents Association application and as the landowners' representative. He noted that the Residents Association original objection to the Town Council's proposal had now been circulated to all parties but said he was still concerned that the Residents Association proposal was being considered under sections 118 and 26 of the Highways Act 1980 instead of section 119, as the latter section had wider criteria. He said that, although Saxon Shore Way did not enjoy public right of way status, it would be better to divert the public footpath along what had become the alternative route.

(59) The PROW Officer confirmed that although the "alternative route" was not recorded on the Definitive Map, there was no doubt that it enjoyed acquired public rights. She explained that although the Definitive Map was conclusive in respect of the rights that it did show, it was not conclusive in respect of those it did not.

(60) Mr Alberry went on to say that one of the tests set out in section 119 of the Highways Act was whether it was expedient in the interests of the owner of the land that the right of way should be diverted. He said that only the Residents Association proposal would have satisfied that criterion

(61) Mr Alberry then raised the question of the proposed ramp. He referred to section 29 of the Commons Act 1876 and said that its interpretation was any attempt to construct a ramp on the village green would be in breach of the Law.

(62) The Countryside Access Principal Case Officer said that the Law allowed the construction of something on the land that would improve the use and enjoyment of the Village Green. In his view, facilitating access to and from the village green would not breach Victorian statutes.

(63) Mr Alberry then referred to the *Ashbrook v. East Sussex CC* case and said that once the ramp had been constructed there would be legal ramifications if the reinforced concrete wall were to be damaged.

(64) Mr Alberry said that it had been established that any diversion of a public footpath had to be convenient, practical, suitable and appropriate. He noted in this context that part of the Town Council's proposed diversion would take the path over an area which had been specified as a car parking space on the planning permission for Faversham Reach. This condition did not permit any other development and would need to be amended. This, in turn, would lead to vehicles being parked on an already congested part of the public highway.

(65) The PROW Officer clarified that the fact that there was an alternative route being used by the public was not relevant in terms of applying the tests as laid down in the Highways Act 1980. The only comparison that could be made in terms of the proposed diversion was that between the line on the Definitive Map and that along which it was proposed to divert the footpath.

(66) Mr Gates (Local Member) informed the Panel that he was also a Member of Faversham TC. He said that he believed that the Town Council's proposed diversion should go ahead enabling the establishment of a continuous route. He referred to the history of the Pollard Shipyard by saying that before 1970, an apprentice would open the gate in order to allow people to walk there. This was a facility that had been lost to the people of Faversham, and they deserved to have it restored. He concluded by saying that the residents were not responsible for building the houses over the line of the public path.

(67) In discussion, Mr Pascoe said that as Faversham Reach had been constructed in 1989, no one could have used Footpath ZF5 for 23 years. Common sense therefore suggested that the route set out in Appendix B was appropriate.

(68) Mr M J Angell moved, seconded by Mr S J G Koowaree that the recommendation set out in paragraphs 65 and 66 of the report be agreed.

*Lost by 3 votes to 2*

(69) Mr R A Pascoe moved, seconded by Mr A D Crowther that an Order be made under Section 118 of the Highways Act 1980 to extinguish part of Public Footpath ZF5 at Faversham; that an Order be made under Section 26 of the Highways Act 1980 to create a Public Footpath at Faversham (as set out in Appendix B to the report) and that the County Council decline to make the Order recommended in paragraph 65 of the report.

*Carried unanimously*

(70) RESOLVED to:-

- (a) make an Order under Section 118 of the Highways Act 1980 to extinguish part of Public Footpath ZF5 at Faversham and make an Order under Section 26 of the Highways Act 1980 to create a Public Footpath at Faversham (as set out in Appendix B to the report); and

- (b) decline to make an Order under Section 119 of the Highways Act 1980 to divert part of Public Footpath ZF5 at Faversham.



# The Planning Inspectorate

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Mr N Westaway  
c/o Public Rights of Way and  
Access  
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Your Ref:

Our Ref: FPS/W2275/6/4 & 3/12

Date:

01 JUL 2014

Dear Sir

HIGHWAYS ACT 1980 SECTION 26

Kent County Council

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53

(Public Footpath ZF42, Faversham)

Public Path Creation and Definitive Map and Statement Modification Order 2012

&

(Public Footpath ZF5 (Part) Faversham) Public Path Extinguishment Order and Definitive Map and Statement Modification Order 2012

I enclose for your information a copy of the Inspector's decision on these Orders following the Inquiry on Tuesday 20 May 2014.

Also enclosed are two leaflets entitled *Our Complaints Procedure* and *Challenging the Decision in the High Court*.

If you have any queries about the enclosed decision, please contact the Quality Assurance Unit at the following address:

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<http://www.planningportal.gov.uk/planning/appeals/planninginspectorate/feedback/>

An electronic version of the decision will shortly appear on the Inspectorate's website.



Yours faithfully

*Clive Richards*  
(Rights of Way Section)

Despatch 1

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## Order Decisions

Inquiry opened on 20 May 2014

Site visits made on 19 and 22 May 2014

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

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

Decision date: 01 JUL 2014

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### Order Ref: FPS/W2275/6/4 – the Creation Order

- This Order is made under Section 26 of the Highways Act 1980 (the 1980 Act) and is known as the Kent County Council (Public Footpath ZF42, Faversham) Public Path Creation and Definitive Map and Statement Modification Order 2012.
- The Order is dated 21 December 2012 and proposes to create a public right of way as shown on the Order plan and described in the Order Schedule.
- There were 31 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed**

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### Order Ref: FPS/W2275/3/12 – the Extinguishment Order

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as the Kent County Council (Public Footpath ZF5 (Part) (Faversham) Public Path Extinguishment and Definitive Map and Statement Modification Order 2012.
- The Order is dated 21 December 2012 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There were 31 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed**

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### Preliminary and Procedural Matters

1. I carried out an unaccompanied site inspection prior to the opening of the inquiry. At the request of the parties I carried out a further site inspection during the inquiry accompanied by representatives from all main parties.
2. Faversham Town Council, the Faversham Society, the Faversham Creek Consortium, the Faversham Municipal Charities and Bensted's Charity (the Joint Objectors) made a number of legal submissions. These include that the Creation Order is incapable of confirmation as the route the subject of the Order is already a public right of way.
3. The Joint Objectors also state that the effect of the Orders is to extinguish one right of way and create another length between the same points. Accordingly it is submitted that the proposal amounts to a diversion and section 119 of the 1980 Act should have been used, rather than sections 26 and 118 of that Act.
4. I shall deal with these submissions before considering whether the tests in sections 26 and 118 of the 1980 Act are met. First, however, I shall set out the background to the making of these Orders.

## **Background to the Orders**

5. Public Footpath ZF5 was added to the Definitive Map as part of a review in accordance with the National Parks and Access to the Countryside Act 1949 which enabled authorities to produce a revised Definitive Map by adding any rights of way omitted from the previous map and showing any changes. It was added at the 1970 Draft Review Stage and no objections were received to its inclusion. That review was partly abandoned due to the introduction of the duty to keep the definitive map under continuous review. However, effect was given to changes on the revised draft map to which there had been no objection. Public footpath ZF5 is shown on the consolidated Definitive Map and Statement with a relevant date of 1 April 1987.
6. Public Footpath ZF5 is about 1450m long and runs from Crab Island, along Faversham Creek (the Creek), through a housing estate known as Faversham Reach, within which it turns away from the Creek, passes close to a light industrial area and then heads across agricultural land. Behind the industrial area it meets Footpath ZF1 which follows the boundary of that area until it meets Footpath ZF32 which heads back towards, and then follows, the Creek. The section of the path within Faversham Reach (approximately 198 metres) is partly obstructed, in particular by a concrete wall and five houses (Nos 2, 3, 13, 14 and 15).
7. Kent County Council (KCC) received a number of applications. The first was from Faversham Town Council who applied for an order to divert that part of ZF5 located within Faversham Reach to an alternative route also within Faversham Reach but avoiding the houses (the Proposed Diversion Route). Applications were subsequently submitted by the Faversham Reach Residents Association (FRRA) to extinguish the part of ZF5 through Faversham Reach (the Extinguishment Order Route) and to create a route to the rear of Faversham Reach (the Creation Order Route).
8. A report by the Corporate Director of Customer and Communities to the Kent County Council Regulation Committee on 21 November 2012 (the KCC Report) considered all of the applications and recommended that an order be made under s119 of the 1980 Act to divert the obstructed part of ZF5 in accordance with the Faversham Town Council application. However KCC's Members Panel resolved not to make such an order and to make an extinguishment order under S118 and a creation order under s26 as applied for by the FRRA. It is those orders which are now before me.

## **Legal Submissions**

9. KCC accepts that the Creation Order Route appears to have been in use by the public since as early as 1937 and that it has been promoted as the route of the Saxon Shore Way, a long distance coastal path, since around 1980. In December 2013 an application to modify the Definitive Map and Statement by adding the Creation Order Route was submitted by Faversham Town Council and KCC states that there is little doubt that the requested order would be made. Nevertheless KCC submitted in evidence that there would be a residual benefit in confirming the Creation Order. In particular in its opinion it would remove any uncertainty about the status of the route and would ensure that the route would be recorded as a highway maintainable at public expense. The latter would mean that the public would benefit from the Council's

management and maintenance of the way, as well as removing any uncertainty over potential liability resulting from its use.

10. The land over which the route passes is owned by the FRRA. At the inquiry, Mr Albery, representing the FRRA, confirmed that residents had done nothing to prevent use of the route, had given consent for works to be carried out to it and would be happy to dedicate the route. KCC accepted that any residual uncertainty as to status or ongoing maintenance was therefore diminished.
11. Nevertheless KCC submit that the Order may be confirmed if the tests in s26 of the 1980 Act are met; namely that there is a need and it is expedient to confirm the Order. Reference is made to Order decision Ref: B6855/W/2011/515568 in which the Inspector stated "where there remains doubt over the status of the claimed way, I accept there **may** be circumstances where it is expedient...to utilise the provisions in Section 26 of the 1980 Act whether that in truth creates something new or merely formalises a pre-existing arrangement". However, the Inspector also stated that "the process of creating a right of way is nonsensical if the proposed right already exists. The essential question is whether there is sufficient proof that it does".
12. In that case, no application had been made for a definitive map modification order in relation to any of the approximately 5 miles of routes to be created and the Inspector found that "clarification of the public's pedestrian rights over the Order routes will be a significant benefit". She also added that if some routes already carried public footpath rights, formal recognition would add to the enjoyment of the wider public as the routes would appear on published maps and their availability would be better publicised. That is far from the case here where the Creation Order route is signposted as part of a long distance walking route and there seems little doubt that a modification order will soon be made and confirmed.
13. In *R v The Lake District Special Planning Board ex parte Bernstein 1982* (Bernstein), it was held that a new route cannot be created by means of a diversion order if that new route is already a public right of way. KCC accepts that the reasoning in that case applies equally to creation orders. Although it is pointed out that Bernstein related to an alternative route that was already a formal public right of way, it would seem illogical to conclude that it did not apply in this case where there is no reason to doubt that the right of way exists and will be added to the definitive map and statement. This therefore means that a new route cannot be created in the circumstances of this case. The residual benefits which KCC suggests exist do not alter this position and I therefore conclude that the Creation Order should not be confirmed.
14. The Joint Objectors also submit that it was misleading to give the elected members of the Panel the impression that the Creation Order would create something new in exchange for the extinguishment of part of footpath ZF5. However, the basis on which KCC's Members Panel made its decision is unclear from the minutes of the meeting and I have no way of knowing the extent to which the decision to make the Extinguishment Order may have been dependant upon the making of the Creation Order. In any event, the Extinguishment Order has been made and I will determine whether or not to confirm it by considering the tests contained in S118 of the 1980 Act.
15. Given my decision not to confirm the Creation Order it is not necessary to consider further the submissions with regard to the circumstances in which it

may be appropriate to make concurrent creation and extinguishment orders rather than a diversion order under S119 of the 1980 Act.

## **The Extinguishment Order (EO)**

### **The Main Issues**

16. The Order is made under S118 of the 1980 Act. The requirements of this section are that, before confirming the Order, I must be satisfied that it is expedient to stop up the right of way having regard to
- (a) the extent, if any, to which it appears that it would, apart from the Order, be likely to be used by the public; and
  - (b) the effect which extinguishment would have as respects land served by the path.

When considering these requirements I must disregard any temporary circumstances preventing or diminishing the use of the right of way. The 1980 Act also requires me to have regard to any material provisions in the rights of way improvement plan for the area.

17. The use of the word "expedient" means that I may take into account considerations other than those specifically set out in the 1980 Act and I note the judgement in *Ashbrook v ESCC* where Grigson J interpreted the word "expedient" as meaning "suitable and appropriate" in accordance with the dictionary definition. In *R v Secretary of State for the Environment, ex parte Stewart (Stewart)*, Phillips J stated that expedient must mean that "to some extent at all events, other considerations can be brought into play besides user. The judgment as to whether or not it is expedient to stop up a path is bound to be of broad character".
18. The Order was made because it appeared to KCC that the EO Route was "not needed for public use". However, although that was a matter of foremost importance for KCC when it decided to make the Order, and falls within the broad character of expedience, in considering whether to confirm the Order it is the likely use of the path in the future that I am required to consider.

### **Reasons**

#### ***The extent to which it appears that the route would, apart from the Order, be likely to be used by the public***

19. KCC submits that historically there has been very limited, if any, use of the EO Route and that there will be no use of the route by the public in the future due to the obstructions, which in its view cannot be disregarded as temporary. It also submits that even without those obstructions use would be limited due to the existence of an alternative route, namely the Creation Order Route, and that even if the EO Route was diverted within Faversham Reach, there would be little use of that route.

#### ***Evidence of Use of the EO Route prior to the construction of Faversham Reach***

20. It appears that historically there was a towpath running the length of the Creek from Crab Island. In 1916 Pollock's Shipyard opened and the definitive map shows footpaths ZF1 and ZF5 leaving the Creek side and running alongside the concrete wall which formed the boundary of the shipyard. In 1938 Pollock's

shipyard was extended in to the area crossed by footpath ZF5. Although the concrete boundary wall was also extended, the Joint Objectors state that access to footpath ZF5 was still possible due to the presence of a gate at the end of the concrete wall adjacent to a corrugated iron fence. Mr Osborne and others state that the gate was requested by the Faversham Navigation Commissioners and local bargeman so that the towpath was not obstructed. A photograph has been produced which shows the gate and I accept that it appears to be either on or close to the definitive line of footpath ZF5.

21. Mr White gave evidence that when he was a boy he and his friends would ask Mr Meadows, the resident caretaker at the shipyard, to open the gate. Sometimes they would drag a piece of wood along the corrugated iron to attract his attention. Mr White states that the caretaker would reluctantly open the gate and instruct them to stick to the path, which ran along the Creek side and then through the shipyard to the main gate. Mr Gardner also gave evidence that he was occasionally able to get through the gate "by luck".
22. In a statement of truth submitted in writing to the inquiry, George Juniper who worked at the shipyard from 1950 to 1956 and from 1958 until it closed in 1970, states that he recalls being occasionally ordered by the foreman fitter to unlock the gates to allow a walker to "assert his rights" to walk along the tow path through the yard and that the walker climbed over the slipways that crossed the path. His evidence is supported by a similar statement from Dorothy Smith, who lived in the caretaker's house at the shipyard from 1964 until 1987 and whose late husband was employed at the shipyard until it closed in 1970. However a later letter from her contradicts her statement and states that the gates were always kept locked and that there was no public access to this area before Faversham Reach was built. I have also been provided with letters from a number of former employees of Pollock's shipyard which state that the gates were kept locked and that members of the public were not allowed access.
23. Mr Maloney, who has researched and produced a film about the shipyard, provided extensive photographic evidence of the heavy industrial activities carried on at Pollock's shipyard. It appears that the southern part of the landholding crossed by ZF5 was used less intensively than other parts, and in particular one of the photographs shows an area of land between the Creek and the lighters under construction where it may have been possible to walk. Nevertheless given the industrial activity it is difficult to see how the definitive line of ZF5 could have been used by the public with any regularity. Mr Osborne acknowledges that access was prohibited during the Second World War and that after that the path fell into disuse apart from "some walkers anxious that the right of way should not be lost". On the evidence before me it seems likely that any public use of the definitive line of this part of ZF5 was very limited during the time the land was used as a shipyard.
24. Mr Cosgrove gave evidence that after the shipyard closed, the area was cleared and he used to walk the route of ZF5. He produced a photograph which, although undated, shows that the area was grassed. It appears from the photograph that it would have been possible to walk the route during at least some of the period following closure and before the construction of Faversham Reach. Mr White states that after the shipyard closed the area was neglected and it was possible to walk through whenever he wished.

25. I note however, that when the Saxon Shore Way was promoted in around 1979 it was routed along the Creation Order Route away from the Creek. I agree with KCC that if there had been regular use of the EO Route at this time it is unlikely that it would have been excluded from the Saxon Shore Way. Indeed the KCC report states that from a site visit at the time it was noted that ZF5 was obstructed and Mr Osborne described the EO Route as "not easily walkable" at that time.
26. Furthermore I also agree with KCC that it is likely that more would have been done during the planning process for Faversham Reach if there had been more than occasional use of the EO Route during this period. In fact there is no mention of ZF5 in any of the planning documentation. I acknowledge that Mr Osborne and Mr Cosgrove state that they were satisfied from the plans submitted with the application that provision for a Creek side footpath would be made and that it was not therefore an issue which would have been apparent from the minutes of meetings. However, although the plans could be interpreted as showing a footpath along the Creek, and indeed there is space between the Creek and the houses as constructed, none of the plans before me clearly shows a public footpath connecting with the wider network. Furthermore, it is clear from the plans that the definitive line would be obstructed by the development and no action was taken to divert the EO route.

*Evidence of use of the EO Route post the construction of Faversham Reach*

27. The definitive line of ZF5 has been obstructed by houses since Faversham Reach was constructed. Nevertheless there does appear to have been some limited use of parts of the route, particularly before 2003. Mr White described using logs or a milk crate to access the concrete ledge at the edge of the estate adjacent to No 15 with his children or grandchildren and Mr Cosgrove also referred to obtaining access by using a pile of logs or timber. From my site visit it was apparent that obtaining access to the ledge in that manner would not be particularly difficult and although the ledge is not on the definitive line, it would have been possible to join the EO Route along the marina from this point.
28. However, using the ledge to access the area between the houses and the Creek would have become impossible after 2003 when railings were erected. Although prior to this date there appears to have been a wooden board in the location of the railings, it does not seem to have prevented access. In particular I note that it was not recalled by Mr White and is described by FRRA in the planning application for the railings as "ineffective". The application refers to the railings being required in order to prevent unauthorised access and reference is made to vandalism and access by children. There is however nothing to suggest that people were accessing Faversham Reach to try to walk the EO Route. It seems to me that although there may have been access to parts of the EO Route prior to 2003, use of it as a through route will have been limited. Any access subsequent to that date will have been through the main Faversham Reach entrance and, even with deviations, it will not have been possible to use ZF5 as a through route.

*Evidence of likely future use*

29. I agree with KCC that it appears that there has been little public use of the EO Route since 1938. However, although I accept that evidence relating to historic usage may be relevant in considering likely future use, it is not necessarily

conclusive. This is particularly the case where, as in this situation, the route has been subject to a variety of obstructions over the years, and although on the definitive map, use of the route has clearly not been encouraged.

Furthermore, although it can be argued that the path is not needed due to their being an adequate alternative available (the Creation Order Route), the path may still be used in the future simply because people prefer it. Indeed the Joint Objectors submit that if the EO were made available it would be used to a significant extent, in preference to the Creation Order Route.

30. The question therefore arises as to whether the EO route could be made available for future use. In considering likely future use I am to disregard temporary circumstances preventing or diminishing use of the path. In this case KCC submit that the obstructions, in particular, the houses, are not temporary and cannot be disregarded and therefore that future use of the EO route will be nil.

### *Temporary Circumstances*

31. In *Stewart*, Phillips J stated that "the expression "temporary circumstances" entitles one to have regard to a wide variety of considerations, but obviously the prime question is, in the case of an obstruction, whether it is likely to endure. Now, it may by its nature, be temporary, or it may by its nature, seem to be permanent, but if it appears, in the case of what seems to be a permanent obstruction, that it is likely to be removed, I now see no reason why it could not be regarded as temporary".
32. He went on to consider the difficulties of "allowing obstructions... to count to any substantial extent as reasons for making a stopping up order. Were it not so, it would mean the easiest way to get a footpath stopped up would be to unlawfully obstruct it, and that cannot be the policy of the section. Therefore it seems to me that only rarely can it be right to make an order stopping up a highway on the ground that as a result of an unlawful obstruction, or as a result of doubt as to the line of the highway, it is difficult to use it".
33. He found that a tree and an electricity sub station which were obstructing a path were a "temporary circumstance". With regard to the sub-station he stated that "it seems to me impossible for there to be any justification for it remaining where it is".
34. It seems to me that although the concrete wall has been in place for many years, there can be no justification for it continuing to obstruct a public right of way and it should therefore be considered as a temporary circumstance. The 5 houses have been described as "lawful" but this appears to be a reference to the fact that they have been granted planning permission. Such permission does not give authority to obstruct a public right of way and it is possible that legal action could be taken and may be successful in securing their removal.
35. I note that no-one has suggested that the taking of such legal action would be an appropriate course of action. Indeed a number of objectors state that removing the houses would be disproportionate and there is a clear willingness on the part of all the objectors to see alterations to the alignment of the EO Route so that it can co-exist with the houses. The Joint Objectors define the arguments before me as should the length of path be closed or should it be retained with a diversion from under the 5 houses that have been built on it.

36. In these circumstances it is difficult to conclude that the houses will not endure. However Phillips J did not consider a situation where the reason that the buildings may endure is because it is considered preferable to remove the path from under the buildings rather than to seek to demolish the buildings. Phillips J also states that "only rarely" can it be right to stop up a highway as a result of an unlawful obstruction. Whilst acknowledging Mr Rusling's opinion that this is an unusual, possibly exceptional case, KCCs draft revised Rights of Way Improvement Plan (known as the Countryside and Coastal Access Improvement Plan) states that "a significant number of routes are obstructed by buildings (including residential property) that were constructed in the absence of an order for the diversion or extinguishment". It seems to me that this is therefore not a rare or exceptional case. Mr Rusling accepted that if the EO is not confirmed KCC will have a duty to resolve the issue and in his view would be obliged to seek to move the path from under the houses.
37. Circular 1/09 refers to temporary circumstances as "including any buildings or other structures preventing or diminishing the use of the way" and I see no reason why that advice should not be followed in this case. To the contrary, to consider the likely future use of the EO route as nil due to the fact that objectors would prefer to see an alteration to the line of the route to avoid the houses rather than the demolition of the houses would seem to me to be contrary to the policy of the section. I agree with the Joint Objectors that the feasibility of alterations to the EO route so that the route and houses can co-exist is a factor to be taken into account in determining what weight should be given to the presence of unlawful obstructions on the route.
38. Although no diversion order has been made, I heard evidence with regard to 2 possible routes within Faversham Reach which would remove the route from beneath the houses and I see no reason why, in considering likely future use, I should not take these alternative routes into account.

#### *Alternative routes*

39. The Proposed Diversion Route would involve the construction of a ramp with a proposed gradient of 1 in 12 from Crab Island. The ramp would enter Faversham Reach in an area currently used for parking and the route would then pass Nos 13 to 15, before heading towards the Creek to follow the definitive line along the marina, then turn away from the Creek to pass Nos 2 and 3 before heading along the definitive line towards the entrance to Faversham Reach.
40. KCC's Members Panel resolved not to make an Order in respect of that route. Although the reasons for that decision are unclear from the minutes of the meeting, at the inquiry it was suggested that providing the route may not be straightforward. In particular reference was made to the possibility of consent being required under S38 of the Commons Act 2006 in relation to the ramp due to it being work on a village green. It is also suggested that safety railings may be necessary along the marina and that the cost of the diversion would be significant. However, these are all matters which were considered in the KCC Report which recommended that an order for the Proposed Diversion Route should be made and no evidence has been presented which would lead me to conclude that such a diversion would not be feasible.
41. The Faversham Creek Streetscape Strategy (the Streetscape Strategy) refers to the "possibility of making a connection between the path on Crab Island and

the Faversham Reach/Waterside Close quayside path, for public access". The work referred to includes a ramp which would connect with the area between Nos 13 to 15 and the Creek (to which the public do not have access) and then connect to the EO Route along the marina. The aspiration is that the route, rather than following the EO Route away from the Creek, would pass between Nos 2 and 3 and the Creek, connect with Waterside Close and then, via a further ramp at the far end of Waterside Close, connect with ZF32 to form a continuous Creek side footpath. The document has been adopted by Faversham Town Council, Swale Borough Council and the Swale Joint Transportation Board, which includes KCC, and its recommendations are incorporated in the pre-consultation draft Faversham Creek Neighbourhood Plan (the Neighbourhood Plan).

42. An agreement made under Section 106 of the Town and Country Planning Act (the S106 Agreement) relating to Waterside Close contains a footpath creation agreement which would provide a public path along the front of the Waterside Close development and I have been provided with a copy of a letter which confirms that the relevant landowner has no objection to the creation of a link from ZF32 to Waterside Close, including a walkway structure. However, there is no guarantee that the S106 Agreement remains enforceable or that it would be enforced and it does not provide a mechanism for joining that route with the wider network.
43. There is no certainty that the continuous Creek side route aspired to in the Streetscape Strategy and draft Neighbourhood Plan will ever be achieved. Nevertheless there is no evidence before me which would lead me to conclude that it would not be possible to divert part of the EO Route away from Nos 13 to 15 by providing a ramp and connection to the area between Nos 13 to 15 and the Creek and thereafter follow the Proposed Diversion Route. For ease of reference I shall call this the Streetscape Strategy Route, although I am mindful that it is only part of the route described in that document.
44. I therefore consider that either the Proposed Diversion Route or the Streetscape Strategy Route would provide a feasible means of avoiding the current obstructions and I shall consider the likely use of them if made available.

#### *Local Opinion*

45. There has been a considerable volume of objection to the EO, including the Joint Objectors, Swale Borough Council and a significant number of individuals. At the inquiry Mr Caffarey represented 25 individual objectors. I have also received 23 pro forma questionnaire forms, some of which, but by no means all, were submitted by people who had also submitted individual objections. On the forms the individuals state that, if made available, they would walk the EO Route in preference to the Creation Order Route. Although it is clear that those forms were only given to people who were known to have a preference for using the EO Route and should not be taken as a general survey of people's opinion, nevertheless they show that a number of local people wish to walk the EO route and consider that it would be preferable to the existing, Creation Order Route.
46. KCC refer to the submission of Councillor Michael Henderson who states that he has "spoken to well over 100 local people walking the route of ZF42 all of whom find it entirely acceptable and none of whom want to see the ZF42 route

changed". However, no changes to ZF42 (the Creation Order Route) are proposed, none of these people gave evidence at the inquiry and I have no way of knowing whether, if available, they would use the EO Route instead of or in addition to ZF42 or not at all. Indeed there are few letters of support for either the Creation Order or the EO except from residents of Faversham Reach.

47. Ms Salmon gave evidence that the creation of a Creek side footpath was one of the most popular items in consultation during preparation of the Streetscape Strategy. A letter from Mr Cosgrove as chairman of the Faversham Creek Consortium refers to the workshops and exhibitions which have taken place in connection with the preparation of the draft Neighbourhood Plan. The letter states that the "one proposal which has received almost universal support is the opening of existing Creek side footpaths and the creation of the missing sections". Although I acknowledge that other elements would be necessary to provide a continuous Creek side path and ultimately such a path may not be achievable, nevertheless I consider that support for these proposals suggests that local people would like to use any section of Creek side path which was reopened or created.

*Merits of the EO Route, alternative routes and the Creation Order Route*

48. Mr Rusling for KCC produced a series of photographs taken along the Proposed Diversion Route and along the Creation Order Route. On my site visit views from both routes were considered in detail together with views from the EO Route and from the Streetscape Strategy Route in so far as possible.
49. For the majority of its length the Creation Order Route runs alongside the village green and public open space and I agree with Mr Rusling that this part of the route is pleasant in comparison with many urban and urban fringe paths. It does not however provide the views of the Creek which are available from the EO route, the Proposed Diversion Route or the Streetscape Strategy Route.
50. The Proposed Diversion Route would have a direct frontage to the Creek for less than 100m but views of the Creek would be available for considerably more than that. Although I accept that the various buildings along the Creek referred to in evidence can all be seen from other vantage points, I agree with many of the objectors that the close up views afforded from within Faversham Reach are not available from elsewhere. Mr Gardner referred to the panoramic view of the Creek available and Mr Blackford, a voluntary tour guide for the Faversham Society and the local Tourist Information Centre, stated that he would use the EO route regularly as part of his tours if available as it offers a "unique view of much of the historic port". Many of the letters of objection to the EO refer to the views available and the pleasures of walking by the Creek and I note that the KCC Report states that the EO Route and the Proposed Diversion Route provide "superb" views of the Creek.
51. Mr Rusling acknowledged that about 30 metres of the Creation Order Route is enclosed between buildings. The route is described in the Streetscape Strategy as "directly following the concrete wall.....to end in a dank, dark, cramped alley between the concrete wall and industrial premises". Although some users may consider this to be an over statement, I agree that this part of the route is unattractive.
52. I accept that the Creation Order Route is marginally shorter than the Proposed Diversion Route and that it is established, familiar and obvious on the ground.

However I do not accept that the Proposed Diversion Route would not be legible or that there would be an unacceptable conflict with cars within Faversham Reach. If necessary the route could be marked on the ground to guide users and I agree with the Joint Objectors that the greatest hazard from vehicles is where users have to cross the road immediately north of the northern end of any of the routes rather than within Faversham Reach itself.

53. Neither do I accept that the fact that Faversham Reach is a private residential estate would put off walkers to any degree. Those who gave evidence at the inquiry were clear that this was a route that they would wish to use and indeed it is somewhere that Mr Blackford stated he would include on his tours of Faversham.

#### *Conclusion on likely future use*

54. KCC submits that even if one were to disregard Faversham Reach entirely, "it is a little unreal to suggest that members of the public would use the line of footpath ZF5". I accept that some of the evidence before me relates to a desire to retain the EO route so that it could become part of the proposed public path through Faversham Reach, through Waterside Close and joining ZF32 to form a continuous Creek side path. I also accept that a continuous Creek side path is an aspiration which may never be realised. Nevertheless, a clear preference has been expressed by many who gave evidence that ZF5, or a diversion of it to avoid the houses whilst still retaining the views of the Creek, would be used in preference to, or at the very least in addition to, the Creation Order Route. I am satisfied that this use would be separate from and not dependant on any continuation of a Creek side path through Waterside Close.
55. From all the evidence before me I conclude that if it were made available for use, the EO Route would be likely to be used extensively by members of the public. Although there are strong policy reasons for treating the houses as temporary obstructions and therefore disregarding them, I acknowledge that in practice it is unlikely that any action aimed at removing the houses would be taken. I am however satisfied that a solution could be found to divert the definitive line so as to avoid the houses but retain the views of the Creek and that future use of such a route would be extensive.

#### **The effect of extinguishment on land served by the footpath**

56. The only land affected by the EO is Faversham Reach. Making the route available would give residents direct access to the village green and Crab Island and provide a shorter route to the centre of Faversham. Although this could be seen as a benefit, the evidence before me is that this is not something which residents would welcome and indeed concerns have been expressed about safety, security and vandalism if access is allowed from Crab Island.
57. I accept that it is in the private interests of the residents of the houses within Faversham Reach that the EO is confirmed. However there is no land directly served by this part of the footpath which would be detrimentally affected by its closure and compensation issues are not relevant.

#### **Whether it is expedient to extinguish the footpath**

58. The parties agree that expediency has a "broad character" and is not confined to the specific matters set out in S118 of the 1980 Act. I agree with KCC that need and the availability of an alternative route, in this case the Creation Order

Route are factors which can be taken into account and I acknowledge that the EO Route connects the same 2 points over a similar distance as the Creation Order Route.

59. I also accept that fairness can come into the equation. It is pointed out that many years have passed since Faversham Reach was constructed and that more than 35 conveyances have taken place, none of which has revealed the existence of the right of way. Although this may be as a result of the optional enquiry regarding rights of way not having been asked, I have considerable sympathy with the residents of Faversham Reach who have purchased houses through which a public right of way passes.
60. Nevertheless this has to be balanced against the interests of the public. KCC accepts that the public is entitled to use footpath ZF5 and there is no suggestion that it has been added to the definitive map in error. I have concluded that, if it were made available, the EO Route would be likely to be used extensively. Even if, due to there being reasons why it is unlikely that the obstructions would be removed, I accept that future use of the exact line of the EO Route would be nil as submitted by KCC, I have concluded that there appears no reason why it would not be feasible to divert the route from beneath the houses. I have also concluded that use of such a route, whether the Proposed Diversion Route, the Streetscape Strategy Route, or some other similar route is likely to be extensive.
61. The Joint Objectors refer to Natural England's duty under the Marine and Coastal Access Act 2009 to define a line for the English Coastal path and point out that once that line is defined all land between the coastal path and the sea becomes "coastal margin" to which, subject to exceptions, the public has a right of access for recreation. It is submitted that, as communal areas on estates are not excepted from coastal margin, if the Creation Order Route became the coastal path then the consequence would be that all the communal areas of Faversham Reach would be subject to a public right of access.
62. No information regarding the proposed coastal path is available to me and I have no way of knowing what route it may take and what the consequences of that route would be. Accordingly, in considering whether or not it is expedient to confirm the EO, I give very little weight to this matter. Furthermore no relevant provisions in KCCs Rights of Way Improvement Plan or emerging plan have been drawn to my attention.
63. Nevertheless, I give considerable weight to my conclusion with regard to the likely future use of the EO Route or a diversion of the EO Route. None of the other matters raised is of sufficient weight to lead me to conclude that it would be appropriate to confirm this order. Accordingly, I conclude that it would not be expedient to confirm the EO.

## **Conclusion**

64. Having regard to these and all other matters raised at the inquiry and in writing, I conclude that neither the Creation Order nor the Extinguishment Order should be confirmed.

**Formal Decisions**

**Creation Order**

65. I do not confirm the Order.

**Extinguishment Order**

66. I do not confirm the Order.

*Alison Lea*  
**Inspector**

## APPEARANCES

### FOR THE ORDER MAKING AUTHORITY:

Mr N Westaway

He called

Mr G Rusling

Public Rights of Way and Access Manager, KCC

### FOR THE JOINT OBJECTORS:

Mr J Trevelyan

He called

Mr A Osborne

Mr D Simmons

Mr M Cosgrove

Ms A Salmon

Mr D White

Trustee and former Chair of Faversham Municipal Charities and Chair of Bensted's Charity.  
Councillor and former Mayor of Faversham  
Councillor for St Ann's Ward, Faversham and  
Chair of Faversham Creek Consortium.  
Chair of Faversham Society Planning Committee  
and Director of the Faversham Society  
Resident of Upper Brents.

### SUPPORTERS:

Mr A Albery

Mr M Maloney

Faversham Reach Residents Association  
Resident of Faversham Reach

### OBJECTORS:

Mr G Thomas

Mr J Blackford

Mr T Gates

Mr M Gardner

Mr B Caffarey

Swale Borough Council  
Local resident and tour guide  
Town and County Councillor  
Local resident  
Local resident representing 25 individual objectors

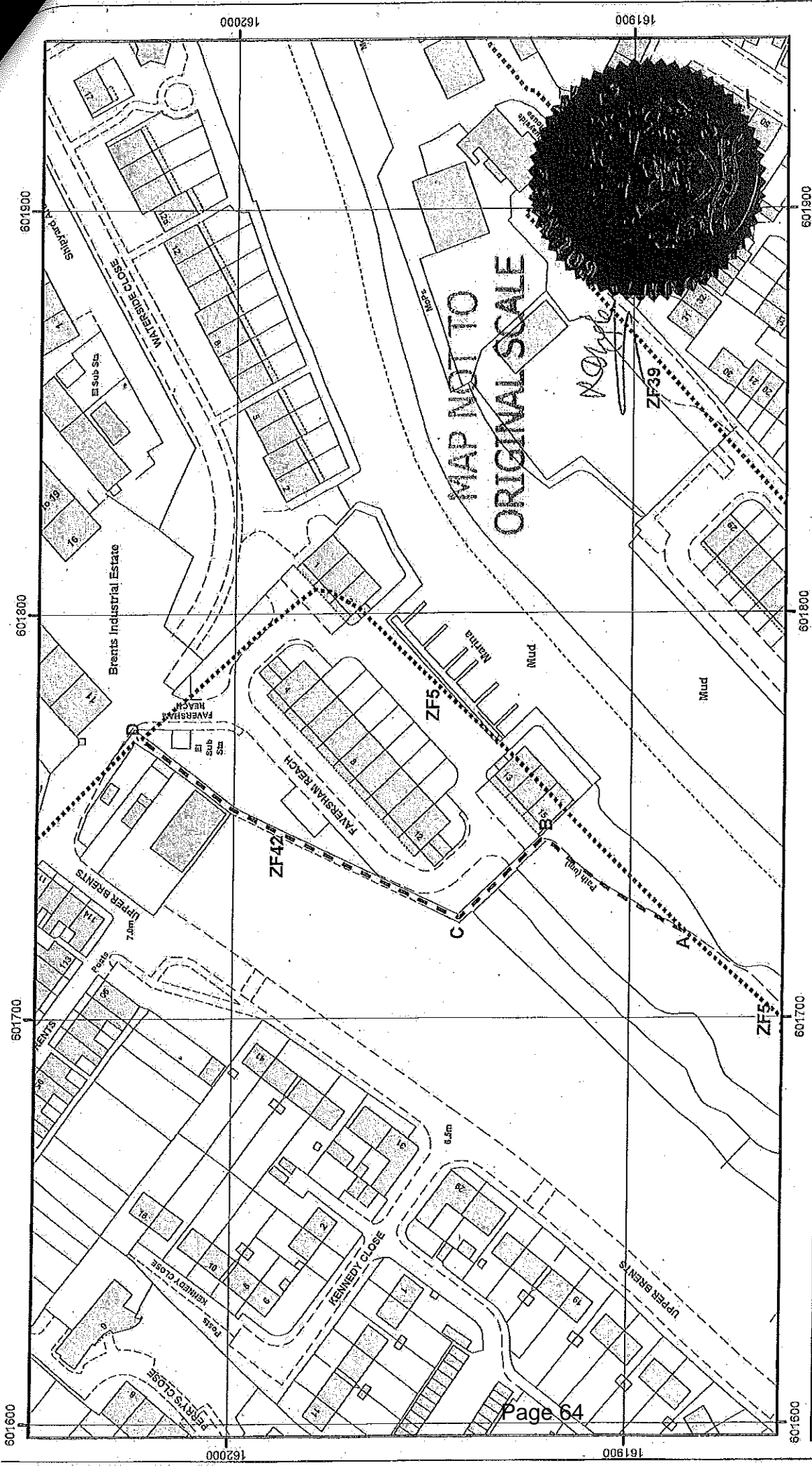
## DOCUMENTS SUBMITTED AT INQUIRY

- 1 Andrew Osborne Supplementary Proof of Evidence in Rebuttal
- 2 Statement by Brian Caffarey
- 3 Faversham Creek Neighbourhood Plan Pre-submission Draft Consultation Document
- 4 Planning permission and associated documentation relating to Faversham Reach
- 5 Letter dated 22 March 2001 from Swale Borough Council enclosing signed acknowledgement relating to footpath creation agreement at Waterside Close and subsequent correspondence
- 6 Letter from Mr M Cosgrove, Chairman of Faversham Creek Consortium in response to public consultation
- 7 Planning permission and associated documentation relating to railings at Faversham Reach
- 8 Extracts from Marine and Coastal Access Act 2009 and from

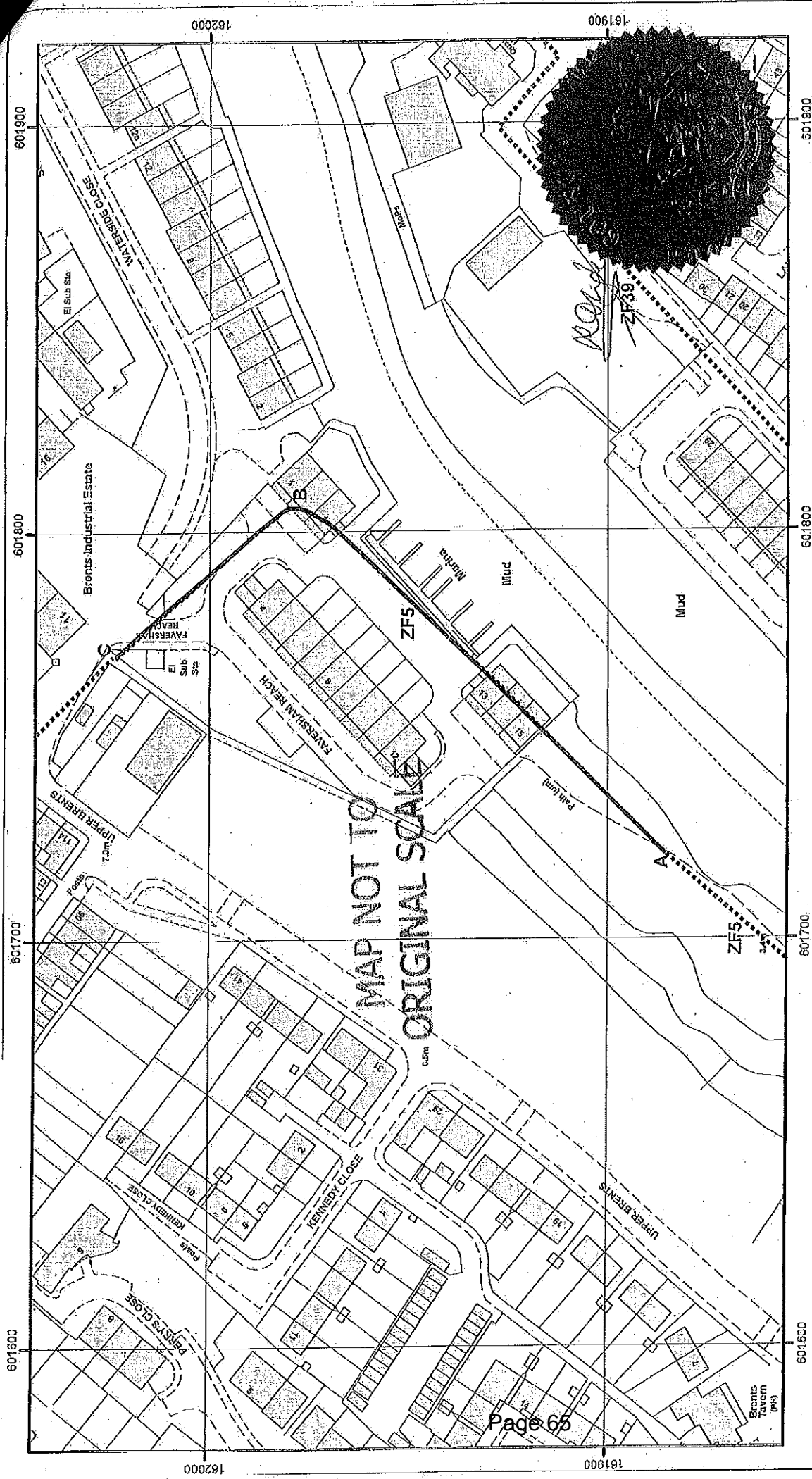
- 9 Coastal Access, Natural England's Approved Scheme  
Letter dated 16 April 2014 relating to creation of a link to footpath ZF32
- 10 Extract from KCC Countryside and Coastal Access Improvement Plan
- 11 Proof of evidence relating to Creation Order at Kilvey Hill
- 12 Extract from Defra Circular 1/09
- 13 Minutes of Faversham Footpaths Meeting 21 October 2010
- 14 Letter from Mr and Mrs Bales dated 28 March 2013 in support of the Orders
- 15 Letter from Ms S White in support of the Orders
- 16 Extract from A History of Faversham and Oare Creeks and the Faversham Navigation by Frank Taylor
- 17 Transcript of Judgment in Cusack v London Borough of Harrow

## **PHOTOGRAPHS**

- 1 Undated photograph showing site of Faversham Reach after closure of the shipyard
- 2 Bundle of photographs of working shipyard submitted by Mr Maloney
- 3 Undated photograph showing HGV close to entrance to Faversham Reach and Waterside Close

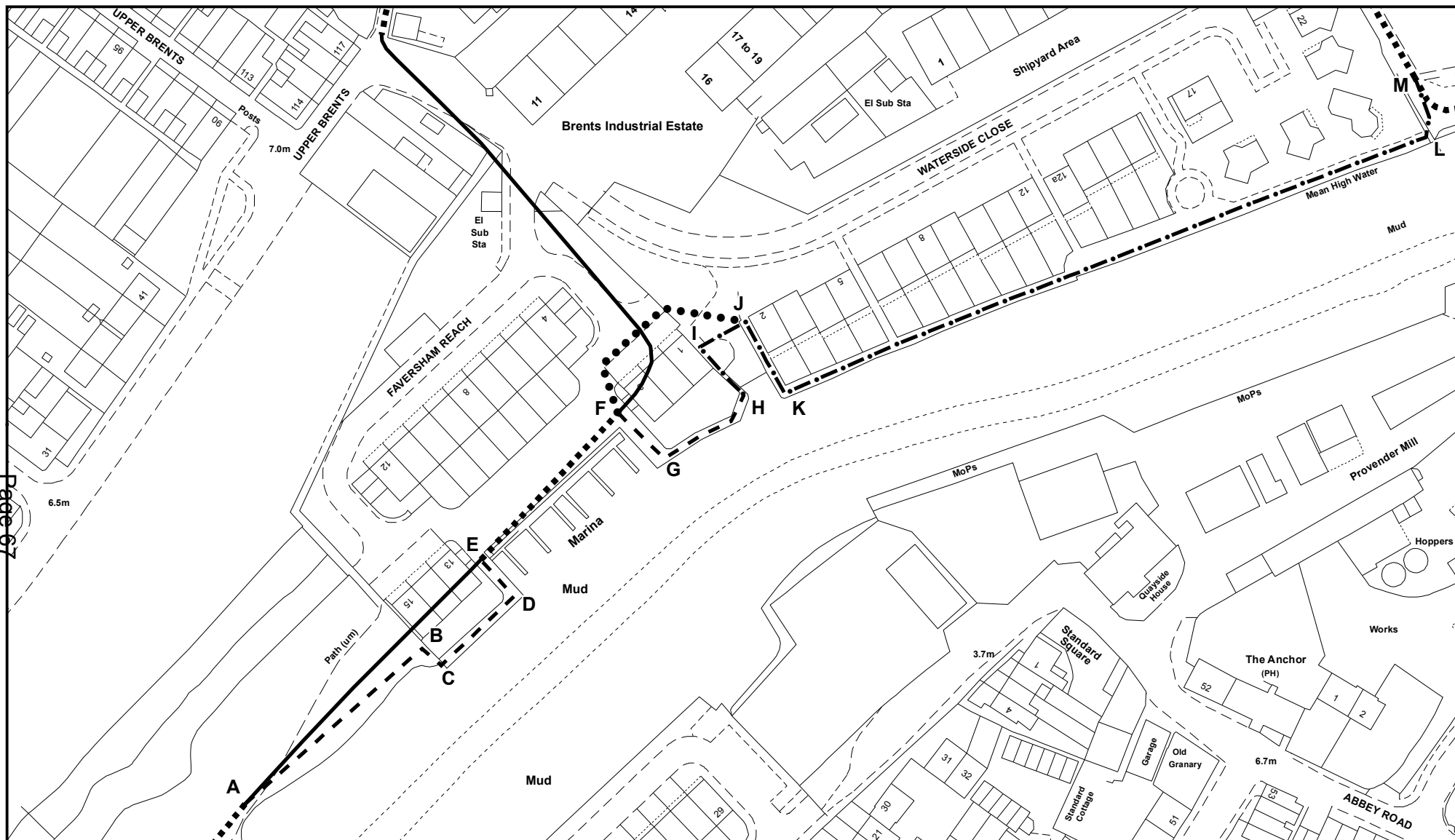


<p><b>Key</b></p> <p>----- Route to be created</p> <p>----- Unaffected Routes</p>		<p>Highways Act 1980 Wildlife and Countryside Act 1981 The Kent County Council (Public Footpath ZF42 Faversham) Public Path Creation and Definitive Map and Statement Modification Order 2012</p>		<p>0 Kilometres 0.0225 0.045</p> <p>0 Miles 0.0175 0.035</p>		<p>N</p> <p>1:1,250</p>
<p>Countryside Access Service</p>				<p>Produced by the KCC Countryside Access Service © Crown Copyright and database right 2012. Ordnance Survey 100019238</p>		<p>Created by: SC</p> <p>Checked by: SC</p> <p>Reference: PROW/ZF42/1404</p>



<p><b>Key</b></p> <p>Route to be extinguished</p> <p>Unaffected Routes</p>	<p>Highways Act 1980 Wildlife and Countryside Act 1981 The Kent County Council (Public Footpath ZF5 (part) Faversham) Public Path Extinguishment and Definitive Map and Statement Modification Order 2012</p>	<p>0 Kilometres 0.0225 0.045</p> <p>0 Miles 0.0175 0.035</p> <p>Produced by the KCC Countryside Access Service © Crown Copyright and database right 2012. Ordnance Survey 100019238</p>	<p>Created by: SC</p> <p>Checked by: SC</p> <p>Reference: PROWZF5/1404</p>
<p>Countryside Access Service</p>			

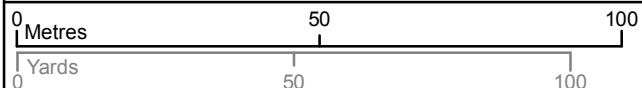
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- ..... Unaffected route
- Length of ZF5 to be extinguished
- - - Proposed diversion ZF5
- New length of route (s106 creation)
- Alternative route

### Proposals for Public Footpath ZF5 Faversham Reach & Waterside Close

Please note: this map extract is not a legal record of the alignment or existence of a public right of way.  
No measurements should be taken from it.



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## Update on Planning Enforcement Issues

## Item 7

Report by Head of Planning Applications Group to the Regulation Committee on 27<sup>th</sup> January 2015.

Summary: Update for Members on planning enforcement matters.

Recommendation: To endorse the actions taken or contemplated on respective cases.

Unrestricted

### Introduction

1. This report provides an update on planning enforcement and monitoring work carried out by the Planning Applications Group since the 2<sup>nd</sup> September 2014 Regulation Committee Meeting.
2. Three summary schedules of all current cases would normally be appended to this report. Schedule 1 covering alleged (part) unauthorised breaches of planning control; Schedule 2, permitted Minerals and Waste sites and Schedule 3 on County Council Developments.
3. However, in the light of the new Regulations concerning third party recording of Committee proceedings, a new format is being adopted, following the views of Committee. A cross-party meeting chaired by Mr Mike Harrison, the Committee Chairman agreed on health and safety grounds that the unauthorised sites should be considered as exempt business. The other reason was to avoid sharing in advance publically the County Council's enforcement strategy that it might later rely upon in legal proceedings. Alleged breaches on permitted Minerals and Waste sites and on County Council Developments, along with this report would continue to be considered in open business.
4. To reflect this new arrangement, Schedule 1 will now cover permitted Minerals and Waste sites and Schedule 2, County Council Developments. Both will appear in the open (white) papers. For ease of referencing and continuity, the unauthorised cases will now be listed under Schedule 3 but their content taken as exempt items. For this Committee please note that there are no cases for the new Schedules 1 and 2, save for a case that is referred to in the text below. However, a list of the cases covered in Schedule 3 is given in paragraph 8 of this report.

### Report Format

5. The report will otherwise follow its established format, equipping Members with the essential facts of a series of cases, varying in their degree of complexity and challenge. The following sub-divisions may also be called upon as required:
  - Achievements / successes [including measurable progress on existing sites]
  - New cases, especially those requiring Member endorsement for action
  - Significant on-going cases
  - Other cases / issues of interest and requests by Members

6. Members may wish to have verbal updates at Committee on particular sites from the schedules, (ideally with prior notice) or reports returned to the next Meeting. The report continues to give details of general site monitoring and progress on statutory chargeable monitoring for minerals development.
7. On this occasion, no alleged breaches on permitted sites have arisen (nor are there any existing cases that require reporting) apart from Unit 4 Apex, in Gravesend which is covered in the main body of this report, under paragraph 13.
8. The list of cases covered under Schedule 3 attached to the Item 10 exempt report of these papers includes:

- **Wyecycle Ltd**, Nacolts Brickworks. Wye, Ashford.
- **Larkey Wood Farm**, Chartham.
- **Mount Pleasant Farm**, Seasalter Lane Yorkletts, Whitstable.
- **Lancebox Ltd**, Plot 14, Manor Way, Swanscombe.
- **Court Wood House**, New Barn Road, Longfield.
- **Nt Rix Scaffolding Ltd**, Astley Avenue, Dover.
- **Plant Hire Solutions**, Camp Site, Back Lane, West Hougham.
- **Kiln Wood**, Lenham.
- **Warren Court Farm**, Knockholt Road, Halstead.
- **Woodgers Wharf**, Horsham Lane, Upchurch.
- **Thirwell Farm**, Drove Lane Hernehill.
- **Top Bungalow**, Frieszley Lane, Cranbrook.

### Meeting Enforcement Objectives

#### *Themes*

9. The main themes of this report continue to be, flexibility of work style and further integration of services, both inside and outside of the County Council. I reported at the last Meeting on closer internal links within the Environment, Planning and Enforcement (EPE) Division, including: Village Greens, Public Rights of Way, Community Wardens, Trading Standards and the Gypsy & Travellers Unit. Principal external links are District

Planning / Enforcement Officers, Environment Agency Teams and Kent Police. A great deal of effort is being made to ensure that we synchronise as far as possible with allied enforcement bodies. On one hand, this allows a pooling of staff, expertise and powers in difficult and challenging cases. On the other hand, the determined and united front that it presents can amount to a powerful restraining force in its own right.

### *Staffing*

10. I reported to the last Meeting on the retirement of the former Senior Planning Enforcement Officer. I have not currently sought a 'like-for-like' replacement. Instead, I am continuing the service through the internal transfer of an officer with allied enforcement experience and some specialist skills. To support this approach, new networking opportunities are being sought with other regulatory bodies, connecting us to wider enforcement resources. These include District Council Planning Enforcement Officers, Environment Agency Inspectors / Crime Team officers and Kent Police. However, links are also being made to the investigative and enforcement arms of official bodies such as the Inland Revenue. Alleged avoidance of landfill tax is a serious offence and as an example, could well offer a further avenue of challenge in some of our more serious waste-related cases.

### *Other initiatives*

11. Along with access in a team context to a wider range of enforcement powers, closer ties, both internally and externally could bring further benefits. Within EPE Division for instance, discussions have already taken place with the Waste Management and Public Protection Groups over the potential use of: 'Smart Water' as an invisible trace along lines of alleged criminality (e.g. as a transfer marker for unauthorised waste materials); information yields from the National Anti-Fraud Network (NAFN) and Company House financial profiling and DVLA vehicle registration searches.

## **Achievements / Successes**

12. There are three achievements of note to report since the last Meeting:

- **Larkey Wood Farm, Chartham** – the repossessed site awaits restoration but some scrap metal has already been removed, the wooden residential shack is ready to be demolished following court proceedings and the surplus imported materials that need to leave the site have been very accurately surveyed using a combination of infrared 3 dimensional mapping by drone and test bore drilling. From both of these sources topographical drawings and contours are being produced which once agreed will form the basis for compliance with the County Council's Enforcement Notice.
- **Woodgers Wharf, Upchurch** – although restricted to a 31<sup>st</sup> October 2014 habitat time window (so as to avoid disturbing wintering birds), between a half and two thirds of the very substantial stockpile of concrete beams at the site has been spliced and reduced to rubble. The remainder of the on-site solution to this long-standing contravention will resume in the early spring.

- **Top Bungalow, Cranbrook** – no further importation has taken place of building materials, small items of plant & machinery, wooden planks and so on. This eclectic mix of materials and items was found strewn about the site. However, a monitoring and supervision plan which is being carried out by KCC's and Tunbridge Wells Borough Council's Planning Enforcement Teams and the EA, has led to a turnaround on site. The owner / occupier has responded well to realistic and practical site clearance targets and from simple encouragement. I am confident that if current progress continues, the land will be reinstated within a reasonable time frame and without the need for any formal action.

### **New Cases, especially those requiring action / Member support**

13. **Unit 4 Apex Business Park, Gravesend. DH12 3HU (Member: Bryan Sweetland)** – a complaint concerning this permitted waste transfer and recycling activity revealed that the existing covered building on site was being demolished in apparent favour of a larger waste management hall. This was already under investigation by Gravesham Borough Council's Building Control section and the Environment Agency, given waste handling in the open. There were also alleged breaches of the planning permission. A Planning Contravention Notice was drafted but before being sent, a retrospective planning application for the revised building was received. This submission reflects planning enforcement good practice and the application is currently being processed. I shall keep Members informed.

### **Significant on-going cases**

14. I give advice and progress on a number of significant on-going cases in Schedule 3.

### **Other cases / issues of interest and requests from Members**

15. No cases identified on this occasion.

### **Monitoring**

#### **Monitoring of permitted sites and update on chargeable monitoring**

16. In addition to our general visits to sites as a result of planning application work, we also undertake routine visits to some sites to formally monitor them under the statutory charging scheme. Since the last Regulation Committee, we have made a further 21 chargeable monitoring visits to mineral and waste sites, yielding a related income to the Group. We have also carried out 10 non-chargeable visits.

#### **Resolved or mainly resolved cases requiring monitoring**

17. Alongside the chargeable monitoring regime there is a need to maintain a watching brief on resolved or mainly resolved enforcement cases which have the potential to recur. That accounts for a significant and long-established pattern of high frequency site monitoring. Cases are routinely reviewed to check for compliance and where necessary

are reported back to the Committee.

### Conclusion

18. We have made good progress on a number of particularly difficult cases along with statutory and non-statutory site monitoring. The Planning Enforcement Team continues to work closely with the other regulatory bodies in the County and has made good recent links with new partners that bring additional means of resolving planning breaches. This will allow a more informed, intelligence-led approach, with multi-agency actions drawn from a wider range of powers. Co-ordination and advisory work by the Planning Enforcement Team, is a natural extension to these new working relationships.

### Recommendation

19. I RECOMMEND that MEMBERS NOTE & ENDORSE:

- (i) the actions taken or contemplated in this report.

Case Officers: Robin Gregory

03000 413380

Background Documents: see heading.

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