

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.

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

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.

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.

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