

By: Head of Public Protection
To: Regulation Committee – 27 January 2015
Subject: Public Footpath ZF5 Faversham
Classification: Unrestricted

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

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". 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's¹ 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.

¹ 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 01622 69 6995
