

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.

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 re-connecting 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

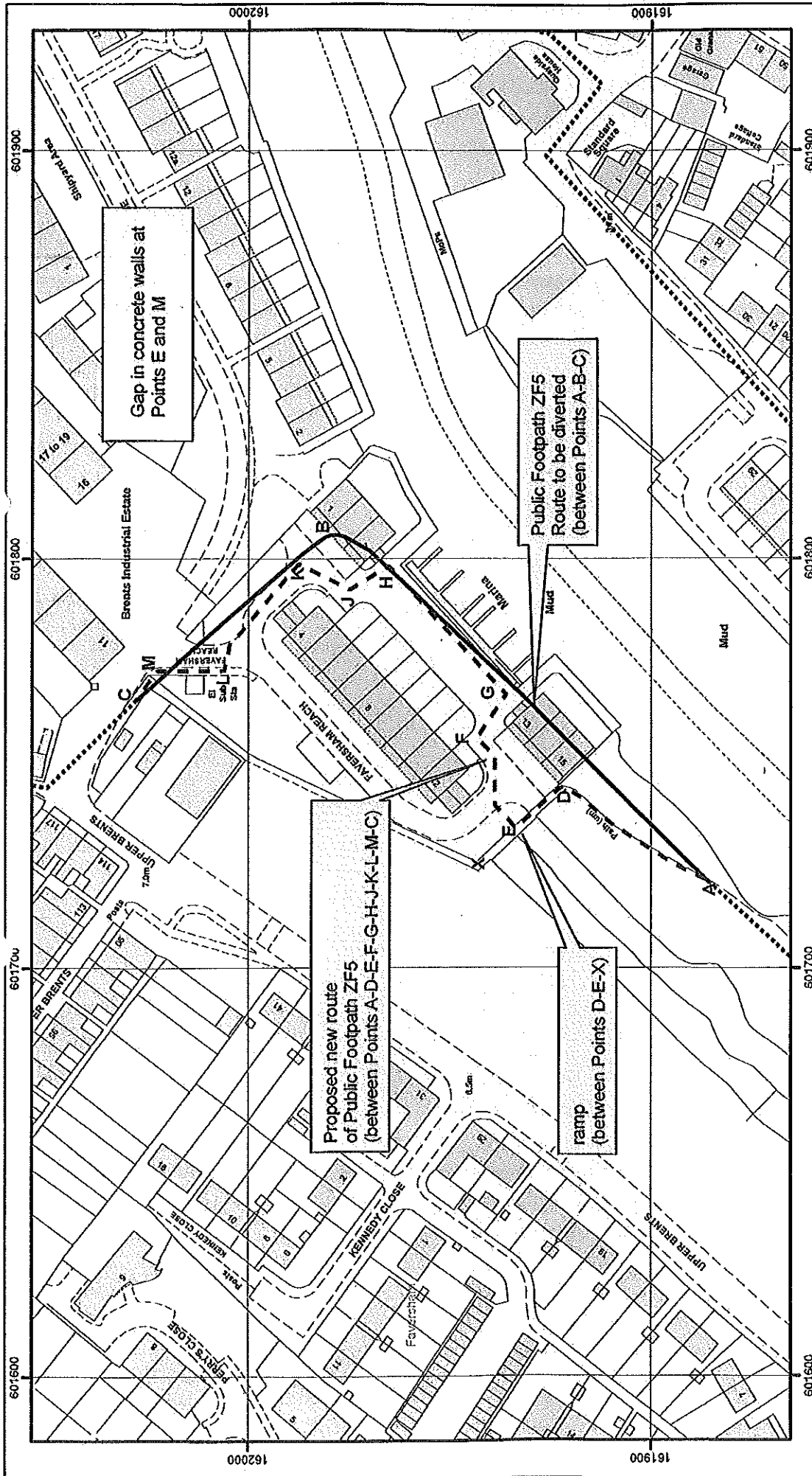
Appendix D – Responses to the proposal submitted by Faversham Reach Residents Association.

Appendix E – Proposed ramp design.

Contacts: Sonia Coventry 01622 221512

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<p>Key</p> <ul style="list-style-type: none"> — Route to be diverted - - - New length of route Unaffected Routes 		<p>APPENDIX A</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</p>	<p>Checked by: SC</p>	<p>Reference: PROM/ZF5/1340</p>
<p>Highways Act 1980, Section 119 Proposed diversion of Public Footpath ZF5 (part) Faversham</p>						
<p>Countryside Access Service</p>						



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KENT COUNTY COUNCIL

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 minimalise 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.