

Appendix D

Report to Regulation Panel 22 February 2016 – Public Footpath ZF5

Response to Consultation

1. During June and July 2015 the Public Rights of Way and Access Service consulted residents, user groups, local elected members and representative bodies on its preferred option to resolve the long term obstruction of Public Footpath ZF5 at Faversham Reach. Option 1, proposed the diversion of the obstructed length of Public Footpath ZF5 to run beside Faversham Creek, through Faversham Reach and Waterside Close Estates. This option would require the construction of two ramps to provide access to the estates and a cantilever walkway to provide safe access around a slipway.

2 In addition Amey, the County Council's engineering consultant were tasked with providing a detailed feasibility report for the construction of ramps and a cantilever walkway including outline options for construction with indicative costings.

3 73 responses were received to the consultation: 35 in support of Option 1, 38 objecting to Option 1. This appendix summarises and responds to the points raised in response to the consultation.

Support

4 Many of the 35 responses received expressing support for the proposal did so in generic terms, stating a preference for a route following the creek-side

5. The main points made in support of the proposal, specifically option1, are:

a) *There is no loss of creek-side views in comparison with the current available route, indeed views of the creek are maximised.*

b) *The proposed route is of higher amenity.*

c) *Option 1 would meet all of the requirements for coastal access for the England Coast Path and remove any doubt about the extent, nature and accessibility of the coastal access margin.*

d) *The proposal would minimise disruption to residents. It would enable the access gates to Faversham Reach to be closed to the public.*

e) *Option 1 provides the access to the creek that many locally have sought.*

f) *Option 1 most closely reflects the observations and decision of the Planning Inspectorate's Inspector in her decision reference FPS/W2275/6/4 & 3/12.*

- g) Support was expressed for option 1 as it enables both access at Faversham Reach and the outstanding Waterside Close section 106 agreement to be considered in a coherent way.*
- h) The intention at the time of the construction of Waterside Close was to provide a creek-side route.*
- i) Option 1 would provide direct access to the town for residents of both estates should they wish to use it. The route would provide a more direct route from the town to the marshes.*
- j) Option 1 provides access along what was an ancient towpath.*
- k) Option 1 would deliver the access identified in the Streetscape Strategy and draft Neighbourhood Plan.*
- l) Option 1 delivers benefits to health and well-being provided by waterside access.*
- m) The route would be the one most easily followed by walkers.*
- n) Option 1 removes the continuing blight to 5 homes.*
- o) A leader of health walks, with 30-40 regular participants, in the area indicates that if option 1 were delivered then the route would be used for such walks.*
- p) The cost of the provision of ramps would be small in comparison of to the public benefit that would be delivered.*
- q) Diversion of the route is the only remaining option following the Inspector's decision.*

Many of the reasons given in support of the proposal are equally matters raised by objectors, and explored in greater detail below:

Objections and representations

The status and alignment of Public Footpath ZF5

6. Many objecting to the proposed diversion questioned the validity of the recording of Public Footpath ZF5 suggesting that it should run further inland to Ham Farm, on the route that has been promoted for the Saxon Shore Way since 1980. Ordnance Survey sheet 172 produced in 1972 was cited as evidence that the route had been incorrectly recorded in 1970, an error reflected on later versions of the Definitive Map and Statement 1 April 1987 and 31 May 2013. One objector suggested that given the many amendments to the DMS since its original productionⁱ, error is common place and the DMS cannot be relied upon.

7. Position of the PROW and Access Service:

The Definitive Map and Statement provide conclusive evidence at law as to its contents.

There is no suggestion that due process was not followed in recording ZF5 on the DMS; a process that allowed for objection by interested parties.

Once established a public right of way may only be extinguished through a legal event, such as a legal order or in consequence of a Parliamentary Act.

The majority of the amendments to the DMS reflect changes as a result of legal orders that relate to desired changes requested by landowners or orders to facilitate development, the construction of CTRL and numerous roads.

Definitive Map Modification Orders to amend the DMS as it is in some way in error are relatively few and generally relate to omissions or rights that have been acquired through use. I'm not aware of any PROW being removed from the DMS for Kent on the basis that they were incorrectly recorded.

8. Mere disuse does not result in the loss of the right.

9. Ordnance Survey Sheet 172 -1972 must be viewed in the context in which it was produced. It does not purport to show public rights of way, it reflects a topographic survey the purpose of which is to record physical features. In that respect it reflects the widely accepted position that access to Public Footpath ZF5 was not possible, or at least difficult, following the construction of the ship yard wall in 1938.

10. The Ordnance Survey 2nd Edition and 3rd Edition show a route that very closely approximates to the route of ZF5 recorded at Faversham Reach. The submission of the joint objectors to the Public Inquiry in May 2014 contained evidence that the route of ZF5 was physically in existence.

11. Case law establishes a high bar for the amendment of the DMS. There must be sufficient cogent evidence to show that the Definitive Map and Statement requires amendment .

12. It has been open to anybody at any time since 1981 to apply to have the DMS amended on the basis that a public right of way is omitted, should be recorded in some other way or removed altogether. This information has been freely available to all parties and advice has previously been given. No application has been received to amend the DMS on the basis that ZF5 is incorrectly recorded.

13. The County Council has not discovered any evidence that would cause it to make an order to amend or remove Public Footpath ZF5 from the DMS on the basis that it is incorrectly recorded. What evidence has been presented to the County Council, or is in its possession, weighs in favour of ZF5 having been correctly recorded.

The do nothing option

14. *A number of objectors including a District Councillor suggested that it is within the County Council's powers to allow the current situation, of the obstruction of the definitive alignment of Public Footpath ZF5 to continue; in effect to do nothing.*

15. Position of the PROW and Access Service:

The County Council is under an obligation to assert and protect the right of the public to the use and enjoyment of the public highway and to prevent the obstruction of it. Failure to act not only results in the public being deprived of the use of the public right of way but also exposes the County Council to action in the Court's and a Local Government Ombudsman complaint.

16. There are also continued implications for the owners of the five properties obstructing the footpath. It is argued that these properties have been sold in the past, including two in recent times, and that the existence of the public right of way had no detrimental impact on those sales or the price received for the property. I'm aware in the case of one of the property sales the existence of the public right of way was considered in detail before the purchase went ahead and the purchaser was aware of and prepared to accept the risk. I am also aware of significant delay to another sale. It cannot be assumed that as two purchases have proceeded without any detrimental impact that future sales would result in a similar outcome.

17. Aside from the points raised above it is simply not appropriate to allow the matter to drop into abeyance:

- a) Considerable time and money has already been expended in seeking a solution,
- b) The creation of the England Coast Path further highlights the obstruction of the right of way and poses further questions about access issues
- c) There is no reason to suppose that if allowed to drop the matter would not simply re-emerge at a later date.

Public Inquiry Decision

18. *A number of residents of Faversham Reach felt that the extinguishment of the obstructed section of ZF5 through Faversham Reach should be pursued again, as a forth option.*

19. Position of the PROW and Access Service:

This is simply not an option that is available. The Order to extinguish has already been independently considered by a Planning Inspector on behalf of the Secretary of State, following a four day public inquiry. The Order was not confirmed. That decision was not challenged by the County Council as it

appeared that the decision was correct in law and its application of Government policy. Nor was the decision challenged by any other party.

20. There is no precedent that I am aware of for an order to be made that is identical in effect to an order that had previously been considered by the Secretary of State and, for want of a better term, rejected. It fails to demonstrate appropriate deference for the earlier decision on behalf of the Secretary of State. It also shows considerable optimism in clearly anticipating a different outcome, given that statute law, case law and policy remain the same.

Safety

21. The potential risks to the public from creek side access were cited by a great many residents. The area around the slipway was highlighted as a particular risk, along with material laying in the creek bed, high tides and fast flows. Rails or fencing beside the creek are requested as a measure to improve safety.

22. Position of the PROW and Access Service:
The section of creek-side walkway at Waterside Close was specifically designed with public access in mind. The creek-side access at Faversham Reach is of similar design. Other than at the proposed ramps the width is greater than 2 metres wide; there is plenty of room for users to pass. The area is level and trip free. It is clearly defined; the creek side of the path is particularly well delineated by the pile capping.

23. It is accepted that all locations should be considered on their merits taking account of the nature of any hazards, the number and type of users and the potential risks to those users. Safety rails are considered necessary for the ramps and cantilever walkway as a result of the narrower width at these points.

24. Option 1 does not appear to pose a risk to users that is out of line with those present on the many miles of waterside paths in Kent and beyond. Much of this access runs beside creeks, tidal river sections, along quaysides, harbours, marinas, steep banks, unguarded cliff edges; such areas do not universally have safety barriers, commonly they don't. While there is liability on the occupier for the safety of visitors to the property this has to be balanced with the general obligation of any highway user to use the highway safely accounting for conditions.

Security

25. Objectors, and residents in particular, point to the security that they enjoy from living in what they consider to be gated community, to property, private moorings and person. It is cited as a principal reason for purchasing property at Waterside Close and Faversham Reach. Incidents of criminal and anti-social behaviour are given, in the main relating to interference with and theft from moored vessels. The Faversham Reach Residents Association had

railings erected to prevent access into the estate from Crab Island [and Waterside Close] in order to prevent such activity. There have been recent reports of further incidents.

26. Position of the PROW and Access Service:

Criminal and anti-social behaviour in the Faversham Creek area is at relatively low levels when considered as a percentage of all crime and antisocial behaviour within Swale Borough. Street level data for Faversham Reach and Waterside Close for the period November 2014 to October 2015, indicates low levels of crime and anti-social behaviour : 5 reported instances for Faversham Reach and 12 for Waterside Close. Detailed analysis is difficult without full access to the background information. There does not appear to be a correlation between public access and crime and anti-social behaviour.

27. While considered a gated community by the residents, Faversham Reach is not a gated community. Faversham Reach is subject to public access; the public may deviate around obstructions to public rights of way on land in the same ownership. Those owners of properties in Faversham Reach that obstruct the public footpath are equally owners [in part] of the communal areas of Faversham Reach.

28. Waterside Close was not developed as a gated community. Public access along the creek was envisaged throughout the planning process. Design of the estate reflects this. A section 106 agreement was put in place to deliver public access.

Section 106 agreement

29. Position of the PROW and Access Service:

The developer's intention to deliver the agreed access is plain in the correspondence dating back to 2002, notwithstanding the practical difficulties that have been encountered by the Planning Authority in seeking to bring this to fruition in the period since the development was started.

Maintenance

30. Position of the PROW and Access Service:

Public paths brought into being through diversion or creation orders are maintainable at the public expense. If Option 1 were to be successfully implemented the surface of the footpath, ramps and cantilever walkway would be publically maintainable highway as would any safety rails erected by the highway authority. Incidental infrastructure although not proposed (such as lighting) would be publically maintainable. The retaining walls/ creek defences over which a path would run are integral to the structural stability of the estate. The highway authority would not be in a position to accept any liability for these structures.

Compensation. impact on property values

31. *Waterside Close Residents Association Ltd point to the fact that those buying within a gated community do so for a reason and that a premium is paid for direct secure waterside access.*

32. *A number of residents assert that public access would have a significant adverse impact on property prices and that compensation would be sought.*

33. Position of the PROW and Access Service:

The successful creation or diversion of a public footpath triggers the compensation provisions within the Highways Act 1980ⁱⁱ. These provisions are only triggered if an order is confirmed. Compensation is limited to those that can show that a value in interest in the land is depreciated or has suffered damage by being disturbed in their enjoyment of land. Claims for compensation must be submitted within 6 months of the coming into operation of an order. Disputes are adjudged by the Lands Tribunal.

34. Faversham Reach is already subject to public access, albeit that the public footpath is obstructed. It was intended that the creek-side would also be accessible through Waterside Close. Both of these facts are likely to substantially limit any compensation.

35. Compensation is not payable in respect of the England Coast Path and coastal access margin.

36. The impact of the cantilever walkway on the slipway is di-minimis. The feasibility report indicates that it will not prevent the launching of boats and should not restrict the size of boats that may be launched.

England Coastal Path and Access Margin

37. Position of the PROW and Access Service:

Government is committed to the creation of the England Coast Path, providing continuous access on foot around the coast of England. The England Coast Path is to have national trail status. Land seaward of the trail is to be coastal access margin to which the public will enjoy access on foot for the purposes of open air recreation.

38. Kent was a one of the first areas to be considered for the creation of the England Coast Path (ECP), the first stretch being Ramsgate to Folkestone. Whitstable to Iwade forms stretch 4 in Kent. Natural England opened consultation to establish the alignment of the ECP for stretch 4 in September 2015. The provisional programme would see final approval by the Secretary of State for the proposed alignment in October 2016ⁱⁱⁱ.

39. The Public Rights of Way and Access Service has worked closely with Natural England in both defining the alignment of the ECP and establishing the route on the ground. Given the specific issues relating to Faversham Creek the Service has stepped back from involvement in defining the route of the ECP in this area to enable Natural England to reach an independent view.

40. The scheme^{iv} setting out how the route is to be provided establishes a number of exceptions, where the coastal access rights will not apply; this includes (at Figure 1) “land covered by buildings or the curtilage of buildings”.

41. It is not at all clear if Natural England will consider that the communal areas of Faversham Reach or Waterside Close are excepted areas or form part of the coastal access margin.

Ramp design and cantilever walkway – feasibility – detail and cost

42. *Many points were raised in respect of the feasibility, design and the limitations to the design of ramps and the cantilever walkway.*

43. Position of the PROW and Access Service:
Amey, the County Council’s Engineering consultant was commissioned to undertake a detailed feasibility study identifying constraints to the site and to provide outline designs for ramps and a cantilever walkway that reflect the constraints at the site. The outline designs would also assist in producing an informed estimate of the costs associated with the work; both the costs of construction and the ongoing costs of maintenance.

44. The feasibility report indicates that there are no practical engineering matters that would prevent construction.

The feasibility report and outline designs are provided as Appendix B.

Cost and Funding

45. Position of the PROW and Access Service:
A number of matters were raised by respondents relating to the cost of delivering Option 1. Prior to the completion of the outline designs the cost of delivering Option 1 was unknown. A figure had previously been provided for the provision of the route in the Streetscape Strategy of £90K although the provenance of this figure is unknown. Clearly the outline design provides a firmer basis on which to found consideration of the costs of the scheme.

46. The estimated cost of the PROW and Access Services preferred designs is £92979. Solid ramp constructions at all locations are estimated as costing £125725. Were all elements to be delivered the actual cost may of course vary significantly if works were tendered. The PROW and Access Service would expect lower costs to be achieved than estimated. However the estimated cost represents a significant investment.

47. Many objectors identify other matters, particularly the Bridge Road bridge and improved flood defences as a greater priority for the public purse. My understanding is that funding has already been allocated for improved flood defences and that there are commitments in place in respect of the bridge albeit the final design will very much depend on the funding raised locally.

48. These projects and others identified in the Streetscape Strategy and draft Neighbourhood Plan are not mutually exclusive. All are delivered through different budgets, different funding streams and by different public bodies.

49. If simply doing nothing is ruled out as an option, as I believe that it should be, then there are simply no low cost/ no cost solutions. Even if another option were taken to divert the path within Faversham Reach a ramp would be required to provide access. Feasibility work has already incurred costs as did the previous extinguishment proposal for Faversham Reach.

50. A number of the objectors to Option 1 did not feel that the short length of creek side access made available to the public warranted the expense to the public purse, that cost outweighed benefit.

51. As stated above the costs are significant. The proposal does deliver the creek side access desired by, at least a proportion of the local community. The proposal addresses two long standing matters that should have been addressed many years ago.

52. The consultation indicated that the costs of provision would be met through a number of sources. Having more accurately established the cost of Option 1 it is clear that the commitments from charitable sources still leave a substantial amount to be found by Swale Borough Council and Kent County Council against a back drop of continued financial pressure. There would be significant risk to making Orders with the intention of delivering creek side access if those Orders could not be implemented. Clearly how the full costs of construction of the ramps and walkway would be met would have to be understood and secure before making any orders.

To date contributions have been identified from The Faversham Municipal Charities, Bensted Charities. Swale Borough Council has indicated that it will contribute to the cost. The Kent County Council elected Member for the area has indicated that he would support the creation of the route through Member Fund if available.

53. Potential funding for the work may also be available from Natural England for establishment work were the England Coast Path to be established along the creek.

The Faversham Creek Streetscape Strategy and the Faversham Creek Neighbourhood Plan

54. The Faversham Creek Streetscape Strategy identifies the possibility of improving access to the creek by making a connection between public footpath ZF5 at Crab Island and the Faversham Creek/ Waterside Close quayside path and on to meet public footpath ZF32.

55. The Submitted Faversham Creek Neighbourhood Plan - identifies creek-side access as one of its aims. Option 1 if implemented would be in accord with this aim. The examination into the NP was held 5th – 7th October last year and we are currently awaiting the Examiner's report. The plan has yet to be put to a local referendum for adoption.

Appendix E

Type of Orders

A technical point was raised in respect of potential hurdles to the use of a public path diversion order to deliver the creek-side access. Specifically it is thought that it may be difficult to satisfy the test set out in the Highways Act 1980 section 119 (2)(b) "A public path diversion order shall not alter a point of termination of the path or way – (where it is on a highway) otherwise to a point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public."

Position of the PROW and Access Service:

The PROW and Access Service accept this view as the point of termination of the proposed route is approximately 435 metres from the original termination point on Upper Brents. Therefore, even if it is accepted that this point is on a highway connected to the original highway on which the path terminated, it could clearly be argued that this point is not substantially as convenient.

Should Option 1 be pursued it is considered that two Orders would be required:

1) A partial extinguishment of ZF5 (as shown on the Proposals Plan rev 1) sections A-B1-E and F-X on the basis that those sections are no longer needed as access A – X is provided by the long existing path A –B-X which is subject to a Definitive Map Modification Order application, and was accepted as highway at the Public Inquiry.

2) A creation of a public footpath over sections B-C-D-E, and F-G-H-I-J-K-L-M Public Footpath ZF5 section E-F to be retained.

This would overcome the existing obstruction to Public Footpath ZF5 by development and provide continuous creek side access.

It is considered that this amended proposal for concurrent but independent Orders meets the tests for extinguishment and creation as set out in the Highways Act 1980: These being

Creation by Order:

Highways Act 1980 section 26:

(1) Where it appears to a local authority that there is need for a footpath or bridleway over land in their area and they are satisfied that, having 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

(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 contained in section 28 below,

it is expedient that the path or way should be created, the authority may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, create a footpath or bridleway over the land.

Stopping up of footpaths and bridleways.

Highways Act 1980 section 118

(1) Where it appears to a council as respects a footpath or bridleway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way

(2) The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

ⁱ 1889 amendments to the Definitive Map and Statement (2014)

ⁱⁱ Highways Act 1980 s28 (applicable to diversions HA1980 sec 121(2))

ⁱⁱⁱ Natural England produce a report detailing the alignment following consultation and negotiation. Objection may be made to the report and these objections may be determined by the Secretary of State - through written representations, hearing or Public Inquiry.

^{iv} Coastal Access Natural England's Approved Scheme 2013.