
Order Decisions

Inquiry opened on 20 May 2014

Site visits made on 19 and 22 May 2014

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 1 July 2014

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

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

Summary of Decision: The Order is not confirmed

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

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

Summary of Decision: The Order is not confirmed

Preliminary and Procedural Matters

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

Background to the Orders

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

Legal Submissions

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

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

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

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

The Extinguishment Order (EO)

The Main Issues

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

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

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

Reasons

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

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

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

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

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

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

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

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

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

Evidence of likely future use

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

conclusive. This is particularly the case where, as in this situation, the route has been subject to a variety of obstructions over the years, and although on the definitive map, use of the route has clearly not been encouraged. Furthermore, although it can be argued that the path is not needed due to their being an adequate alternative available (the Creation Order Route), the path may still be used in the future simply because people prefer it. Indeed the Joint Objectors submit that if the EO were made available it would be used to a significant extent, in preference to the Creation Order Route.

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

Temporary Circumstances

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

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

Alternative routes

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

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

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

Local Opinion

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

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

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

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

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

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

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

Conclusion on likely future use

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

The effect of extinguishment on land served by the footpath

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

Whether it is expedient to extinguish the footpath

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

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

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

Conclusion

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

Formal Decisions

Creation Order

65. I do not confirm the Order.

Extinguishment Order

66. I do not confirm the Order.

Alison Lea
Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Mr N Westaway

He called

Mr G Rusling

Public Rights of Way and Access Manager, KCC

FOR THE JOINT OBJECTORS:

Mr J Trevelyan

He called

Mr A Osborne

Trustee and former Chair of Faversham Municipal Charities and Chair of Bensted's Charity.

Mr D Simmons

Councillor and former Mayor of Faversham

Mr M Cosgrove

Councillor for St Ann's Ward, Faversham and Chair of Faversham Creek Consortium.

Ms A Salmon

Chair of Faversham Society Planning Committee and Director of the Faversham Society

Mr D White

Resident of Upper Brents

SUPPORTERS:

Mr A Albery

Faversham Reach Residents Association

Mr M Maloney

Resident of Faversham Reach

OBJECTORS:

Mr G Thomas

Swale Borough Council

Mr J Blackford

Local resident and tour guide

Mr T Gates

Town and County Councillor

Mr M Gardner

Local resident

Mr B Caffarey

Local resident representing 25 individual objectors

DOCUMENTS SUBMITTED AT INQUIRY

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

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

PHOTOGRAPHS

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