

Statement containing Kent County Council's Comments on the objections

Highways Act 1980

The Kent County Council

**(Public footpath ZF43 (Parts), Faversham) Public Path Creation Order
2016**

and

**(Public Footpath ZF5, (Parts) Faversham) Public Path Extinguishment
Order 2016**

PINS ref:

(Public Footpath ZF5 (part) Faversham) PPEO and (Public Footpath Faversham ZF43) PPCO
Comments of the Order Making Authority on the objections to the Order

1. The County Council received 58 objections and representations to the Kent County Council (Public Footpath ZF43 (Parts), Faversham) Public Path Creation Order 2016 and Kent County Council (Public Footpath ZF5, (Parts) Faversham) Public Path Extinguishment Order 2016. The responses were relatively evenly split in terms of support and objection with 27 representations, many on behalf of representative bodies, writing to express support for the orders and 31 objections. The view of the Public Rights of Way (PRoW) and Access Service is that the objections received must be viewed in the context of the very great support for the Orders also expressed during the consultation period.
2. Two of the objections to the Orders were made by individuals who opposed the extinguishment of sections of Public Footpath ZF5 on the basis that development should not lead to the loss of public rights. It is the PRoW and Access Service view that these two objections fail to properly recognise the combined effect of the two Orders which preserve as far as is practical existing rights in addition to creating further rights.
3. The majority of the objections to the Orders, and specifically the Creation Order, are made by residents of, or representative bodies, on behalf of residents of Faversham Reach and Waterside Close Estates, with the points made in opposition to the Orders falling into a number of broad categories:
 - General process
 - The history of the matter

- The validity or otherwise of the outstanding Town and Country Planning Act 1990 section 106 agreement.
 - The need for creek-side access
 - The impact on residents, including potential nuisance and criminal activity
 - Mitigation
 - The suitability of the proposed route for public use.
 - The potential financial implications in respect of construction costs and future maintenance.
4. The view of the PRoW and Access Service in response to the objections made is set out under these broad headings below.

General process

5. The point is taken the views of objectors, though small in number, should not be overridden.
6. The PRoW and Access Service's view is that every opportunity has been provided for residents, and others, to express their views on the proposals. The current Orders were made after a Regulation Committee Panel resolution on the 20 February 2016. That Panel meeting considered an options report for resolving what is a long standing matter. The options report reflected responses to an informal consultation with all interested parties. Those supporting and opposing the proposal were given the opportunity to make representations to the Panel. [Minutes provided – Regulation Member Panel Meeting – 20 February 2016]

7. The consultation by the PRoW and Access Service followed careful consideration of the Inspector's decision on two earlier Orders made by the County Council to extinguish a section of Public Footpath ZF5 and create alternative provision around Faversham Reach Estate. Those orders reflected the residents' own application.
8. Additionally the current Orders have been made in line with all relevant procedures and guidance. The process affords every opportunity for residents to make representation, and in the case of opposed Orders for those representations to be independently and impartially considered by an Inspector on behalf of the Secretary of State.

The history of the matter

9. A number of objectors make the point that the obstructions to Public Footpath ZF5 ("the Public footpath") are long standing. In granting planning consent for the Faversham Reach development the existence of the footpath was not recognised. The existence of the public footpath was not identified through local land searches undertaken at the time of the purchase of the properties at Faversham Reach, on at least 30 occasions, and the public footpath is not shown on the planning documents or in land registry documents. Subsequent planning applications have received consent without reference to a public footpath, specifically for the installation of railings. It is unfair to current residents that failings in respect of planning over a 25 year period should now be resolved in this way.

10. The view of the PRoW and Access Service is that the public footpath is recorded in the Definitive Map and Statement, which provides conclusive evidence of the existence and alignment of the public footpathⁱ. Title deeds record matters relating to property such as any private rights of access. It is not the purpose of title deeds to record public rights of way and the failure of those deeds to show a public footpath would be anticipated.
11. It is accepted that in the past only had the question been specifically asked would the existence of the public footpath have been identified. Since 4th July 2016 questions relating to the existence of PRoW, and applications to record or amend them, are included in the local authority CON29 form and asked in respect of all property purchases.
12. It is clearly regrettable that the existence of the public footpath was not identified at the time of the planning application for Faversham Reach Estate, and steps taken at that time to prevent the obstruction of the path by either accommodating it within the design or making an order to divert or extinguish it. Unfortunately as this was not done the County Council is faced with a situation where the public footpath is obstructed by a number of residential properties and a former shipyard wall. However, the County Council is under an obligation to assert and protect the rights of the public to the use and enjoyment of any highway for which it is the highway authority and to prevent as far as is possible the stopping up or obstruction of the highway.ⁱⁱ Given the nature of the obstructions to the public footpath the only tenable solution is to divert or extinguish the affected section of the route. The County Council's

Orders in this case reflect public consultation and detailed consideration of the options available to resolve this matter. The solution most acceptable to residents of Faversham Reach Estate, orders to extinguish the public footpath within the estate and create a new footpath on a long used route around the perimeter of the estate, was pursued by the County Council on their behalf, but the orders were not confirmed by the Secretary of State following a public inquiry.

Validity of the section 106 agreement

13. Waterside Close residents raise objections to the creation of a public footpath beside the creek at Waterside Close. The Town and Country Planning Act 1990 section 106 agreement was not implemented in full, despite a direction from the Local Government Ombudsman. The creation of a footpath is just one outstanding element of the agreement that also considered CCTV and lighting amongst other matters. The route now proposed does only partly follow the alignment indicated in the agreement; that route running to the gates to the estate.

14. It is the view of the PRow and Access Service that the intention to create creek-side access at Waterside Close was clearly expressed in the section 106 agreement and confirmed in further correspondence with the developer. That the agreement has not been implemented over many years seems to relate to a failure of the planning authority and subsequent title holders to conclude the creation agreement,

along with other matters, rather than a material change in circumstances that would render the access to be provided unnecessary or no longer desirable.

15. The PRow and Access Service observe that the obligations imposed under section 106 were necessary to make a development proposal acceptable in planning terms. Planning obligations should only be sought where they meet all of the following tests, they are:

- Necessary to make the development acceptable in planning terms
- Directly related to development
- Fairly and reasonably related in scale and kind to the development.

16. It is clearly the case that both the planning authority and developer entered an agreement for Waterside Close and that creek-side access was considered necessary to make the development proposal acceptable. It is also the case that access was constructed beside the creek to meet the requirements of the agreement. It therefore follows that the agreement should have been concluded and that the public should be able to enjoy the access intended. The planning authority, Swale Borough Council support the Creation Order and wish to see it implemented.

17. It is accepted that the Creation Order deviates in part from the section 106 agreement route. It provides access around the slipway to link with Faversham Reach rather than simply exiting through the gates at Waterside Close. It does however provide a means to deliver access without the need to further pursue the section 106 agreement in respect of public access and in doing so it contributes to a solution that

would see the long term obstruction of Public Footpath ZF5 at Faversham Reach resolved.

The need for creek- side access

18. A number of objectors challenged the need for the proposed creation route pointing to the existence of alternative inland routes linking Crab Island with Ham Marshes. It is stated that residents of Upper Brents and North Preston would use existing routes rather than the creation route. Brents Community Association did not support the necessity for the route.

19. It is asserted that the creation route would provide no real benefit to existing and potential users, that the Creation Order route would provide no unique or attractive views and that the existing routes provide an interesting and varied alternative. The economic case for creating the path was also questioned on the basis that there is no assessment of quantifiable benefit and no evidence that the expenditure would be repaid through economic activity. While the public may like a path they do not need a path.

20. The County Council has exercised its power to make the Creation Order as it is satisfied that a public footpath beside Faversham Creek would add to the convenience and enjoyment of a substantial section of the public and to the convenience of persons resident in the area. This view is supported by the 26 representations received in support of the Creation and Extinguishment Orders. Many of the representations were received from representative bodies with many members.

21. The Faversham Creek Streetscape Strategy and the emerging Faversham Creek Neighbourhood Plan both reflect the desire of a substantial section of the public for a creek-side path. The inclusion of creek-side access within the section 106 agreement for Waterside Close further indicates that the provision of a footpath is a long-standing and beneficial goal, considered to add to public enjoyment and convenience.

22. Research relating to the economic benefits of public access has been carried out; the ongoing Monitoring Engagement with the Natural Environment survey undertaken by Natural England demonstrates the economic benefits delivered through visits to an area. Natural England's assessment of its Paths For Communities Project demonstrated high levels of return on investment where new public paths were created. There has been no specific assessment of the economic benefits of creating access beside Faversham Creek of which the PRow and Access Service is aware. However the test for creation is not an economic one and in any event in this case it should be viewed in light of the financial commitments made to meeting the costs of provision from a number of organisations, reflecting the wide base of support for the creation. The County Council is confident that the Orders would have a positive economic impact in terms of tourism and recreation in particular.

23. It is accepted that there are alternative routes providing connections between Crab Island and Ham Marshes. The existence of these alternatives was given thorough consideration at the 2014 Public

Inquiry. In that case the Inspector concluded that were a realigned Public Footpath ZF5 available beside Faversham Creek it would be likely to be used.

24. It may be that residents of Upper Brents and North Preston would elect to use other existing highways particularly where they provide the most direct route and journeys are being primarily made for utilitarian purposes. However that cannot be taken as an indication that a creek-side path would not add to the convenience or enjoyment of a substantial section of the public, as evidenced by the many representations made in support of the Orders. Notwithstanding opposition expressed by residents it would also provide a direct path, of high amenity, between Faversham Creek and Waterside Close Estates and Faversham town centre.

Impact on residents and mitigation options

25. Objections raised to the Orders pointed to a number of effects that the creation of a footpath would have on the rights of persons interested in the land. These in particular related to:

- Loss of privacy: public use in close proximity to property and to the rear of property and moored boats. Views directly into living areas from the proposed footpath. The detrimental impact on residents' social events in communal areas.
- Security of both residential property and moored boats: Residents identified the feeling of security that living in a gated community provided. This was cited as a reason for choosing to live at

Waterside Close by one single female respondent. Past incidents involving theft from and damage to moored vessels were identified along with concerns that the creation of a right of way would lead to a greater number of such instances. Railings were erected at Faversham Creek Estate in the past by residents to prevent access from Crab Island and Waterside Close, this followed a grant of planning permission.

- The likelihood of increased instances of antisocial and criminal behaviour such as noise, litter, dog fouling, cycling, increased risk of theft and arson were all referred to as potential impacts.

26. The alignment and design of the proposed Creation Order route were also highlighted in respect of potential adverse impacts on residents of Faversham Reach and Waterside Close. The route is aligned to the rear of houses not in front. The levels of the platforms and cantilever walkway will result in gardens being overlooked.

27. It was argued that the creation of rights may necessitate a change in the layout and use of communal areas and adversely impact on private events and communal gatherings at Waterside Close. The creation of a right of way may result in higher insurance premiums.

28. To offset the potential adverse impacts residents of both Faversham Reach and Waterside Close Estates requested night time closure of the creek-side public footpath along with other mitigation measures such as CCTV and lighting.

29. The slipway area was a significant cause for concern in a number of responses, particularly the potential impact on parking bays, a

communal area used for composting and access to the slipway. It was also said that public access would interfere with the safe mooring of boats.

30. The PRow and Access Service acknowledges that it is impossible to prevent all instances of criminal and antisocial behaviour. Littering, dog fouling and graffiti are all present, albeit at low levels, on existing public rights of way in the area and it would therefore be overly optimistic to think that they would not occur on the Creation Order route.

31. However, consideration of crime reports for the area, based on Kent Police records and referred to at the Regulation Committee Member Panel on the 22nd February 2016, indicate that the area is subject to only low levels of criminal activity. It is worthy of note that instances of theft from and damage to moored vessels cited by Faversham Reach residents occurred both before and after railings were installed intended to prevent access. It should also be noted that public access via Public Footpath ZF5 and deviating around obstructions to it, is currently available from the gates to Faversham Reach.

32. Waterside Close was designed with the expectation of public access being provided beside the creek. While residents have come to view the Estate as a gated community, it was not designed on that basis. The creek- side walkway was designed to be segregated from the properties by way of fences and the garden areas are not overlooked. The same is true along much of the length of the creek- side through Faversham Reach, where the proposed (and existing) footpath is overlooked from the upper storeys of adjacent properties. The point is

made that the proposed route is particularly intrusive in respect of numbers 3 and 13 Faversham Reach and number 2 Waterside Close. Numbers 3 and 13 Faversham Reach currently obstruct Public Footpath ZF5 and those sections still extant have the self-same views into the properties. Number 2 Waterside Close is particularly close to the proposed footpath. The proposed alignment at this point is that which was envisaged for the access to be created through the section 106 agreement. The potential for providing a screening wall to mitigate some of the impact of having a path in close proximity to the property has been discussed with the occupants of number 2 Waterside Close.

33. While the PRow and Access Service cannot agree to provide or maintain CCTV or street lighting, discussions did take place with residents of both Estates to see if there are any practical measures that can be introduced to mitigate perceived potential antisocial behaviour and criminal activity. Measures discussed included demarking public and private areas, and the provision of fences, walls and screening. While it was not possible to agree measures, in part because some of the measures proposed had adverse impacts for those needing to moor boats, the County Council is willing to explore mitigation further with residents in the event that the submitted Orders are confirmed. In respect of the night-time closure of the path, should the Orders be confirmed; it is no longer within the County Council's gift to make a gating order, the effect of which would be to close the proposed footpath at night time. This power now rests with the Borough Council under the Antisocial Behaviour Crime and Policing Act 2014, in the

form of a Public Spaces Protection Order. It would therefore fall to Swale Borough Council to consider any application for a Public Spaces Protection Order against the relevant tests and any policy that it has adopted. It should be noted that the gating of highways to prevent criminal or antisocial behaviour has to balance that aim with the public benefit derived from the use of the highway. When the County Council had the power to make gating orders it made only two in the entire county and then in response to high levels of antisocial behaviour that were clearly linked to the highway.

34. Further detailed design work has been commissioned to provide clarity in respect of the layout in the slipway area. It is the view of the PRoW and Access Service that there is sufficient room available to accommodate both public access on foot and parking. The dimensions of the walkway should ensure that the use of the slipway is not significantly impeded. There is an area of amenity land adjacent to the parking areas that is understood to be held by Waterside Close Residents Association Ltd for further development for offices, including parking. This area could in part be configured to accommodate any loss of parking in the slipway area, indeed the existing proposed layout would mean that the area currently used for parking would be required for access and manoeuvring.

35. There are significant communal areas in both Faversham Reach and Waterside Close Estates that are not impacted upon by the Creation Order route and on which communal events and gatherings could be held without any impact from public access. In any event communal

events and public access need not be mutually exclusive and frequently are not. Public rights of access are present beside many hundreds of miles of navigable waterway, harbours and marinas. Public access need not hinder or present a safety issue to the mooring of boats. Use of public rights of way, indeed use of the existing creek-side access, is sporadic in nature. Users are generally respectful and aware both of their surroundings and any activities taking place; they are likely to be tolerant and to pause to avoid interfering with mooring (etc).

The suitability of the proposed route for public use

36. A number of matters have been raised in respect to the suitability of the alignment and design of the public footpath. These matters include:

- A lack of detailed design for the slipway area that makes it difficult to assess the impacts of establishing the cantilever walkway has on the use of the slipway and on parking and amenity areas.
- The need to retain and not compromise existing sea defences.
- The need to avoid compromising the foundations of neighbouring properties.
- The proximity of the creation route to properties.
- The danger to public users, posed by the slipway, and falls from the footpath into the creek.
- The impact of construction on ecology.

37. It is the view of the PRow and Access Service that the route proposed would provide a coherent, legible creek-side path that is clearly defined

and easy for the public to follow. Alternative proposals that take a route through the gates of the estates would be more difficult to follow, more likely to result in wandering and would remove the ability to lock gates that may effectively control vehicle access to and from the estates.

38. In the case of Waterside Close the creek-side walkway was designed and constructed to provide for public access. It is accepted that the slipway area requires more detailed design to clarify precise dimensions and the scale of impact. However the feasibility report made it clear that a walkway could be constructed, and by reducing the dimensions of the walkway the impact on the slipway should be significantly reduced and not adversely impact the use of the slipway for the launch of boats.

39. The route beside the creek and marina area at Faversham Reach Estate is if anything better constructed than that at Waterside Close and considerably safer than many waterside and coastal access paths with ill-defined margins, and steep drops.

40. The design includes a guard rail on the ramps and cantilever walkway. At all other sections the sea wall capping beam clearly defines the seaward edge of the path. Post and chain fencing exists along the capping beam at Waterside Close, providing further protection. While there is no agreement for the provision of similar fencing at Faversham Reach the PRoW and Access Service is open to its inclusion in any detailed design.

41. The constraints to design have been identified in the detailed design brief to the County Council's engineering partner and were reflected in

the outline designs provided in the feasibility report, notwithstanding the amendments to the design required at the slipway. The construction phase would be managed to mitigate any adverse impacts to property identified at the design stage. The need to retain the integrity of the existing sea defences and to avoid design that may compromise them in the long term is understood as a design requirement. Ecological assessment of the area has been undertaken during the feasibility study and further assessment and mitigation would be put in place, in common with all construction projects, should the Orders be confirmed.

42. The potential danger to users, particularly unaccompanied children was identified by a number of respondents, with swift tidal flows, mud and steep drops identified in addition to the draw of the slipway area.

43. Following the objection period the Service was notified of an instance of a gentleman wandering in to the creek at the slipway area and requiring rescue. While such a case should not be dismissed it is understood that the gentleman suffers from dementia and is prone to wandering. It is also noted that this happened in the absence of public access.

44. There are very many instances where there is unguarded public access to a water side, steep drops, swift flowing water and mud. These include Dover harbour wall, the White Cliffs, the River Medway at Tonbridge and Aylesford to name a few Kentish examples. It is the view of the PRow and Access Service that the safety concerns are easy to over-state and are not supported by the levels of accident

reports or insurance claims relating to the PRow network over many years. It is the view of the PRow and Access Service that the alignment of the proposed creation route would be clearly legible for users; it follows the water side. It is the least intrusive remaining option for residents, the Faversham Reach residents' favoured option having been rejected following the Public Inquiry in 2014. It is the alignment that most closely reflects the Government's stated aim of creating the England Coast Path. It is also the alignment that best resolves matters relating to what would and would not be coastal access margin: land to which the public would have a right of access on foot.

The potential financial implications in respect of construction costs and future maintenance.

45. A number of respondents highlighted the costs of construction, believing that the costs of construction would be greater than stated and also questioned how the costs of future maintenance would be met.

46. The feasibility report produced by Amey for the County Council provided indicative construction costs for the scheme based on the costs of similar recent construction activities. The indicative costs included a 10% contingency. The PRow and Access Service preferred options were estimated at £92,000. It is always possible that final scheme costs may vary reflecting detailed design cost, amendments to design, the inclusion of un-costed mitigation measures and market competition. It is however considered that the scheme can be funded.

There are commitments to meet the costs of the construction from local charities and Swale Borough Council and Faversham Town Council. In addition the County Council holds an identified reserve for the scheme of £30,000 which will in the main meet design costs and is intended to provide a further contingency if required.

47. In respect of the maintenance of the proposed route of the footpath the County Council is responsible for the maintenance of almost 7,000 Km of Public Rights of Way, including over 3,000 structures some of which are relatively complex. The design criteria used is for a design life of a minimum of 120 years. While some elements of the ramps and walkways will require periodic inspection and replacement these are not viewed as significant when considered in the context of the network as a whole or indeed when considered in the context of other highways being adopted by the County Council following development.

48. The existing paving is durable and will withstand pedestrian use. Repair is likely to be to small areas only. Maintenance costs would be entirely in line with those that exist for the rest of the public rights of way network.

49. General tidiness and litter picking is a matter for Swale Borough Council.

ⁱ Wildlife and Countryside Act 1981 section 56.

ⁱⁱ Highways Act 1980 section 130.