

**Highways Act 1980**

**The Kent County Council**

**(Public Footpath ZF43, Faversham) Public Path Creation Order 2016**

and

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

**PINS reference: ROW/3175170 & ROW/3175171**

## Statement of Case on behalf of the Kent County Council

### Introduction

1. The Kent County Council (“the County Council”) is the highway and surveying authority for the area of Faversham. The County Council has powers under Section 118 and Section 26 of the Highways Act 1980 (“the 1980 Act”) to make public path Orders to extinguish and to create public rights of way. The County Council has made the following two Orders under the 1980 Act:
  - The Kent County Council (Public Footpath ZF43 (Parts) Faversham) ) Public Path Creation Order 2016 (“the Creation Order”);
  - The Kent County Council (Public Footpath ZF5 (Parts) Faversham) Public Path Extinguishment Order 2016 (“the Extinguishment Order”).
2. On publication of the Orders, the County Council received 31 objections to the confirmation of the Orders and 27 representations in support. It may not therefore itself confirm the Orders but has referred them to the Secretary of State for determination. The County Council seeks the confirmation of both Orders with two minor amendments to the Creation Order as follows:

- I. the width of the path between points H & I to 1.2 metres, to limit the impact of the proposal on the use of the slipway  
and,
- II. amend the date on which the new route comes into being to 28 days after the date on which the Order is confirmed.

The County Council intends to rely on its permitted development rights accorded under the General Permitted Development Order 2015 and powers of improvement in Part V of the Highways Act 1980 and therefore seeks confirmation of the Order in advance of the construction of the highway in order to benefit from these provisions. Reflecting the fact that access will not be available on confirmation the County Council would introduce a temporary traffic regulation order prohibiting access until the new route has been constructed. This will also facilitate safe working practices through the construction period.

The effect of the Orders if confirmed:

3. If confirmed as made the Creation Order will create:

A new length of Public Footpath numbered ZF43 which commences at NGR TR 0174 6192 (Point B) and runs in a generally south easterly direction passing over a ramp for approximately 18 meters to NGR TR 0176 6191 (Point C), generally north easterly for approximately 21 metres to NGR TR 0177 6192 (Point D), generally north westerly for approximately 13 metres to its connection with the unaffected length of

Public Footpath ZF5 at NGR TR 0177 6193 (Point E). The new length of Public Footpath ZF43 will have a width of 2 meters (measured from the landward edge of the capping beam) except between points B –C where the width will be reduced to 1.5 metres.

A new length of Public Footpath also numbered ZF43 which commences from a point on the unaffected length of Public Footpath ZF5 at NGR TR 0180 6196 (Point F) and runs in a generally south easterly direction for approximately 11 metres to NGR TR0181 6196 (Point G), then generally east north easterly through north north easterly for approximately 24 metres to NGR TR 0183 6197 (Point H), then generally north westerly through north north easterly passing along a cantilever walkway for approximately 15 metres to NGR TR 0182 6198 (Point I), then generally north easterly for approximately 6 metres to NGR TR 0183 6199 (Point J), then generally south south easterly for approximately 18 metres to NGR TR 0183 6197 (Point K), then generally east north easterly for approximately 157 meters to NGR TR 0198 6203 (Point L) and then generally northerly passing over a ramp for approximately 10 metres to its connection with Public Footpath ZF32 at NGR TR 0198 6204 (Point M). Between the Points F-G-H-I-J-K-K1-L-M on the Order Plan. The new length of Public Footpath ZF43 will have a width of 2.0 metres (measured from the landward edge of the pile capping beam between points F-G and K1-L and between the points G-H the width will be 1.8 metres, between

the point H-I –J the width will be 1.4 metres, between the points J-K the width will be 1.3 metres, between the points K-K1 the width will be 1.8 metres and between the points L-M the width will be 1.5 metres.

4. If confirmed as made the Extinguishment Order will extinguish:

The entire width of that length of Public Footpath numbered ZF5 which commences at a point on the unaffected length of Public Footpath ZF5 at NGR TR 0172 6188 (Point A) and runs in a generally north easterly direction for approximately 65 metres to its connection with the unaffected length of Public Footpath ZF5 at NGR TR 0177 6193 (Point E) Between the Points A-E on the Order Plan. And,

The entire width of that length of Public Footpath numbered ZF5 which commences at a point on the unaffected length of Public Footpath ZF5 at NGR TR 0180 6196 (Point F) and runs in a generally north north easterly, north north westerly then north westerly direction for approximately 72 metres to its connection with the unaffected length of Public Footpath ZF5 at NGR TR 0177 6202 (Point X). Between Points F-X on the Order plan.

**Proposed modifications**

5. If the Orders are confirmed the County Council respectfully requests that the Inspector modifies the Creation Order as follows:

In part 1 of the Order delete “365 days from the date of confirmation and replace with “28 days from the date of confirmation”

In part 1 of the Schedule to the Order *delete* the width 1.4 metres between H-I-J and replace with 1.2 metres between H-I- J,

### **Background**

6. The line of ZF5 is obstructed by five residential buildings, a concrete wall, a brick wall and areas of landscaping. The residential development was given planning consent in late 1987 and appears to have been completed in summer 1990. The walls surrounding the site appear to have been present when the site was operational as a shipyard. It is understood that the shipyard was built in the 1930s.
7. The land crossed by ZF43 is owned by Faversham Reach Residents Association and Waterside Close Residents Association Ltd. The land crossed by ZF43 at Waterside Close was to have been dedicated to the public as a footpath through a Town and Country Planning Act 1990 section 106 agreement, however this process was never formally completed.
8. Before determining to make the present Orders, the County Council had previously considered an application to divert public footpath ZF5 within Faversham Reach Estate. That application was rejected by a panel of the County Council Regulation Committee in favour of an application by Faversham Reach Residents Association to extinguish public footpath ZF5 within the estate and to create a public footpath (ZF42) around the perimeter of the estate. Orders to this effect were subsequently made and

submitted to the Secretary of State. Those Orders were considered by Inspector Alison Lea, on behalf of the Secretary of State for Environment , Food and Rural Affairs at a Public Inquiry at Faversham, held at Faversham on 20<sup>th</sup> to the 22<sup>nd</sup> May 2014. In reaching a decision not to confirm the Orders, reference FPS/W2275/6/4&3/12 [Appendix 1], the Inspector concluded:

- I. the route around the perimeter of Faversham Reach Estate had already been established as a public footpath. A Definitive Map Modification Order was subsequently made and confirmed on 20 June 2016 to record that route as Public Footpath ZF42.
  - II. Were the obstructed ZF5 made available for use on an alternative alignment the route would be likely to be used extensively by members of the public.
9. The County Council then consulted on and considered a number of options to resolve the obstruction of public footpath ZF5. The County Council's preferred option was to create creek-side access from Crab Island to Ham Marshes beside Faversham Creek, for a number of reasons:
- I. It resolved the continuing obstruction of Public Footpath ZF5 by houses and a shipyard wall.
  - II. It provided creek-side access in accord with the Faversham Street Scape Strategy and emergent Faversham Creek Neighbourhood Plan. [Appendix 2a & b and 3]

- III. It would bring to conclusion the creation of creek-side access at Waterside Close that was intended to have been provided through a Town and Country Planning Act 1990 section 106 agreement.
- IV. It would provide access consistent with the creation of the England Coast Path, and remove any remaining uncertainty about the extent or otherwise of coastal access margin at Faversham Reach and Waterside Close Estates.
- V. It would provide a coherent/ legible route beside Faversham Creek.

The proposal enjoyed support from a broad range of local authorities, organisations and individuals but was opposed, by some local residents, residents' associations and a Swale Borough Councillor.

10. To address a number of matters raised in response to the consultation a study was undertaken on behalf of the County Council by Amey its engineering services partner, to establish the feasibility and cost of constructing a creek-side route.

11. On February 22<sup>nd</sup> 2016 a Panel of the County Council Regulation Committee determined that two Public Path Orders should be made to extinguish parts of public footpath ZF5 at Faversham Reach Estate and to create a public footpath beside Faversham Creek, linking Crab Island with Ham Marshes. It was further resolved that the Orders should only be

submitted to the Secretary of State for confirmation (it was anticipated that that the Orders would be opposed) in the event that funding for the construction of the creek-side route was secured. The funding for the construction of the creek- side route has been secured as detailed in paragraph 31 below.

### **The legislative framework**

12. Section 118 of the 1980 Act provides:

*(1) Where it appears to a council as respects a footpath, bridleway or restricted byway 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.*

*An order under this section is referred to in this Act as a “public path extinguishment order”.*

*(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.*

*(3) A public path extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.*

*(4) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.*

*(5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering—*

*(a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or*  
*(b) under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public, the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.*

*(6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.*

*(6A) The considerations to which—*

*(a) the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order, and*  
*(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order, include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would extinguish a public right of way.*

13. Section 26 of the 1980 Act provides:

*(1) Where it appears to a local authority that there is need for a footpath, bridleway or restricted byway 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, bridleway or restricted byway over the land.*

*An order under this section is referred to in this Act as a “public path creation order”; and for the purposes of this section “local authority” has the same meaning as in section 25 above.*

*(2) Where it appears to the Secretary of State in a particular case that there is a need for a footpath, bridleway or restricted byway as mentioned in subsection (1) above, and he is satisfied as mentioned in that subsection, he may, after consultation with each body which is a local authority for the purposes of this section in relation to the land concerned, make a public path creation order creating the footpath, bridleway or restricted byway.*

*(3) A local authority shall, before exercising any power under this section, consult any other local authority or authorities in whose area the land concerned is situated.*

*(3A) The considerations to which—*

*(a) the Secretary of State is to have regard in determining whether or not to confirm or make a public path creation order, and*

*(b) a local authority are to have regard in determining whether or not to confirm such an order as an unopposed order, include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the proposed footpath, bridleway or restricted byway would be created.*

*(4) A right of way created by a public path creation order may be either unconditional or subject to such limitations or conditions as may be specified in the order.*

*(5) A public path creation order shall be in such form as may be prescribed by regulations made by the Secretary of State, and shall contain a map, on such scale as may be so prescribed, defining the land over which a footpath, bridleway or restricted byway is thereby created.*

*(6) Schedule 6 to this Act shall have effect as to the making, confirmation, validity and date of operation of public path creation orders.*

### **Relevant case law**

14. In applying the provisions of Section 118 of the 1980 Act there is some relevant case law which must also be taken into account.

15. Under Section 118 (2) the Secretary of State shall not confirm an Order unless he considers it 'expedient' to do so (having regard to various factors).

16. The meaning of the term 'expedient' in Section 118 is not defined in the 1980 Act, nor has it been considered by the Courts in relation to Section 118. However, the meaning of expedient in relation to section 110 (2) of the Highways Act 1959 (the predecessor power) was considered in *R v Secretary of State for the Environment ex parte Barry Stewart* (1980) 39 P & CR 534 [Appendix 4] where it was held that expedient must mean that:

*"....to some extent at all events, other considerations can be brought into plan besides user. The judgment as to whether or not it is expedient to stop up a path is bound to be of broad character".*

The meaning of expedient in Section 119 of the 1980 Act was also considered in *Ashbrook v East Sussex County Council* [2002] EWHC 481 (Admin) where Grigson J said:

*"The Concise Oxford Dictionary gives two definitions of expedient;*

*'i) convenient and practical although possibly improper or immoral.*

*ii) Suitable and appropriate.'*

*I think it safe to assume that Parliament had in mind the second."*

17. There is DEFRA guidance in Rights of Way Circular 1/09 [Appendix 5] (paragraph 5.23) in relation to extinguishment orders. This says:

*"An extinguishment order can be made only if the authority considers it expedient that the way should be stopped-up because it is not needed for public use. Authorities must disregard temporary circumstances, including*

*any buildings or other structures preventing or diminishing the use of the way. Further information is available in Planning Inspectorate Advice Note 9 (s 18)”*

18. Paragraphs 18 and 19 of the Planning Inspectorate Advice Note 9, March 2001, refers to the *Stewart* case [Appendix 6] and how this case applies to a situation where a footpath cannot be used because it was obstructed. The advice given is that, *“Section 118 (6) requires temporary obstructions to be disregarded when considering the merits of the order. In Stewart, the Court found that a pine tree with a girth of 2’6”, a hedge 4’ wide and 12’ high and an electricity substation were capable of being temporary obstructions and could be disregarded under subsection (6).”*

19. Guidance on creation Orders is contained in paragraph 5.21 of Circular 1/09 [Appendix 5]. This states, inter alia, *“Before making an order, an authority must be satisfied that it is expedient that a way should be created, having regard to the extent to which it would add to the convenience of enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and the effect that the creation would have on the rights of persons interested in the land, account being taken of the Act’s provisions as to compensation.”*

20. As with Section 118, expedient is not defined in Section 26 and the County Council considers that it is appropriate to define it per *Ashbrook* and per *Stewart* (see above).

### **The case in support of the Creation Order**

21. The evidence presented to the Public Inquiry , 20 – 22<sup>nd</sup> May 2014, the conclusions of the Inspector in her decision [Appendix 1]; the response received to the consultation on the various options considered to provide a solution to the long standing obstruction to Public Footpath ZF5 as reported to the Regulation Committee Member Panel on the 20 February 2016, the minutes of which are provided as [Appendix 7], the representations received to the consultation on the creation and extinguishment Orders all point to a desire to see the creation of public access beside Faversham Creek.

22. The County Council considers that it is suitable and appropriate to create a public footpath alongside Faversham Creek:

- To fulfil a need that local residents have to access the creek, as demonstrated in the responses to consultations outlined above, the Faversham Street Scape Strategy 2012 [ Appendix 3] and the emergent Faversham Creek Neighbourhood Plan 2014 [ Appendix 2a and 2b]
- To add to the enjoyment of a substantial section of the public by creating a convenient, direct, high amenity access beside the creek

which enjoys far reaching views along Faversham Creek, including iconic buildings.

23. The creation Order enjoys the support of Swale Borough Council and Faversham Borough Council who have both been consulted and have offered financial support towards the costs of providing access should the creation Order be confirmed.

24. In having regard to the impact the creation (and extinguishment) would have on residents the County Council's view is that the effect of the Orders at Faversham Reach if confirmed:

- Would resolve the longstanding obstruction of the footpath by residential properties to the significant benefit of those owning the affected properties.
- Would provide a clear route for the public to follow, rather than having a situation where the public have a right of access and in exercising this right may deviate from the obstructed line of the path.
- Would provide public access beside the creek at Waterside Close that was considered necessary at the time that planning consent was granted for the estate and that should have been delivered through the Town and Country Planning Act 1990 section 106 agreement.
- In following the creek beside the slipway, via a cantilever walkway, minimise disruption to residents.

### **The case for confirmation of the Extinguishment Order**

25. The County Council considers that the parts of ZF5 proposed for extinguishment (A-E and F-X on the Order plan) are not needed for public use. The *Stewart* case, [Appendix 4] is authority for the proposition that a path may be determined to be “not needed for public use” if there was, for example, an equally convenient path nearby.

26. Section 118 (5) of the 1980 Act allows for proceedings preliminary to the confirmation of a public path extinguishment Order to be taken concurrently with proceedings preliminary to the confirmation of a public path creation Order and that where this is the case the Inspector may have regard to the extent to which the public path creation Order would provide an alternative path. This is the approach that the Council has adopted here, and it is the Council’s view that the unaffected length of public footpath ZF5 (E-F) when considered with the lengths of path created through the creation Order (A-B-C-D-E) and (F-G-H-I-J-K-L-M) Public Footpath ZF43 and the existing Public Footpath ZF42, running between points B and X on the Order plan, will provide equally convenient alternatives to those lengths of public footpath proposed to be extinguished.

27. The County Council considers that it is expedient to confirm the Extinguishment Order, taking a broad view, on the ground that an alternative path will be made available by the confirmation of the Creation Order and that the existing route of ZF5 can only be made available to the public by the removal of residential properties. Whilst the County Council accepts that it is

only rarely appropriate to make an Order to extinguish a public right of way because it is illegally obstructed, the County Council considers that the fact of these particular obstructions is a relevant factor for the Inspector to take into account when considering the Orders and any alternative options.

28. There is a tension in the Inspector's decision FPS/W2275/6/4&3/12 [Appendix 1]. While the Inspector, in reaching a decision on the two previous Orders concluded that the obstructions to public footpath ZF5 should be disregarded for the purposes of the Act she also concluded that the obstructions were likely to endure and placed weight on the need to realign the path. Given the nature of the obstructions to the route, it is the County Council's case that sections of the public footpath should be extinguished on the basis that the effect of the Creation Order and the preservation of sections of the existing public footpath ZF5 have the effect of preserving that access that is likely to be used by the public were it available. The proposal reflects the Inspectors earlier decision.

### **Objections and representations**

29. The County Council's response to the objections and representations are set out separately [Appendix 8]. The County Council has nothing further to add at this stage.

### **Other considerations**

#### *The use of a creation and extinguishment order*

30. In light of the Inspectors comments [Decision FPS/W2275/6/4&3/12]

The County Council considered the making of an Order to divert Public Footpath ZF5. However, given the proposed termination point of the diverted route, point M on the Order plan, it was considered that it may not be possible for the proposal to meet the test set out at section 119 (2)(b )

*119 (2)“A public path diversion order shall not alter a point of termination of the path or way*

*(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public”*

Strictly point M is on a highway, Public Footpath ZF32 which links to Public Footpath ZF1 and then Public Footpath ZF5 back to the original point of termination, point X on the Order plan.

The County Council also considered that, even were the test set out in the Highways Act 1980 section 119 (2)(b) met, given the substantial length of path to be provided at Waterside Close, it is more accurate and appropriate in this instance to make creation and extinguishment orders.

*Funding for the construction of the created route*

31. A number of bodies have set aside funds to meet the estimated £92000 cost of constructing the new path. Those bodies are:

Swale Borough Council : £60000

The Bensted Charity      £24500

Faversham Municipal Charities £22000

Faversham Town Council £5000

In addition to the above the Kent County Council holds a contingency reserve of £30000, should costs increase. Additionally, to date, it has been possible to meet design costs from existing revenue allocations.

*Kent County Council's Countryside & Coast Access Improvement Plan (CCAIP)*

32. The Council's CAIP 2007-2017 is the relevant Rights of Way Improvement Plan. The Council considers that the Orders are not inconsistent with the aims of the CCAIP.

*Crime and Disorder Act 1998*

33. The Council considers that that Orders are not inconsistent with its duty to consider crime and disorder implications (under section 17(1) of the Crime and Disorder Act 1998).

*Equality Act 2010*

34. The Council considers that the Orders are not inconsistent with its public sector equality duty under the Equality Act 2010 an equality impact assessment for the scheme having been completed. Indeed in applying Access for All Design Standards to the design of the creek-side route the path if constructed would be particularly suitable for those with ambulant disability the less mobile and those with young families.

*Protection for agriculture and forestry*

35. Under Section 29 of the 1980 Act authorities have a duty to take due regard to the needs of agriculture and forestry in the making of public path

creation Orders. The Creation Order would, if confirmed provide a link to agricultural land at Ham Marshes; that land is already crossed by public footpaths ZF32, ZF5 and ZF1. A gate would be provided at point M to prevent the egress of livestock. The gate would be authorised under the provisions contained in the Highways Act 1980 section 147, a power to authorise stiles and gates etc on a footpath or bridleway for the purposes of preventing the ingress or egress of animals on land in use for agriculture, forestry and the breeding or keeping of horses. This is the County Council's preferred approach to the authorisation and provision of gates as their removal may be required as a condition of authorisation if land use subsequently changes.

*Duty to conserve biodiversity*

36. Under Section 40(1) of the Natural Environment and Rural Communities Act 2006 authorities have a duty to take due regard to the purpose of conserving biodiversity. The Council commissioned a feasibility study including ecological impact assessment for the works required to establish the proposed creation route. Potential adverse impacts of the construction phase have been identified and mitigation will be put in place prior to and during construction should the Creation Order be confirmed.

**Conclusion**

37. The County Council respectfully requests that the Inspector confirm the Orders with the modifications to the Creation Order set out at paragraph 5 above.

Documents appended to this Statement of Case

Appendix 1: Decision Letter FPS/W2275/6/4&3/12

Appendix 2: Faversham Creek Neighbourhood Plan (Pre – submission draft parts a and b)

Appendix 3: Faversham Creek Streetscape Strategy

Appendix 5: Rights of Way Circular 1/09

Appendix 6: Planning Inspectorate Advice Note 9 2001

Appendix 7: Minutes of the Regulation Member Panel 20 February 2016

Appendix 8: Response to Objectors.

Case law appended to this Statement of Case

Appendix 4: *R v Secretary of State for the Environment ex parte Barry Stewart* (1980) 39 P & CR 534