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## Appeal Decisions

Inquiry Held on 26 – 30 July and 2 - 5 August 2021

Site visits made on 20 July and 12 August 2021

**by Katie Peerless Dip Arch RIBA**

an Inspector appointed by the Secretary of State

Decision date: 25 October 2021

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### **3 Appeals at Land at Whitstable Beach, Whitstable Foreshore, Kent**

**Appeal A: APP/J2210/C/18/3209297,**

**Appeal B: APP/J2210/C/18/3209299**

**Appeal C: APP/J2210/C/18/3209300**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeals are made by Whitstable Oyster Company Limited (Appeal A), Whitstable Oyster Fishery Company (Appeal B) and Whitstable Oyster Trading Company Limited (Appeal C) against an enforcement notice issued by Canterbury City Council.
  - The enforcement notice, numbered ENF/17/00049, was issued on 6 July 2018
  - The breach of planning control as alleged in the notice is the construction of oyster trestles with the associated activity for the purpose of cultivating and farming of oysters on the Land.
  - The requirements of the notice are: 1. Remove all oyster trestles from the Land. 2. Remove all oyster bags, their contents, and any strapping or webbing attached to the oyster trestles from the Land. 3. After the actions of 1 and 2 have been carried out, remove all marker buoys, withies and any other items that warn of the siting of oyster trestles from the land.
  - The period for compliance with the requirements is 2 calendar months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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### **Decisions**

1. It is directed that the Enforcement Notice be corrected and varied as follows: Replace paragraph 1 of section 2 (The land to which the notice relates) with: *'Land at Whitstable Beach, Whitstable Foreshore, landward of the mean low water line and edged red on Plan 1 attached to this Notice, hereafter referred to as the 'The Land'. The mean low water line is shown as a blue line on the plan.'*
2. In sentence 1 of paragraph 2 of section 2, replace *'the survey'* with *'Plan 1'*. In paragraph 4 of section 2, delete the complete sentence beginning *'The oyster trestles are angled away ...'*. In section 3, replace existing text with: *'Without planning permission, the construction of oyster trestles for the purpose of cultivating and farming oysters on the Land'*. Replace sentence 2 of paragraph 1 of section 4 with: *'The Land falls within the District of Canterbury'*. Delete plans 1 and 2 attached to the Notice and replace with Plan 1 attached to these Decisions.

3. Subject to these corrections and variations, the appeals are allowed and planning permission is granted for the construction of oyster trestles for the purpose of cultivating and farming oysters on the Land at Whitstable Beach, Whitstable Foreshore, landward of the mean low water line and edged red on Plan 1 attached to this Decision, subject to the conditions attached as Annex A to this Decision.

### **Application for costs**

4. At the Inquiry an application for costs was made by the appellants against Canterbury City Council (CCC). This application is the subject of a separate Decision.

### **The site and surroundings**

5. The seaside town of Whitstable is well known for its working harbour, the variety of water sports that take place in the area and the 'Whitstable oyster' which has a Protected Geographical Indication (PGI) that is internationally recognised and controlled. Both the native and Pacific oysters grown in the area benefit from this designation.
6. The Whitstable Oyster Fishing Company (WOFC) was originally the Company of Free Fishers and Dredgers of Whitstable, which was incorporated in an Act of Parliament in 1793. From that time, the Land Registry title K781262 has been owned by the corporation and its' successor, the WOFC, which was established in 1896 by a further Act of Parliament. The land owned by the company includes the foreshore and large areas of the seabed either side of the harbour at Whitstable, as well as a number of properties along the seafront.
7. The trestles that are the subject of the Enforcement Notice (EN) lie between the mean low water mark (MLWM) and the mean high water mark (MHWM) on the foreshore of the Swale Estuary opposite the town. The estuary is included in a number of protected environmental areas including the Swale Special Protection Area (SPA), the Swale Site of Special Scientific Interest (SSSI), the Swale RAMSAR site and the Swale Estuary Marine Conservation Zone (MCZ) and the oyster farm can be seen from within the Whitstable Town Conservation Area. The trestles enforced against are part of a larger development of trestles and poles and lines on the land owned by the appellant company on which oysters are grown for both consumption in the UK and for export.
8. The trestles are about 0.75m high and 0.8m wide and consist of metal frames on which bags of oysters are stacked, secured by large elastic straps. The frames are linked and arranged in rows with tracks up to 6m wide between them for access. At intervals the tracks also run at 90° between the trestle rows.
9. The farm is surrounded by a series of 'special marker' buoys and there are also withies, or timber poles, located at the ends of some of the rows. These are higher than the trestles and serve to indicate the exact location of the farm at times when it is covered with water. A number of the withies are higher than the others and marked by flags which are visible at high water. On shore, warning signs have been erected to alert swimmers and water users to the presence of the trestles.

## **Procedural matters**

### Modifications to the enforcement notice

10. Following discussions, agreement has been reached between the appellants and CCC that the EN should be varied to exclude all the trestle rows and parts of rows to the seaward side of the MLWM. This is because CCC's jurisdiction does not extend beyond this point and the positioning of any trestles in the area beyond the MLWM is controlled by other legislation.
11. It has also been agreed between the parties that the EN should be modified to capture all trestles currently landward of the MLWM. It was confirmed at the Inquiry that there has been no change to the number and location of these landward trestles since the EN was issued, and they will therefore all be included in the deemed planning application.
12. If the EN plan is modified by the exclusion of the land seaward of the MLWM, the appellants have agreed to withdraw the appeals made on grounds (b), (c) and (f). The appeals relating to grounds (e) and (d) have also been withdrawn.
13. The wording of the EN also needs to be modified to reflect the extent and location of the trestles enforced against, as agreed between CCC and the appellants in their Statement of Common Ground. As noted above, the plan attached to the EN also needs to be revised and it has been agreed between the parties that if planning permission is granted, the 'red line' of the plan should be drawn to include only the trestles that were under the control of CCC and were in position at the time of issue of the EN, with the remainder of the intertidal area owned by the appellant companies being excluded. Any additional development on this area would then require a further grant of planning permission to authorise it.

### Remaining reasons for refusal

14. During the course of the appeal and the Inquiry, the appellants and Natural England (NE) reached agreement on the likely effects of the development on the ecology of the SPA and the Swale RAMSAR site. NE confirmed in a joint Statement of Common Ground<sup>1</sup> with the appellants that, subject to a condition preventing work from taking place on the oyster farm in temperatures of less than -3°C, they would no longer consider that the trestles enforced against would have an adverse effect on any sites protected under the Habitats Regulations 2017, either alone or in combination with the remainder of the oyster farm.
15. It is also confirmed that this view extends to the conservation objectives of the SSSI and the Swale Estuary MCZ and NE does not maintain any objection to the success of the appeal on ground (a) and the deemed planning application on these grounds. CCC confirmed that it adopts NE's views on these matters.
16. CCC has also confirmed that it no longer considers that there are any archaeological reasons to refuse the application. CCC therefore now puts forward no planning objections to the proposed retention of the trestles enforced against.

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<sup>1</sup> Inquiry document 13

17. However, it was agreed between the appellants and CCC that the EN should not be withdrawn as a result of this situation, because to do so would be prejudicial to the appellants, who would then have to begin the process of applying for planning permission again. It was agreed that it would be preferable to allow the appeals to proceed to a decision.

### **Main Issues**

18. Despite CCC's eventual agreement that it no longer opposes the grant of planning permission for the trestles, the WBC and various interested parties still maintain the objections originally raised by CCC, as well as objections on a number of additional matters.

19. Therefore, from the submissions presented to me during the appeal and at the Inquiry, I consider that the main issues are:

On ground (a): the effect of the development on:

- (i) the environment and ecology of the Swale Special Protection Area (SPA), the Swale Site of Special Scientific Interest (SSSI), the Swale RAMSAR site and the Swale Estuary Marine Conservation Zone (MCZ);
- (ii) the character and appearance of the surrounding area including the setting of the Whitstable Conservation Area;
- (iii) the local economy, including local tourism;
- (iv) the recreational use of the area and the safety of marine traffic and recreational users of the coastal area and foreshore (e.g. sailors, windsurfers and swimmers)

Other matters raised by interested parties:

- (v) pollution caused by litter from the oyster production operation
- (vi) potential harm to archaeological remains.

### **Legal requirements and controls**

#### Scope of the enforcement notice

20. The trestles that are the subject of the appeal are those that fall within the jurisdiction of CCC as the local planning authority and, therefore, require a grant of planning permission to authorise them. CCC does not control the wider development which falls under the remit of the Government's Marine Management Organisation (MMO) which, amongst other things, licences activities taking place in the sea or on the seabed.
21. The Marine Licensing (Exempted Activities) Order 2011 (as amended) sets out that a marine licence is not required for the deposit or subsequent removal of any shellfish trestle, cage, pole, rope, marker or line used in the course of propagation and cultivation of shellfish. However, this exemption does not include construction activities, deposits made for the purpose of creating, altering or maintaining an artificial reef or deposits that cause, or would be likely to cause, an obstruction or danger to navigation.
22. In order to confirm whether the extent of the oyster farm that falls outside the CCC's jurisdiction would require a licence, a survey was commissioned in 2017 by the MMO from Marico Marine, a specialist independent marine consultancy. The aim of the report was to undertake a Navigational Risk Assessment (NRA) to identify the risk to navigation associated with the oyster farm.

23. This report concluded that, subject to certain recommendations, the trestles would not cause an '*obstruction or danger to navigation*' as noted above and the MMO subsequently confirmed that the farm was exempt from the need for a licence.
24. Following the expansion of the farm, a further survey was undertaken by Marico Marine and an updated report, from 3 March 2020, was submitted to the MMO. The findings of this report were not finally released by the MMO until after the Inquiry sittings had concluded, having not previously been made public. However, the statutory parties and interested persons who appeared at the Inquiry have been given the opportunity to make additional comments relating to this latest report.
25. This report made various further recommendations and is discussed in more detail in subsequent paragraphs. However, it does not recommend that the MMO changes its original view that the farm is exempt from the need for a licence and, to date (having had the report for over a year), the MMO has not done so.

#### Environmental Impact Assessment development

26. The Whitstable Beach Campaign (WBC), who are registered as a Rule 6 party to the Inquiry, have submitted that the original screening direction asked for by the appellants, and given by the Secretary of State under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 – Regulation 38, should be reconsidered.
27. This is because the wider oyster farm that lies beyond the EN area has expanded since the conclusion of the direction was reached. The conclusion was that the oyster farm, as it existed at the time of consideration, was not Environmental Impact Assessment (EIA) development and this is the position subsequently adopted by CCC.
28. However, WBC point to the different construction method now used in the 'pole and line' section of the farm and the fact that metal stanchions that support it have been driven into the ground in an area where archaeological remains may be present and where they may impact on the ecology of the seabed.
29. At the time of issue of the screening direction, the Secretary of State had considered the extent of the whole farm when reaching the decision that it was not EIA development. This included the area seaward of the MLWM as it then existed. Since that time, CCC and NE have not suggested that the expansion of the farm beyond the MLWM, including the pole and line development, had caused, or could be causing, any likely significant effects.
30. In any event, even if the development in the expanded area was causing some likely significant effects, such that screening for EIA should be carried out, that development is not part of the area considered for planning permission in this appeal. Although it is the case that the cumulative effects of development must be considered together when assessing these matters, it cannot be the case that a development that is not causing any likely significant effects in its own right could contribute to any such effects resulting from a combined development.

31. Therefore, as there has been no change to the development that is being considered for planning permission since the Secretary of State made the direction, there can be no likely significant effects now arising from the trestles subject to the EN, nor can they be contributing to any such effects that may be caused by the farm as a whole. I consequently conclude that there is no requirement to call for a further screening direction before reaching my decision.

### **Reasons**

32. As explained in preceding paragraphs, the majority of the oyster farm lies outside the control of the planning regime. Although there had been an earlier suggestion that the whole development should be considered as a single 'building' I do not agree that this is the case. The trestles are linked together in lines, there are clear spaces left between them and, as has been seen during the past few years, they can be added to relatively easily. One row is not reliant on another for stability and I consider that each individual row and part row can be considered independently. This means that, as it would be possible to reduce the length of the rows, if the EN is upheld all the seaward trestles could remain and it would only be the intertidal trestles that would be required to be removed through the planning process.

33. As noted in preceding paragraphs, at the time of the Inquiry and being in possession of the latest Marico Marine report, the MMO did not object to the seaward trestles as they existed in March 2020 and did not consider that they needed to be licensed.

34. The appellants' witness confirmed under oath that, even if the WOFC decided not to use the seaward trestles, they, and the land on which they are situated, would be likely to be leased out to another company, probably from France, who would then use them for growing 'half ware' oysters that would then be shipped out of the area to be grown on elsewhere. Consequently, it seems to me that there is nothing to suggest that the seaward trestles are likely to be removed, even if these appeals fail. It is against the baseline of this scenario that I will therefore consider the impact of the trestles covered by the EN.

### *Ecology*

35. Prior to the survey of over-wintering wading birds carried out between September 2020 and March 2021, NE considered that there was insufficient evidence to demonstrate that the development would not have an unacceptable impact on the areas of special protection in which the trestles are located, focussing primarily on the Swale SPA and the RAMSAR site. They were particularly interested in the likelihood of disturbance and/or displacement of the birds, the effect of the trestles on the levels of benthic invertebrates (which are an integral part of the food chain on which other species rely) in the ground below them and the impact of the Pacific oysters as a non-native species.

36. Following the survey and the submission of a shadow Habitats Regulations Assessment by the ecological professionals advising the appellants, as well as extensive consultation with them, NE have now agreed that there are no outstanding concerns over whether the development (even including the wider area of trestles that are not the subject of these appeals) would be likely to adversely affect the protected designations. The local planning authority rely on the advice from NE and confirmed at the Inquiry that they have no reason to disagree with their findings or suggest that there has not been a positive Appropriate Assessment under the Habitat Regulations.

37. WBC dispute these conclusions and seek to suggest that the appellants have failed to produce positive evidence of no harm that would '*dispel all reasonable scientific doubt*' that the development could be causing harm to the integrity of the designated sites.
38. However, the survey methodology was carried out to the specifications set out by NE, who are the Government's statutory consultee on such matters, and the results have been subject to close scrutiny by them. NE have also considered the latest evidence on their other areas of concern and they are satisfied that, subject to the condition noted above, any impact on the Swale SPA and the RAMSAR site is not sufficient to warrant a refusal of planning permission.
39. NE's witness outlined the original reasons for concern to the Inquiry and set out why these are now considered to be satisfied. She explained that, even if there was some impact on the bird species that are either qualifying features of the designated areas in their own right or are part of the assemblage of species that combine to form such a feature, the degree of change observed in the trestle area as a whole was not great enough to cause harm to the wider areas subject to the designations. Numbers of particular species such as dunlin, curlew and sanderling were considered in detail and, whilst there might have been a fall in the numbers using the trestle site compared to similar adjacent habitat, this was not considered significant, given the extent of such habitat still available to the birds.
40. NE had assumed the worst case scenario when reaching this decision and still concluded that the conservation objectives of the designations would not be compromised and there would be no significant effects that would undermine the integrity of the sites. Their witnesses also explained that the status of all the sites is in good condition and there was consequently no requirement to attempt to restore any relevant bird population numbers or habitats at present.
41. NE also considered the impacts on the Swale SSSI and MCZ and advise that there is nothing to suggest that the trestles are having any significant effect. They consider that, utilising the same evidence and assessments that apply to the Habitats Regulations and which informed their conclusions on the impacts on the SPA and RAMSAR sites, there is also no adverse effect on these areas.
42. WBC also raised the question of impact on the habitat from the construction method of the trestles, especially on the benthic invertebrates previously referred to. As already noted, they are concerned about the pole and line areas, where metal poles have been driven some depth into the seabed. However, NE now have no concerns about the impact of the trestles on these grounds in the area enforced against. These are held in place with short metal pegs and, and as previously explained, even if the enforcement trestles were to be removed, this would not make any difference to the impact arising from the remaining farm. In any event, NE have confirmed that, in their opinion, any impact from the farm as a whole is not sufficient to cause an adverse impact on the integrity of the protected areas.
43. Objectors have also pointed to the fact that the farm is growing Pacific rock oysters which are not native to the United Kingdom and are classified as an invasive species which has the potential to cause harm to biodiversity. However, the triploid (i.e. sterile, non-reproductive) Pacific oysters used on the farm are cultivated in many areas of the UK.

44. The Aquatic Animal Health (England and Wales) Regulations 2009 and the Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 cover the production of farmed shellfish and are monitored by the Centre for Environment, Fisheries, and Aquaculture Science (CEFAS) which is an agency of the Government's Department of Environment, Food and Rural Affairs (DEFRA).
45. The Fish Health Inspectorate (FHI) issues licences for aquaculture businesses and CEFAS also carries out this function. These bodies licence the production of non-native species and require the implementation of measures to prevent their uncontrolled spread beyond the trestles and bags where they are grown. The farming of triploid Pacific oysters is not prohibited, provided it is done according to the conditions imposed by the above bodies and it is for them to take action if these are breached. It is not the role of the planning regime to refuse permission for such cultivation on ecological grounds if it is authorised and controlled by other legislation. At present, the regulating authorities have not identified any problems with the farming of triploid Pacific oysters on the Whitstable trestles.
46. Given the detailed scrutiny given by NE to the evidence produced by the appellants, the weight to be given to their role as statutory consultee and the firm opinions expressed by their representatives that they did not consider there was any significant impact on the protected designated areas, I find no reason to disagree with these conclusions. Consequently, there is no reason to refuse a grant of planning permission for the trestles enforced against on the grounds of unacceptable harm to the ecology of the area on which they stand, or to that of the wider protected designations.

#### *Character and appearance*

47. The site lies close to the Whitstable Town Conservation Area and, when exposed by the tide, the whole array of oyster trestles can be seen from the walkway along the sea front, the areas adjacent to it and from the harbour to the Old Nelson public house to the west and beyond. There are numerous listed buildings within the conservation area and these include the Royal Native Oyster Stores restaurant and the slipway adjacent to it, the Old Nelson and the Pearson Arms public house on the Sea Wall.
48. The Whitstable Town Conservation Area Appraisal (2010) for the town centre describes the 'fishing settlement' which is the area immediately opposite the trestles as '*a complex system of alleyways and buildings*' leading '*towards the sea front, which can be sensed through the smells and sounds of the sea itself, and the bustle of fishing and sailing activities.*' This clearly highlights the importance of both the commercial nature of the fishing port and its associated activities as well as the recreational use of the area for water sports.
49. Objectors to the oyster farm describe it as 'industrial' and an 'eyesore' but the appellants' landscape consultant submits that the trestles are not visually intrusive when seen against the background of the dark mudflats. He considers the trestles add interest to the seascape and serve as a reminder of the link between the town and the harvesting of the oysters for which it is famous.
50. Whether the visual impact of the trestles is harmful is clearly one that is influenced by personal preferences and opinions. However, given the length of time the trestles are submerged and the fact that they are seen against a wide



area of rather featureless mudflats when they are exposed, it seems to me that they do not cause unacceptable visual harm. In my opinion, they generate a certain amount of interest when they are visible due to their association with the oyster tradition that is evident in, and so important to, the town.

51. It must also be remembered that the trestles enforced against are seen against the background of the wider farm which, for the reasons explained above, will almost certainly remain whatever the outcome of these appeals. Although the appeal trestles will be those exposed for the longest period, I saw at my site visits that the speed at which the tide comes in and out means that the times when only the intertidal trestles are visible is limited. For the majority of the time when they are exposed, they are seen in conjunction with the seaward trestles.
52. The trestles contribute to the production of the oysters that are normally sold in the numerous food outlets and fish shops in the town and I can understand the interest and attraction for customers in being able to see where the food they are consuming has actually been grown. Whitstable harbour is still very much a commercial enterprise and although the town is now also a seaside tourist destination, the combination of these two activities lends the setting much of its charm. The oyster trestles add to this character and I therefore conclude that their appearance is not having an adverse impact on the area, including the setting of the Whitstable Town Conservation Area.

#### *Economic matters*

53. The appellants point to the fact that the town is in an economically strong position compared to others in a similar location along the North Kent coast and, indeed, in other parts of the country. They attribute much of this success to the production of 'Whitstable' oysters and the spin off benefits to the local economy that this creates. At present the oysters produced on the trestles meet the relevant PGI requirements and can be designated as 'Whitstable' oysters. The appellants submit that it is only because they are presently able to grow oysters to maturity in the intertidal zone that they can supply 'Whitstable' oysters to satisfy the current commercial demand.
54. This is because the native oyster, which grows on the seabed, is now in short supply due to the spread of a disease caused by the *bonamia ostreae* virus and, whilst there are still colonies available for harvesting from Whitstable through dredging from boats, as traditionally collected, these do not provide enough to satisfy demand, particularly as they can only be collected from September to April. It is also the case that only oysters grown to full maturity in the area of the Swale Estuary off Whitstable and harvested from this area meet the PGI designation. The appellants' witness stated that without the intertidal trestles it would be more than likely that they would stop production and, as noted previously, lease out the remaining trestles for another operator to grow 'half-ware' oysters for export.
55. The objectors note that the re-generation of Whitstable began prior to the introduction of the trestles and submit that the only commercial benefit of the farm is to the appellant companies. They note that the export revenue is not of national significance and that the farm employs only 8 full time equivalent employees. They submit that there is little economic benefit to the town as a whole that would justify the retention of the trestles should there be other significant reasons to refuse planning permission for them.

56. It seems to me that it would be regrettable if the supply of 'Whitstable' oysters was significantly reduced, such that the majority of oysters sold in the town had to be imported from elsewhere. Whilst the 'Whitstable' oyster as a PGI designation would not necessarily be lost, as native oysters could still be dredged from the beginning of September to the end of April, the number of these would be limited and the supply would not be available during the summer season when the town is busiest in terms of visitor numbers.
57. It was confirmed that some oysters could be grown to maturity on the seaward trestles but the appellants' witness stated that this was unlikely to be done. This is because it is, apparently, difficult to grow oysters to an acceptable size and quality and harvest them in commercially sufficient numbers on trestles that are submerged for the length of time that occurs with those on the seaward side.
58. As previously noted, the seaward trestles could be used to grow 'half ware' oysters that would be sold on elsewhere and would then no longer be able to be called 'Whitstable' oysters. This is the process that happens at the only other local oyster farm lying further along the coast at Seasalter. Therefore, at present, the only producers of 'Whitstable' oysters on a viable commercial scale are the appellant companies.
59. I have no doubt that the oyster trestles as a whole are providing some economic benefit to the town and the production of 'Whitstable' oysters contributes to the tourist industry and raises the profile of the town, but their presence is also having a restrictive effect on the area of the sea that can be used for marine sports and recreation. Whether the loss of revenue that would occur if the appeal trestles were to be removed would be sufficiently compensated for by an increase in economic activity in these leisure areas has not been quantitatively addressed.
60. Nevertheless, in 2020 the appellant companies were aiming to produce 300 tonnes of Whitstable oysters per annum, many of which would be exported. These exports would account for 15% of the total value of oyster exports from the UK each year. Whilst this value has not been disclosed, I have also been shown nothing to suggest that, if the appeal trestles were removed and the WOFC stopped producing 'Whitstable' oysters, allowing the seaward trestles to be taken over by another company, the loss to the local economy would be replaced by any comparable benefits generated by the area freed up for recreational use by the removal of the intertidal trestles.
61. Therefore, whilst I am not persuaded that the continued health of the economy of Whitstable is dependent on the retention of the appeal trestles, I have no doubt that they do bring some economic benefit to the town and I have not been shown that this would be compensated for if they were removed.

#### *Marine safety*

62. One of the principal objections raised to the development is the hazard that it is claimed to present to recreational users of the sea. It has been pointed out that, despite warning signs and the buoyage, conditions at sea can change swiftly and even experienced sailors, windsurfers, canoeists and swimmers can be taken unawares and find themselves swept into the area over the farm.

63. As noted previously, a NRA has been commissioned for the purpose of informing the MMO as to whether the development is exempt for the need for a marine licence and this considers the risks to navigation from the farm. Although neither of the Marico Marine reports that deal with navigational safety have suggested a marine licence is required, these reports have been criticised for failing to consider the risks to recreational users as well as to navigation.
64. It is the case that neither report specifically covers the risk to swimmers but the 2020 survey has, as referred to in the executive summary, taken into account risks posed to recreational users of the area such as dinghy sailors, windsurfers, paddleboarders and canoeists.
65. The report concluded: *'While the risk assessment recognises that the deposits made do represent a hazard to navigation, the Navigational Risk Assessment (NRA) identified that the risk posed remains As Low As Reasonably Practicable (ALARP) or Low and therefore, broadly acceptable.'* and *'A review of the efficacy of mitigation measures which were recommended but largely unadopted from the 2017 NRA was undertaken, and those that remain pertinent have been adapted and their future adoption recommended. A number of new possible additional risk control measures were also identified, informed by stakeholder consultation and the baseline risk assessment, aimed at further reducing the residual risk, and efforts should also be made to adopt them, if practicable.'*
66. It is also the case that, although additional trestles may have been added to the area covered by the MMO jurisdiction since the last Marico Marine survey was undertaken, those in the enforcement area have not changed. A number of detailed criticisms have been made of the report by the objectors to the development but, ultimately, it is for the MMO to decide whether or not the report is sound and to decide whether or not the farm as a whole is exempt from the need for a licence.
67. The extract from the report also makes clear that the identified mitigation measures are recommendations only. Even if all the previously recommended measures have not been implemented, this has not led the MMO to change its view and there is nothing to suggest that any such measures, either from the first or latest report, would be made mandatory.
68. It has also been suggested that, combined with the other farm off the shore at Seasalter, the trestles should be considered as an artificial reef which, as noted above, would not be exempt from a licence under the Marine Licensing regime. Nevertheless, this is again a matter for the MMO, who have had the opportunity to consider the developments as a whole and have not reached the conclusion that the Whitstable trestles constitute an artificial reef, either on their own or combined with the Seasalter farm.
69. As already confirmed, I consider that the farm beyond the MLWM is likely to remain and, in any event, it is not able to be removed through this appeal. Therefore, I consider that the correct approach to the danger posed by the intertidal trestles is to consider whether their removal would make any significant difference to the hazards resulting from the farm as a whole, such that planning permission should be refused for those trestles for which it is required.

70. Much was made at the Inquiry about the possibility of water users getting into danger if, by chance or accident, they strayed into the trestle area and I do accept that, the smaller the area, the less likely it would be that this would happen. However, people entering the water from the beach, whether swimmers, sailors, windsurfers or paddleboarders would be able to see the marker buoys and withies when the trestles were below the water line and they are obvious when above it.
71. I note that there have been reports of water users, particularly windsurfers and dinghy sailors, coming into accidental contact with the trestles but I do not have details on whether these incidents occurred mainly on the seaward or intertidal sections. There have been suggestions that the Royal National Lifeboat Institution (RNLI) have expressed concern that they would have difficulty accessing the trestles to effect rescues but this was not confirmed by a member of the RNLI team. Although this individual had personal concerns about the safety of the farm, the RNLI have made no official comment, which might have been expected if they had already encountered any problems when helping people in difficulty in the water above the trestles.
72. Anyone who wishes to use the Council-owned slipway for launching a boat have to apply for permission to do so and would then be made aware of the presence of the farm and the warning markers that surround it. These consist of numerous 'special marker' buoys which are a recognised method, approved by Trinity House who manage such signage, of alerting marine traffic to a navigational risk. A number of the withies around the installation are higher than the others and are marked by flags which are visible at high water and I saw at my site inspection that, if the lower withies can no longer be seen, there would be sufficient water over the farm to allow small dinghies, windsurfers and paddleboards to pass safely over the trestles.
73. I accept that there is a possibility that recreational water users could accidentally drift or be blown over the appeal trestles when the water covering them is insufficient to give full clearance. However, the trestles are only about 0.75m high so adults and most older children would not normally be out of their depth in a situation where they had to stand in the water adjacent to them because there was not enough water to pass over them safely.
74. There are warning notices (some of which have been defaced or which otherwise need updating) positioned at many strategic points along the shore. Although local objectors complain about signs telling the public that there are areas of the sea that they cannot use, I saw at my site visits that the warnings are obvious to anyone coming onto the beach. Also, the times between the trestles being covered by water, and therefore hard to see, and having enough coverage to give sufficient clearance for windsurfers and paddleboarders to pass over them safely are limited and any users of the water do have to take some responsibility for their own safety in an inherently dangerous medium.
75. It seems unlikely that the appeal trestles would be commercially viable on their own should the seaward trestles ever be decommissioned and would, in any event, be required by condition to be removed should they cease to be used. However, the majority of the risk comes from the seaward areas of the farm and if the suggested condition relating to the beach safety assessment were to be imposed, I consider that the risks posed by the intertidal trestles can be effectively managed and do not add significantly to those resulting from those on the seaward side.

76. In conclusion, I consider that, whilst there is some additional risk to water users from the appeal development, and this will be taken into account in the planning balance, these risks, on their own are not sufficient reason to refuse planning permission.

*Recreational activity and access to the water*

77. The Whitstable Yacht Club (WYC) and other recreational users are very concerned about the extent of the buoyed area over the oyster farm from which they have been excluded and the length of beach from which access to the sea is now restricted. WYC submits that the oyster farm has now prevented club races taking place across areas of sea that the members have previously been able to use for this purpose.

78. I accept that a large area of sea has now been demarcated by the buoys and that there are consequently similarly large areas of beach from which it is no longer possible to launch dinghies and there is less access to the shallower areas of water previously used for training novice dinghy sailors. I can therefore understand the frustration caused to local people by the fact that WOFC has erected the trestles in an area that is central to the main town beach and that, as a consequence, some of the activities previously carried out in this area by the various local water-based users and clubs have had to be relocated elsewhere.

79. WBC campaign cite a number of policies from the South East Inshore Marine Plan 2021 (SEIMP) which, although it does not form part of the adopted Development Plan, is nonetheless a material consideration in these appeals. They submit that the policies contained within this Plan are those most relevant to these appeals as they relate directly to the issues raised by the trestle development.

80. The first policy is SE-C0-1, which requires proposals that would have significant adverse impacts on, or displace, existing activities to, in order of preference, avoid, minimise or mitigate the adverse impacts. The first consideration is, therefore, whether or not the impacts of the development are significantly adverse or would displace the existing activities that take place in this area.

81. Given that the appeal site is within the intertidal zone, the times at which it can be used for recreational activity are necessarily always going to be limited and outside those times they would need to take place elsewhere in any event; this is the inherent nature of activities on tidal waters.

82. Some of the trestles have been in place since 2017 and all those enforced against have existed since at least 2018. Despite this, and the presence of the wider farm, WYC is still functioning and using other areas of sea for its activities, as are other recreational users. Whilst these other areas may not be the preferred locations, the trestles have not prevented the relevant activities from taking place elsewhere in the sea areas local to Whitstable. The presence of the farm has undoubtedly caused some inconvenience but, in my view, cannot be said to have 'displaced' the activities, such that they can no longer take place anywhere in the immediate vicinity of the town or by members of local clubs.

83. Also, I am not persuaded that dismissing the appeals would make any significant difference to the likely 'fall back' situation, where the appeal trestles would be removed but those beyond the MLWM remained in place. The

intertidal trestles do not extend any further westward than the seaward installation, with their main spread being landward to the south east. They do cover an area of seabed of some 2.96Ha, but this is in comparison to an area of 10.98Ha for the whole farm (excluding the additional expansion that took place between July 2019 and July 2021<sup>2</sup>). I realise that the area enclosed by the marker buoys is greater than this but the proportional difference between the seaward and intertidal areas will not be significantly different.

84. While the removal of the trestles would ease the 'pinch point' between the farm and the groynes on the beach, which was a subject of much concern for the objectors, it would not restore the majority of the area previously used for racing by WYC. Neither would it contribute significantly to the ability to access the shallower water closer to the beach. As noted above, there are other locations where the water based activities can take place and I do not consider that the impact on the activities that previously occurred over the intertidal trestles is 'significantly' adverse. Consequently, there is no conflict with policy SE-C0-1.
85. Similarly, the same tests of avoidance, minimisation and mitigation are included in policies SE-ACC-1 which deals with any significant adverse impacts on public access to the marine area, including for recreational purposes and SE-TR-1 which seeks to protect tourism and recreation. Again, for the reasons given above, I consider that the interference to the public resulting from their exclusion from the intertidal trestle area is not significantly harmful such as to cause a conflict with these policies to the extent that planning permission should be refused.
86. Also, despite raising the question in the Inquiry, I have been given no details of any specific rights that members of the public may or may not have to pass over areas of water where the seabed is in private ownership. Nevertheless, the planning regime does not take account of legal rights of ownership or restrictive covenants when determining the planning merits of a development on private land and whether permission should be granted for it.
87. In this case, if there are any such constraints preventing an owner from excluding areas of the sea from general public access, the matter would need to be raised through other channels. Without any information on such rights, I conclude that the inconvenience to recreational users does not warrant the refusal of planning permission for development on private land.
88. Other policies in the SEIMP relate to matters discussed in other sections of this Decision. These cover heritage and archaeology, seascape, marine litter, biodiversity and non-native species and, for the reasons discussed in those sections, I consider that there are no compelling reasons to refuse planning permission on these grounds.

### *Pollution*

89. Interested parties have drawn attention to finding significant numbers of discarded rubber straps, used to hold the oyster bags onto the trestles, littering the beach whilst carrying out beach cleans. There was some dispute about whether these straps had come from the Whitstable or Seasalter farms but the photographs of those collected do appear similar to those from Whitstable.

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<sup>2</sup> See Lee Evans Partnership plans refs P03701A PL – (00) -X- 0640 1<sup>st</sup> and 0421B

90. However, wherever the straps originated, the terms of the Unilateral Undertaking (UU) submitted under section 106 of the TCPA, which the appellant companies have completed, includes the legal obligation to comply with an approved Operational and Ecological Management Plan (OEMP) and *'keep marine debris and litter to a minimum and collect any redundant rubber bands and conduct regular beach cleaning walks to collect litter and debris.'*
91. Objectors have questioned whether the appellant companies would comply with this requirement when it is alleged that they already have a history of failing to do so. However, if implemented, the obligation would be a legal requirement enforceable by injunction were it to be breached. The Council would have the power to enter the land, remedy the breach and recover their costs from the landowners if necessary. I consider that this obligation contained in the UU is sufficient to mitigate any existing litter problem arising from the rubber straps and has the benefit that it would apply to any litter arising from the whole operation and not just the bands from the trestles covered by the appeals.

#### *Archaeology*

92. Since the EN was issued, the Canterbury Archaeological Trust have carried out surveys of the area in which the appeal trestles are located and have concluded that they are not posing a threat to any historic remains that may lie beneath them. The Council has accepted their report and has withdrawn its objection that related to the concern that there was insufficient information to conclude that no harm would be caused.
93. The WBC maintains objections on these grounds, mainly based on the impact the oyster farm as a whole and, in particular, the method of construction of the more recent pole and line development. This involves much deeper penetration into the seabed, with a consequent risk that archaeological remains could be disturbed. However, the seaward trestles and the pole and line development are not under consideration in these appeals and the trestles enforced against are not contributing to any harm that may be caused by the pole and line development.

#### *Planning balance*

94. Most of the objections to the development are supported by reference to the impact of the wider farm in combination with the appeal site, but to emphasise again, the seaward trestles are controlled through legislation other than the planning regime. I do not have any remit through the scope of these appeals to bring about the removal of the majority of the trestles that comprise the oyster farm as a whole. If, at some point in the future, the wider farm is required to be removed for any reason, then the remaining trestles on their own are not likely to be commercially viable and, if not used, could also be required to be removed through a condition attached to the permission.
95. I have considered the impact of the intertidal trestles in combination with the wider farm and have concluded that they would cause some additional risk and inconvenience to recreational water users. However, they would not cause significant harm on their own and, if the seaward trestles were subsequently to be removed and the appeal trestles were to remain, the magnitude of the risk to the recreational users would not, on its own, justify the refusal of planning permission.

96. With reference to the other matters that form the main issues, that is the impact on the environment and the character and appearance of the area, the trestles are acceptable in their own right and are not adding to any harm arising from the wider farm.
97. I conclude that there is therefore no conflict with the relevant policies of the Canterbury District Local Plan 2017 sufficient to indicate that planning permission should be refused. With reference to the of the SEIMP policies, the trestles on the appeal site do not result in significant adverse impact or displace existing activities and there is consequently no reason to refuse permission on these grounds.

#### *Other matters*

98. The Council is concerned that the appellants do not gain any improper advantage if planning permission is granted retrospectively through the deemed planning application. In normal circumstances, development in a site located in a SPA or RAMSAR area would have been required, under s.63 of the Conservation of Habitats and Species Regulations 2017, to have been the subject of an Appropriate Assessment before it was carried out. This assessment would have considered the implications of the development in the light of the site's conservation objectives.
99. However, in this case, I am satisfied that, through the Inquiry process, the public have had full opportunity to comment on the development and have their views considered. The fact that the trestles were constructed without planning permission arose from the fact that, in 2010, CCC had indicated that an application was not required for metal trestles and it was not until 2017 that this view changed, by which time the majority of the intertidal trestles had been installed. I consider therefore that the erection of the original intertidal trestles was not a deliberate attempt by the appellants to circumvent the planning process.
100. It is also the case that the development has been found not to be EIA development and, while this has been determined after their construction, this is because of the exceptional circumstances of the case. I have been provided with the evidence to enable me to carry out an Appropriate Assessment and have been given comparative data on adjacent habitat with the same characteristics as the appeal site. I am consequently able to be satisfied that there are no significant adverse impacts on the conservation objectives of the protected sites.

#### *Conditions*

101. CCC, WBC and interested parties have suggested a number of conditions that they would wish to see applied to any grant of planning permission. These were discussed at a round table session of the Inquiry and it was noted that any such conditions should comply with the Government's Planning Practice Guidance (PPG).
102. I will impose the condition suggested by NE (as modified after discussion) relating to the restriction of working hours at times of low temperature. This is a necessary precautionary measure to prevent undue disturbance of birds at times when it is necessary for them to conserve as much energy as possible.
103. I also consider that it is necessary to impose conditions that would require the removal of the approved trestles, and the associated marker buoys and other warning measures, should oyster production on them cease, as there would



then be no justification for allowing the obstruction that they cause to continue. CCC suggest 3 months as the time frame for this and the appellants consider this to be too short and ask for 9 months. I consider that 3 months might be too short to establish whether the trestles are genuinely no longer required and consider 6 months to be a more reasonable time to allow for this.

104. WBC have suggested a condition requiring the WOFC to carry out regular removal of feral rock oysters from the intertidal area in order to control the spread of non-native species. However, the OEMP that will be secured by the UU will contain measures for controlling the spread of the farmed oysters and it would be outside the scope of the permission to require mitigation of effects that are not directly connected to the operations carried out by the appellant companies' operations. While the removal of these oysters might be welcome, there is nothing to show that they have been introduced by the farmed Pacific oysters and they are therefore not the responsibility of the appellant companies. Should CEFAS consider that there is any breach of their requirements, they will no doubt instruct the appellants to correct it.
105. The second condition suggested by WBC, which refers to the provisions of the General Permitted Development Order, is agreed only to be needed if the enforcement area were to include a wider intertidal area under the control of the appellants. As I have indicated that the enforcement line will be drawn around the trestles themselves, this condition, removing any possible permitted development rights, will not be necessary.
106. WBC have also asked for a beach safety assessment to be carried out and submitted to CCC for approval. The appellants consider that this is not necessary but would comply if it was needed to secure planning permission. The appellant companies have not yet undertaken any risk assessment associated with the installation of the trestles and how they impact on users of the beach and the warning notices in place at present are agreed to be out-of-date. I therefore consider that this would be a prudent precautionary measure that needs to be taken to ensure that any risks associated with the trestles are minimised.
107. The suggested condition relating to litter is already covered in the terms of the UU by the incorporation of the requirement in the OEMP to keep litter to a minimum and carry out regular beach cleans. Similarly, the final two suggested conditions, relating to the maintenance of equipment and the removal of damaged or redundant items are also covered in the above conditions or the OEMP.
108. Other conditions suggested by interested parties were considered during the discussion but will not be imposed because they are either covered by those mentioned above or the UU or do not meet the tests for conditions set out in the PPG.

### *S106 Undertaking*

109. The signed UU referred to in previous paragraphs and submitted under s.206 of the TCPA will come into force if planning permission is granted. As noted above, it will require the appellant companies to comply with the CEFAS Shellfish Bio-Security Measures Plan and produce an OEMP to be approved by CEFAS. They will also need to complete a Construction Environmental Management Plan before any further work is undertaken. In addition, a further archaeological survey will be undertaken to the seaward side of the farm.

110. The above plans are to be periodically updated and contain the measures to be taken to identify and control any spread of disease and to ensure that the oysters are sterile and kept in bags or baskets secured to the trestles, to prevent escape.

111. I am consequently satisfied that the UU meets the tests as set out in the PPG for such obligations because it contains measures that are necessary to make the development acceptable in planning terms, are directly related to the development and are fairly and reasonably related in scale and kind to it.

### *Conclusions*

112. For the reasons given above I consider that the appeals should succeed on ground (a) and planning permission will be granted for the construction of oyster trestles with the associated activity for the purpose of cultivating and farming of oysters on the Land outlined in red on Plan 1 attached to this Notice, subject to the conditions listed at Annexe A. The appeal on ground (g) does not therefore need to be considered.

*Katie Peerless*

**Inspector**

## **Annex A**

### **Conditions to be attached to planning permission granted under ground (a) and the deemed planning application.**

- 1) Other than the continued siting of the trestles hereby approved, no shellfish farming, propagation or cultivation operations, including any use of vehicles in association with the use or pedestrian movements by farmworkers, shall take place within the site, whether using specialist equipment (any shellfish, trestle, raft, cage, pole, rope, marker or line) or otherwise, in temperatures of minus 3 degrees Celsius or below.
- 2) Within 6 months of the cessation of the use of any of the rows of trestles hereby approved, all unused rows of oyster trestles, associated oyster bags, their contents, withies and any strapping or webbing attached to the trestles shall be removed, in accordance with a decommissioning programme submitted to, and agreed in writing by, the local planning authority.
- 3) Within 6 months of the cessation of the use of any of the rows of trestles hereby approved, all marker buoys and any other items warning of the siting of those particular trestles shall be removed.
- 4) Unless within 6 months of the date of this decision a beach safety assessment for the area of the development hereby permitted is submitted in writing to the local planning authority for approval, and unless the findings of the approved assessment are implemented within 3 months of the local planning authority's approval, the trestles subject of this approval, and all associated equipment, shall be removed until such time as a scheme is approved and implemented.

If no scheme in accordance with this condition is approved within 12 months of the date of this decision, the trestles subject of this approval, and all associated equipment, shall be removed until such time as a scheme approved by the local planning authority is implemented.

Upon implementation of the approved assessment specified in this condition, those measures shall thereafter be retained whilst the trestles remain in position.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

## APPEARANCES

### FOR THE APPELLANTS:

Charles Banner QC	Of Counsel
He called	
Ms Alison Hicks	Canterbury Archaeological Trust
Mr David Parfitt	Landscape and Visual Impact Expert
Captain Brian McJury	Consultant Master Mariner
AFNI FCILT PG Dip Maritime Law	
Mr Richard Green	Director Appellant
Mr James Green	Director Appellant
Ms Ellie Evans BA, MA	Economic Expert
(Cantab)	
Mr Tim Goodwin BSc	Ecology Expert
(Hons) MSc MIEEnvSc MCIEEM	
Ms Jeanne Taylor	Planning Consultant

### FOR THE LOCAL PLANNING AUTHORITY:

Megan Thomas QC	Of Counsel
She called	
Mr Steve Musk MRTPI	

### FOR THE RULE 6 PARTY, Whitstable Beach Campaign:

Michael Brett	Of Counsel
He called	
Mr Paul McNally	Chair, Whitstable Beach Campaign
Mr Neill Austen	Chair, Whitstable and Herne Bay Water Safety Committee
Mr Ian Wild	Whitstable Yacht Club
Mr Mike Bees	Brightlingsea Yacht Club, Essex
Mr Gerald Irvine	Master mariner
Mr Mark Godley	Windsurfer
Mr Mark Barnes	Master Mariner - sailor
Mark Tuckwood	Business owner 'Bordworx'
Ms Rachel Bailey	Environmental Artist
Mrs Patricia Dixon	Whitstable Beach Campaign
Dr Patricia Baker	Archaeology
Ms Sally Newcombe	Whitstable Beach Campaign

### INTERESTED PERSONS:

Mr Keith Dugmore	
Mr Nicholas Frostick	Canoe club
Cllr. Ashley Clark	
Dr Geoff Meaden	
Mr Graham Cox	Chair, Whitstable Society
Captain C G R Spencer	
Dr Terry Stefani	Local RNLi member
Ms Mel Green	Whitstable's Marine Environment Group
Ms Julie Wassmer	Environmental Campaigner

Cllr. Valerie Kenny  
Professor Glyn Davies  
Mr Duncan Roy  
Ms Hilary Metcalf  
Ms Alison Giacomelli      Natural England  
Mr David Harrison          Natural England

#### DOCUMENTS SUBMITTED DURING AND AFTER THE INQUIRY

- 1 WBC's opening submissions
- 2 Appellants' opening statement
- 3 Notes on Marine Plan documents submitted by WBC
- 4 Speaking notes: Ms Wassmer
- 5 Speaking notes: Professor Davies
- 6 Speaking notes: Ms Metcalf
- 7 Speaking notes: Mr Cox
- 8 Speaking notes: Ms Green
- 9 Speaking notes: Dr Meaden
- 10 Speaking notes: Mr Dugmore
- 11 Speaking notes: Mr Roy
- 12 Speaking notes: Captain Spencer
- 13 Statement of Common Ground – Natural England/Appellants
- 14 Copy of CCC's byelaws re seaside pleasure boats
- 15 Cllr. Clark's closing submissions
- 16 Captain Spencer's closing submissions
- 17 Ms Wassmer's closing submissions
- 18 Ms Green's closing submissions
- 19 Mr Cox's closing submissions
- 20 Ms Metcalf's closing submissions
- 21 Mr Roy's closing submissions
- 22 Cllr. Kenny's closing submissions
- 23 WBC's closing submissions and authorities
- 24 CCC's Closing submissions
- 25 Appellants' closing submissions and authorities
- 26 Mr Barnes' comments on 2020 Marico Marine report
- 27 Captain Spencer's comments on 2020 Marico Marine report
- 28 Cllr. Clark's comments on 2020 Marico Marine report
- 29 WBC's comments on 2020 Marico Marine report
- 30 CCC's comments on 2020 Marico Marine report
- 31 Appellants' comments on 2020 Marico Marine report

# Plan

This is the plan referred to in my decision dated: 25 October 2021

by **Katie Peerless DipArch RIBA**

**Land at: Whitstable Beach, Whitstable Foreshore, Kent**

**References: APP/J2210/C/18/3209297, APP/J2210/C/18/3209299 & APP/J2210/C/18/3209300**

Scale: NTS

