

APPEAL STATEMENT

Application Number: CA/22/00888

Location: Land at Whitstable Beach, Whitstable Foreshore, Landward of Mean Low Water Line, Whitstable CT5 1EJ

Proposal: Details submitted pursuant to condition 04 (beach safety assessment) of appeal decisions APP/J2210/C/18/3209297, 3209299 and 3209300



22 November 2022

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GCM/EJB/WH1072/0034

APPLICATION

Application Number

CA/22/00888

Appellant

Mr J Green

Whitstable Oyster Company Limited

Whitstable Oyster Fishery Company

Whitstable Oyster Trading Company Limited

Location of Site

Land at Whitstable Beach, Whitstable Foreshore, Landward of Mean Low Water Line,

Whitstable CT5 1EJ

Proposal

Detail submitted pursuant to condition 04 (beach safety assessment) of appeal decisions

APP/J2210/C/18/3209297, 3209299 and 3209300

Reasons for Refusal

'1 – The Beach Safety Assessments submitted by the applicant are neither a sufficient nor robust appraisal of the level of risk associated with the installation of the trestles and how they impact users of the beach.'

Date of Planning Committee

18 October 2022

Date of Refusal Notice

25 October 2022

APPEAL STATEMENT

Introduction

1. This appeal is against the refusal of an application for approval of the Appellant's Beach Safety Assessments entitled Managing Beach Safety Whitstable Beach (Neptune to West Beach Caravan Park) and Managing Beach Safety Whitstable Beach (Neptune to Harbour) ('the Beach Safety Assessments') (**'the Application'**).
2. Full planning permission was granted on 25 October 2021 by the Planning Inspectorate through appeals APP/J2210/C/18/3209297, APP/J2210/C/18/3209299 and APP/J2210/C/18/3209300 (**'the Planning Permission'**) for the purpose of cultivating and farming oysters on the Land at Whitstable Beach, Whitstable Foreshore. Condition 4 of the Planning Permission, set out below,

required the submission of a beach safety assessment for approval of the Local Planning Authority, and the Beach Safety Assessments were duly submitted by the Appellant for approval. Condition 4 of the Planning Permission provides as follows:

“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.”

3. The Inspector’s reasoning for the condition is set out in paragraph 106 of the appeal decision, as follows:

“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”.

4. The Planning Officer’s Report to the Planning Committee (attached) recommended approval of the Application. Despite this recommendation the Committee refused to approve the BSA’s. Concluding at paragraph 19:

“19. In view of the above and on the basis of the detail that has been provided within the submissions with regards to risks and actions to be taken, the Beach Safety Assessments provided are sufficient in respect of the requirements of condition 4 of the planning permission. The details submitted pursuant to condition 4 are therefore recommended for approval.”

5. On behalf of the Appellant, it is submitted that in determining the Application, the Planning Committee failed to properly grasp the scope and purpose of the Beach Safety Assessments and/or failed to properly grasp and adhere to the extent of its jurisdiction to approve the Beach Safety Assessments.
6. It is submitted that the evidence presented and the content and assessments set out within the Beach Safety Assessments do not support a conclusion by Councillors that the Beach Safety Assessments were not a *'sufficient nor robust appraisal of the level of risk associated with the installation of the trestles and how they impact users of the beach.'*
7. The Beach Safety Assessments were prepared on behalf of the Appellant by Captain Brian McJury, a Master Mariner with over 30 years' experience, with a particular specialism in navigational and marine risk. The Planning Committee considered the October 2022 Reports which superseded earlier BSA's.
8. It is also submitted that in determining the Applications, the Planning Committee were also wrong to place considerable weight on the comments of the Maritime and Coastguard Agency ('MCA').

Jurisdiction of Planning Committee

9. In respect of the purpose of the Beach Safety Assessments, the Inspector set out her reasoning for requiring the Beach Safety Assessments at paragraph 106 of her Decision Letter. The Inspector stated that she considered a requirement for a beach safety assessment to be *'a prudent precautionary measure that needs to be taken to ensure that any risks associated with the trestles are minimised'*. Importantly, therefore, the Planning Permission makes clear that the sufficiency of the Beach Safety Assessments should be assessed only against those risks associated with the trestles.
10. In terms of scope of the Beach Safety Assessments, it is important to emphasise, particularly given the comments made by the Maritime and Coastguard Agency, that the Planning Committee does not have jurisdiction to consider the area of trestles which lie seaward of the Mean Low Water Mark. It follows that the Planning Permission makes clear that the sufficiency of the Beach Safety Assessments should be assessed only against risks associated with those trestles within the Local Planning Authority's jurisdiction.
11. The scope and purpose of the Beach Safety Assessments, as set out above, is acknowledged by the Planning Officer in his report to the committee at paragraph 10:

"10. Within both the assessments provided, the risks associated with the trestles have been identified and split into categories that relate to the type of risk to beach users as a result of the

development, including from tractors and trailers between the farm and beach and the trestles themselves.”

12. The Planning Committee were further reminded of the scope and purpose of the Beach Safety Assessments by Mr Simon Thomas, Head of Planning at the Local Planning Authority, at the meeting on 18 October 2022.
13. Nevertheless, members of the Planning Committee, by their own admission, were unable to grasp and/or disagreed with the extent of their jurisdiction in respect of the Application. By way of example:
 - a. Councillor Ian Stockley described being *‘puzzled as to why I’m sitting here and being asked to judge the adequacy or otherwise of a report that is beyond my speciality’*. Cllr Stockley questioned why the Application *‘should not be passed straight back to the inspectorate’*. Cllr Stockley later described the Application as a *‘poison chalice’* and described feeling as though the Planning Committee should *‘not be in [the] position’* of deciding the Application and *‘the Inspectorate has a bit of a cheek dumping [the Application] on our lap’*.
 - b. Councillor Alan Baldock took issue with being asked to assess the sufficiency of the Beach Safety Assessments against those risks associated with the trestles within the Local Planning Authority’s jurisdiction. Cllr Baldock stated *‘you can’t deal with [the Application] unless you deal with [the trestle site] as a whole’*. Cllr Baldock described being asked to determine the sufficiency of the Beach Safety Assessments with reference to only those trestles within the Local Planning Authority’s jurisdiction as *‘bonkers’* and *‘disingenuous’*. Cllr Baldock confirmed, despite having had the extent of the Local Planning Authority’s jurisdiction confirmed by the Planning Officer and Mr Thomas, that he was not *‘looking at [the Application]’* within those parameters, stating instead he considered *‘you can’t deal with this unless you deal with it as a whole’*.
 - c. Councillor Nick Eden-Green took issue with being asked to determine the Application, despite admitting that he did not have *‘adequate and good planning grounds’* to refuse the Application. Cllr Eden-Green suggested, on that basis, the Planning Committee *‘refuse [the Application] and get an inspector to decide it ... I don’t like using that mechanism to refuse ... [but] I hope that course of action would remove from us responsibility for making a decision for which I don’t think we’re qualified to make’*. Cllr Eden-Green proposed that *‘this committee notes that the Inspector has granted consent for this application however it shares ongoing concerns relating to the MCA and the seasonal risk relating to the application and therefore asks that a qualified planning inspector makes the final decision on this application.’*

- d. Councillor Baker responded to Cllr Eden-Green's proposal above and expressed concern his proposal *'may be problematic'*. Cllr Baker stated, assumingly with reference to the risk of an adverse costs award should the Planning Committee fail to determine the Application, that *'it would put this committee in a stronger position I believe if we were to vote that we don't accept, we don't approve, on the basis of the Beach Safety Assessments not being reasonable and robust ... I think that might be safer'*.
 - e. Councillor Dan Smith characterised determining the Application as being akin to determining *'a transport problem'* and asked for clarification on this point. Mr Thomas provided Cllr Smith with further explanation regarding the scope of the Application, however, Cllr Smith confirmed he was unable to distinguish the Application from being essentially *'a transport issue'*.
14. It is without doubt that in determining the Application, the Planning Committee failed to grasp the scope and purpose of the Beach Safety Assessments, failed to grasp the extent of its own jurisdiction and, in some instances, expressed a desire not to determine the Application at all. It follows the Planning Committee's refusal of the Application is ultra vires and/or without merit.

Expert Evidence

15. Throughout the course of the meeting of the Planning Committee, its members made reference to not having adequate expert qualification to determine the Application. By way of example:
- a. Cllr Stockley made clear he was *'not a marine safety specialist'*.
 - b. Cllr Eden-Green stated that he had *'no understanding, powers or ability as it relates to health and safety issues which is effectively what we are being asked to judge things on'* and further *'I don't feel qualified to decide [the Application]'*.
 - c. Cllr Smith stated he was not *'a water expert'*.
 - d. Councillor Colin Spooner stated *'we have got to decide something we're not really experienced in'* and *'we're not experts in risk assessment or anything like that'*.
16. Despite the Planning Committee's protestations against determining the Application on account of a lack of expertise, the Planning Committee failed to attribute any and/or sufficient weight to the expert opinion of Captain Brian McJury, who prepared the Beach Risk Assessments. Captain McJury is an expert in Maritime and Navigational Risk, with over 30 years' experience. As a Harbour Master, Captain McJury has implemented port safety and risk management

systems, and gave expert evidence at the Public Inquiry in which the Planning Inspector granted the Planning Permission.

17. It is submitted that the evidence of Captain McJury was the only expert evidence available to the Planning Committee and, in failing to attribute any and/or sufficient weight to Captain McJury's qualifications, experience and expertise, the Planning Committee exercised a demonstrable failure to consider the available evidence and, therefore, properly determine the Application.

Maritime and Coastguard Agency

18. It is submitted that in determining the Application, the Planning Committee were wrong to place considerable weight on the comments of the MCA.
19. By way of example, Councillor Pat Edwards placed specific emphasis on the MCA's comment that it would have liked to have seen the measures required by separate Navigational Risk Assessments, commissioned by the Marine Management Organisation ('MMO'), incorporated within the Beach Safety Assessments. As confirmed by the Planning Officer in his report (paragraph 11), however, the separate Navigational Risk Assessments are monitored by a separate body, the MMO, which has jurisdiction for those trestles outside of the Local Planning Authority's jurisdiction. The Beach Safety Assessments were not required to duplicate the findings and/or actions identified in the MMO's Navigational Risk Assessments and, therefore, the Planning Committee was wrong to rely on the MCA's comments in this regard in refusing the Application.
20. In any event, the Planning Inspector had the benefit of both Navigational Risk Assessments commissioned by the MMO during the 10-day Public Inquiry in which the Planning Inspector granted the Planning Permission. Marine safety issues were considered in paragraphs 62 to 76 of the Appeal Decision Letter, the Inspector concluding in paragraph 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.*"
21. The mitigation measures proposed by the Navigational Risk Assessments were consistent with the evidence of Captain McJury insofar as they identified the risk posed by the trestles remains '*As Low As Reasonably Practicable or Low and therefore, broadly acceptable.*' Further, the mitigation measures proposed by the Navigational Risk Assessments were not deemed necessary in order to make the risk associated with the trestles '*As Low as Reasonably Practicable or Low*' but were rather directed at '*further reducing residual risk*' (paragraph 65, Appeal Decision Letter).

22. Accordingly, it is submitted that the Planning Committee were wrong to place weight on the MCA's comments and/or any alleged failure on the part of the Appellant to implement measures proposed by the Navigational Risk Assessments commissioned by the MMO, in determining this Application.
23. As recognised by the Planning Officer in his report to the Planning Committee (paragraph 14), the MCA made a number of further comments about the presentation of the Beach Safety Assessments to include, for example, criticism that there is no mention of the timing of implementation of the measures included in the Beach Safety Assessments. As made clear by the Planning Officer in his report to the Planning Committee, however, implementation of the measures included in the Beach Safety Assessments is dealt with by the Planning Inspector at Condition 4 of the Decision. Condition 4 makes clear implementation must be completed within *'3 months of the local planning authority's approval'*.
24. The MCA also commented that review dates should be included in the Beach Safety Assessments. The Planning Officer, however, again made clear in his report to the Planning Committee that, whilst such review dates were not a requirement of the Planning Permission, the Appellant had nevertheless agreed to incorporate the same.
25. It is submitted that the Planning Committee failed to place the MCA's comments into the context provided by the Planning Officer, which responded to the MCA's concerns and their relevance to the determination of the 'condition 4' application. It is submitted that the Planning Committee were, therefore, wrong to place such weight on the MCA's comments regarding the presentation of the Beach Safety Assessments in their determination the Application.
26. The MCA made more general comments on the Beach Safety Assessments in respect of the assessment of risk and scoring of risk. As emphasised by the Planning Officer in his report (paragraph 15) to the Planning Committee, however, such risks *'were debated at the public inquiry and the risks have been fully assessed in the BSA with control measures set out within ... the scoring that has been attributed to each of the risks is considered to represent a sufficient and reasoned appraisal of the level of risk.'*
27. It is submitted that the determination of the Application should not have been construed by the Planning Committee as an opportunity to re-determine issues already subject to a full inquisitorial determination over the course of a 10-day Public Inquiry. The Planning Committee were wrong to place such emphasis on the MCA's comments in this respect and, consequently, its determination of the Application was fundamentally flawed.
28. Finally, and in respect of other stakeholder comments, it is worth noting there were no comments or objections to the Beach Safety Assessments from Canterbury City Council's

Foreshore Manager (see paragraph 13 of Planning Officer's report to the Planning Committee) nor Whitstable RNLI (see paragraph 4 of Planning Officer's report to the Planning Committee).

29. It is also submitted that many of the public representations raise issues that were considered at the Public Inquiry or are not relevant to the determination of the Application (see paragraph 106 of the Planning Permission and, specifically, requirements of Condition 4).

Summary & Conclusion

30. It is submitted that the Beach Safety Assessments meet the requirements of the Planning Permission as set out at Paragraph 106 and Condition 4.
31. The assessments have been prepared by an expert and suitability qualified expert, being Captain Brian McJury, a Master Mariner.
32. It is submitted that Beach Safety Assessments meet the requirements for risk assessments and identify measures to minimise risks to beach users arising from the installation of the trestles (see Paragraph 106 of the Planning Permission).
33. Attention is drawn to the Planning Officers consideration of the Beach Safety Assessments and his conclusion that *"In view of the above and on the basis of the detail that has been provided within the submissions with regards to risks and actions to be taken, the Beach Safety Assessments provided are sufficient in respect of the requirements of condition 4 of the planning permission. The details submitted pursuant to condition 4 are therefore recommended for approval."*
34. It is submitted that the discussion at the Planning Committee did not expressly demonstrate failings in the Beach Safety Assessments to justify the reasons for refusal – *"neither a sufficiently reasoned nor robust appraisal of the level of risk..."*.
35. For the reasons set out above, it is respectfully requested that the Planning Inspector allow the appeal on the basis that the Planning Committee's refusal of the Application is not justified nor supported by evidence.
36. It is further requested that a full award of costs is made against the Local Planning Authority for having refused the Application and having put the Appellant to the unnecessary costs of having to pursue the Appeal.
37. The Appellant reserves the right to respond to the Local Planning Authority's Statement of Case in due course.
38. The Planning Officer advised approval of the Beach Safety assessment and there is no written explanation from the Local Planning Authority to support the stated reason for refusal.

39. The Appellant cannot therefore provide a full statement of case at this stage.

22 November 2022

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