



Appeal Decision

Site visit made on 8 November 2023

by B Pattison BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 January 2024

Appeal Ref: APP/J2210/W/22/3311742

Land at Whitstable Beach, Whitstable Foreshore, Kent

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
 - The appeal is made by Mr J Green, Whitstable Oyster Company Ltd, Whitstable Oyster Fishery Company, Whitstable Oyster Trading Company Ltd against the decision of Canterbury City Council.
 - The application Ref CA/22/00888, dated 22 April 2022, sought approval of details pursuant to condition No 4 of planning permission APP/J2210/C/18/3209297, APP/J2210/C/18/3209299 & APP/J2210/C/18/3209300 granted on 25 October 2021.
 - The application was refused by notice dated 25 October 2022.
 - The development proposed is construction of oyster trestles with the associated activity for the purpose of cultivating and farming of oysters on the Land.
 - The details for which approval is sought is condition 4 - Beach Safety Assessments for the area of the development.
-

Decision

1. The decision is allowed and the details submitted pursuant to condition 4 attached to planning permission APP/J2210/C/18/3209297, APP/J2210/C/18/3209299 & APP/J2210/C/18/3209300 granted on 25 October 2021, in accordance with the application dated 22 March 2022 and the details submitted within it are approved.

Preliminary Matters

2. A revised National Planning Policy Framework (Framework) was published on 19 December 2023 and updated on 20 December 2023. Accordingly, for the purposes of this decision I have referred to the latest version of the Framework. The content of the Framework has not been materially altered in respect of the main issue which I have considered. Therefore, it has not been necessary to seek further views from the main parties in this instance.
3. Condition 4 was attached to the planning permission granted in October 2021 following a public inquiry held between 26 July and 5 August 2021.

Costs

4. An application for costs has been made by the appellants against Canterbury City Council. This application is the subject of a separate decision.

Main Issue

5. The main issue in this appeal is whether the submitted Beach Safety Assessments (BSAs), required by condition 4 demonstrate that risks for users of the beach associated with the trestles are minimised.

Reasons

6. The appeal site is located on the beach on the foreshore of the Swale Estuary, opposite the town of Whitstable. The beach consists of a sloping shingle beach leading down to a shallow mudflat below the high-water mark. Whilst I undertook my site visit in inclement weather in late Autumn, I understand that the beach is popular with visitors and residents all year round, but particularly in warmer weather. Activities such as swimming and paddling and the recreational use of the area for other watersports are common.
7. The original planning permission excludes all of the oyster farm's trestle rows and parts of rows to the seaward side of the mean low water mark (MLWM). This is because Canterbury City Council's (CCC) jurisdiction does not extend beyond this point and any trestles in the area beyond the MLWM are controlled by other legislation. Consequently, CCC does not control the wider oyster farm 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.
8. Consequently, the sufficiency of the BSAs should be assessed only against risks associated with those trestles within CCC's jurisdiction and which are included within the 'red line' of the approved site location plan. These are only a small part of the whole oyster farm.
9. The previous appeal decision considered marine safety in detail and concluded that the risk to water users from the appeal development was not sufficient reason to refuse planning permission. Condition 4 was imposed to ensure that an assessment of the safety measures needed to further limit any risk to the users of the beach were considered and put into place, as this had not previously been carried out. This is primarily to ensure that sufficient warning notices and buoys are in place as the trestles are exposed at low tide but fully submerged at high tide and people on the beach need to be aware of their presence if swimming or engaging in other water sports.
10. 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. On shore, warning signs have been erected to alert swimmers and water users to the presence of the trestles.
11. The BSA includes a detailed Hazards and Control Measures table which identifies actions to be undertaken to minimise risk to beach and water users. The various potential risks associated with the trestles are identified and split into categories which include those related to the trestles development area, the use of tractors and trailers between the farm and the beach, the buoys at low tide, as well as water quality and microbiological hazards. The table also considers the potential effect on different beach users, for instance the general public, water users, and beach user groups including those sailing, rowing and using power watercraft.

12. The potential risks have been numerically graded by severity to create a risk matrix. The scoring that has been attributed to each of the risks represents a sufficient and reasoned appraisal of the level of risk. This is bearing in mind the specific purpose of the BSAs, which is to consider any additional risks posed by the installation of the trestles which have planning permission and how they impact on beach users.
13. Clear control and management measures are identified, with linked actions. Measures to mitigate potential identified risks are set out within the BSA. This includes a pre-arrival education website, increased signage on the beach and in the vicinity of the trestles and ensuring that buoys are in the correct place and monitored. Additional withies will also be installed at regular intervals and an incident reporting framework will be established in conjunction with CCC Foreshore Services. This will ensure that records are kept and reviewed subject to any change in incident profile.
14. I do not find the BSAs to be vague, unprecise or lacking sufficient detail. The documents do not define 'quieter periods' or provide specific details of the type or frequency of safety training provided for staff using tractors. However, I find that such specific details would exceed that expected within the scope of the condition. Overall, the documents allow the appellant sufficient discretion in the management of hazards and related actions, whilst ensuring that the safety of beach users is mitigated.
15. Questions have been raised in relation to the author of the BSAs. The appellants have confirmed that they were prepared by an employee of the appellants. They were in turn reviewed by Captain Brian McJury, a Master Mariner who was the appellants' navigation and marine safety expert witness at the public inquiry. In my view this approach is appropriate.
16. Neither the condition, nor the supporting paragraph within the Inspector's decision specify a requirement for the appellants to undertake detailed consultation with local stakeholders as part of the preparation of the BSAs.
17. The appellant indicates that the BSAs were prepared in consultation with CCC's Foreshore Services Officer who in turn liaised with the Marine and Coastguard Agency (MCA) and other stakeholders. This is not disputed by the Council. Given the nature of their role, I consider that the Foreshore Services Officer was a suitably qualified person to have been the appropriate point of liaison at CCC for the preparation of the BSAs.
18. Comments have been received in relation to a lack of consultation with the Royal National Lifeboat Institution (RNLI). The submitted evidence confirms that the RNLI have made no official comment, which might have been expected if they had specific concerns in relation to the BSAs. Regardless, the BSAs commit the appellants to work with the RNLI to create an emergency response plan to ensure that search and rescue capabilities are maintained.
19. The wording of the condition requires that upon implementation of the approved BSAs, those measures shall thereafter be retained whilst the trestles remain in position. However, there is no requirement for the BSAs to be 'live' documents which remain under ongoing review with the Council or stakeholders.

20. Notwithstanding this, the BSAs identify a 'review date' approximately one year after the date of initial preparation, as well as for a seasonal review date to take account of any seasonal changes. These dates are flexible and voluntary as there is no binding requirement within the condition for them to be undertaken. Maintaining the BSAs is the responsibility of the appellants in order to ensure safety within the appeal site which is within their ownership. As a result, it seems to me that they are likely to review the BSAs and related safety measures periodically to ensure that adequate measures remain in place.
21. Two Navigational Risk Assessments (NRA) relating to the Oyster Farm were previously carried out. The previous Inspector's decision explains that the NRA was commissioned for the purpose of informing the Government's Marine Management Organisation (MMO) as to whether the development is exempt for the need for a marine licence and that this considers the risks to navigation from the farm. I acknowledge the comments from the Maritime and Coastguard Agency. However, it is important to distinguish between the assessment of navigational risk, which is dealt with in the NRA, and the management of beach safety, which is the subject of the BSAs. For this reason, I do not consider it necessary that every measure outlined within the NRA, some of which may be beyond the scope of the planning condition, need also be included within the BSAs.
22. Notwithstanding this, the submitted evidence confirms that the BSAs outline a number of actions which align with those within the NRA. For instance, the creation of an incident reporting framework in conjunction with CCC Foreshore Services and the addition of more withies at regular intervals around the trestles.
23. For the reasons above, I conclude that the details submitted are sufficient to discharge condition 4 in relation to demonstrating that risks for users of the beach associated with the trestles are minimised.

Other Matters

24. A significant number of interested parties have raised other concerns in relation to the adequacy of the BSAs, and this includes a very detailed objection by the Whitstable Beach Campaign.
25. The BSA's relate to the site which was the subject of the previous appeals. Layouts of the trestles are provided in the assessments submitted, and it is not necessary for the BSAs to provide an additional plan or aerial layout of the oyster farm.
26. Interested parties have requested that the BSAs should include all potential measures including partial or entire removal of trestles. Representations have also provided comments relating to the location and size of the farm, the design of the trestles and whether there is need for the trestles. Significant concerns have also been raised in relation to a 'pinch point' i.e. the narrow channel through which craft including motorised vessels sailing landward of the development pass. Comments in relation to the location, size and need of the oyster farm are not material considerations as the decision to grant the trestles has already been established by the appeal decision, and this cannot be altered by the BSAs.

27. It has been suggested that fixings from trestles wash up on the beach having potential impacts on the public and wildlife. The terms of the Unilateral Undertaking submitted as part of the previous appeal, includes the legal obligation to comply with an approved Operational and Ecological Management Plan (OEMP) and to keep marine debris and litter to a minimum and collect associated litter and debris. Questions relating to the publication of the OEMP are not relevant to the current appeal, which relates solely to the acceptability of the BSAs.
28. A number of comments refer to various safety concerns relating to a range of beach and water users including swimmers, sailors, windsurfers or paddleboarders who may be harmed by contact with the trestles as a result of strong tides and winds. I have also been provided with details of previous reported incidents that water users have had with the trestles. These range from powerboat propellers striking the structures to windsurfers fouling the trestles. The previous Inspector was also provided with detailed commentary on previous incidents and concluded that there was no basis for refusing planning permission on marine safety grounds.
29. I appreciate that there are differing views over the level of risk to beach and sea users. The risks associated with the trestles were considered within the previous appeal decision and the risks have been fully assessed in the BSAs with control measures set out within them. I have not been presented with compelling evidence to demonstrate that the BSAs have insufficiently assessed the level of risk. As the BSAs are submitted to discharge a planning condition it is not necessary to consider whether they meet the general duty under the provisions of health and safety legislation.
30. Representations have questioned which parties would be responsible in the event of a serious accident involving the oyster farm and whether a future ban on swimming at the beach may be forthcoming. Rights of access across private land for recreational purposes are distinct from the planning process and whilst I take these representations seriously, these issues fall outside the scope of this appeal which relates solely to the suitability of the BSAs submitted.

Conclusion

31. For the reasons given above and having regard to all matters raised, I conclude that the appeal should be allowed.

B Pattison

INSPECTOR