
From: [REDACTED] <[REDACTED]@lee-evans.co.uk>
Sent: 26 September 2018 12:57
To: ECAT
Cc: [REDACTED]
Subject: Re: Planning Inspectorate APP/J2210/C/18/3209297: Land at Whitstable Beach
Attachments: p03780.appendix 1 to initial appeal submissions.aug 2018..pdf; p03780.paragraph 88 from initial appeal submissions.aug 2018.pdf

Importance: High

REFERENCE EML-OUT/P03780/K/111
For the attention of ECAT@pins.gsi.gov.uk

Dear Sir/Madam

Town and Country Planning Act 1990
Appeals by The Whitstable Oyster Company Limited, The Whitstable Oyster Fishery Company, The Whitstable Oyster Trading Company Limited
Site Address: Land at Whitstable Beach, Whitstable Foreshore, Whitstable, Kent

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

Further to your letter dated 20th September 2018, we would advise the following:

- With respect to Ground (g) - we would point you to Appendix 1 to the Lee Evans Planning Statement on behalf of the Appellant and Paragraph 88 which sets out the timescale as four to five years. We attach a further copy of the paragraph for ease of reference.
- With respect to the query in relation to Section 6H.1 - we would advise that the correct Appendix you should be referring to is Appendix 1 which is marked "*Appellants' Submissions in Support of Appeal Of An Enforcement Notice*". Again, we attach Appendix 1 for ease of reference.

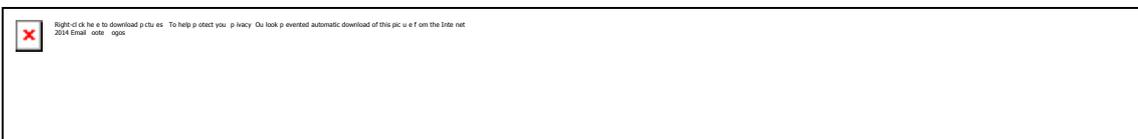
Should you require any further information or clarification, please do not hesitate to contact us.

Yours faithfully

[REDACTED]
PARTNER

Sent on behalf of [REDACTED], by:

[REDACTED]
Secretary
Lee Evans Partnership LLP • Architects and Town Planners



St. Johns Lane, Canterbury, Kent, CT1 2QQ
w: <http://www.lee-evans.co.uk>
e: [REDACTED]@lee-evans.co.uk
Canterbury: 01227 784444
London: 0207 492 1744
Fax: 01227 819102

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Sent: 20th Sep 2018 at 09:59 (GMT+01:00)
Received: 20th Sep 2018 at 10:44 (GMT+01:00)
To: [REDACTED]@lee-evans.co.uk
Subject: Planning Inspectorate APP/J2210/C/18/3209297: Land at Whitstable Beach
Attachments: 211B - Case Officer - Jeanne Taylor - 20 Sep 2018.pdf; FACTS TO SUPPORT GROUND A - 344249 - p03780.appendix 9.document 8 to updated screening application.aug 2018.part 9 of 12.pdf;
Importance: Normal

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The Planning Inspectorate (Wales)
Crown Buildings, Cathays Park, Cardiff, CF10 3NQ

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APPENDIX 1

IN THE MATTER OF:

THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

THE WHITSTABLE OYSTER FISHERY COMPANY (1)

THE WHITSTABLE OYSTER COMPANY LIMITED (2)

THE WHITSTABLE OYSTER TRADING COMPANY LIMITED (3)

APPELLANTS' SUBMISSIONS IN SUPPORT OF APPEAL OF AN ENFORCEMENT NOTICE

1. These submissions are prepared on behalf of the Whitstable Oyster Fishery Company (the "**Company**"), the Whitstable Oyster Company Limited (the "**Oyster Company**") and the Whitstable Oyster Trading Company Limited (the "**Trading Company**").
2. In this statement references to the "**Appellants**" are to the Company, the Oyster Company and the Trading Company collectively.
3. Attached to these submissions and marked Appendices 1, 2 and 3 are bundles of documents referred during the course of these submissions. References to documents in [*square brackets*] are to the page number of Appendix 1, 2 or 3 where the document in question is to be found. The documents exhibited at Appendices 1, 2 and 3 are true copies of the documents in the Appellants' possession.

Background

4. The Appellants produce oysters from the Company's privately owned land at Whitstable, Kent. The Company is the freehold owner of the beach, seabed and foreshore at Whitstable, Kent, the freehold title to which is registered at HM Land Registry under title number K781262.

The History of the Company

5. Initially the Company of Free Fishers and Dredgers of Whitstable was an unincorporated association, the Members of which had held, since time immemorial, the benefit of an oyster fishery within the Manor of Whitstable as tenants of the Lord of the Manor. The fishery was regulated by a court of dredging held by the Lord of the Manor. The right of fishing the oyster beds of the Manor was granted by Royal Patent in 1574.

6. By a series of Conveyances, Deeds of Lease and Release in the 1790's, the fishery came to be vested in Thomas Foord. Some doubts arose as to the validity of the acquisition of the fishery by the unincorporated association and a private Act of Parliament was passed in 1793 called "*an Act for incorporating the company of free fishers and dredgers of Whitstable in the County of Kent and for the better ordering and governance of the fishery*".

7. The 1793 Act incorporated the Company and vested the powers of the Company in the new corporation. The corporation was empowered to buy the fishery and Manor. Immediately after the Act Thomas Foord conveyed the fishery to the Company. That Company ran the fishery through a water court consisting of a bailiff, foreman and jury of 12 freemen. The water court appears to be the same as the court of dredging.

8. In the second half of the nineteenth century, the Company fell on hard times. The oyster crop failed for several years and the treasurer decamped to America with the Company's funds.

9. In 1896 a further private Act was passed by Parliament, the Whitstable Oyster Fishery Company Act 1896. The Company was reconstituted as a company under the Appellants Clauses Consolidation Act 1845 and the name changed to the Whitstable Oyster Fishery Company. The constitution of the Company was reformed and the statutory objects and powers of the Company are to run the oyster fishery which it owns.

The Whitstable Oyster

10. Whitstable is famous for oyster production and the Whitstable native oyster has been cultivated, propagated and produced on the Company's land since Roman times. The World famous "Whitstable Oyster" is a protected food name with Protected Geographical Indication status (pgi status) and cannot be produced outside Whitstable. The Appellants are in fact the only producers of Whitstable native oysters in Whitstable.

11. The Appellants are committed to oyster production in Whitstable, something that is not only intrinsic to the town's heritage but to the operation of the Appellants' businesses which employ some 200 people.

Oyster Production

12. The long term aim and objective of both Appellants is to transform oyster production into a profit-making, sustainable operation through expansion of their operations, achieving economies of scale and improving efficiency of the aquaculture operations. If the Appellants cannot conduct operations using trestles on the land, then those objectives cannot be achieved and the ability to continue oyster production in Whitstable would be lost forever.

13. The oyster production operations are at present loss-making due to the size, scale and traditional methods of farming previously used. The oyster cultivation operations are heavily subsidised by the Appellants' other commercial activities but both have moral and cultural responsibilities to preserve production of the World Famous Whitstable Oyster.

14. Currently oysters are farmed using two methods; the first method involves oysters being seeded on the seafloor and then either being collected via a boat which dredges the area (and is not environmentally friendly as it can cause damage the substrate) or they are collected by hand during low tide, a heavily labour intensive operation which can only be carried out in a limited window when the tide is out.

15. The second method by which oysters are farmed involves seed oysters being placed in mesh bags which are fixed to trestles located in the intertidal zone. Oysters then feed naturally on the plankton in the water from the local environment.
16. The oysters farmed in bags have to be brought ashore to grade them with reference to their size. Initially, there may be as many as 5,000 – 6,000 seed oysters in a single bag. As they grow bigger they are placed in bags with larger mesh holes containing fewer oysters. The bags themselves need to be cleaned regularly to avoid bio-fouling from weed. The Oysters are graded at least 6 times during their life cycle where they are split, graded and placed in different bags. Towards the end of their life cycle, oysters will be placed in bags holding approximately 150 oysters.
17. The cultivation and production of oysters using mesh bags and trestles is not only more environmentally friendly but also sustainable. Sustainable commercial aquaculture of oysters using this method is the only method that can be used to farm oysters in a commercially successful way.

Employment

18. The Appellants employ up to 200 people in all operations, 8 of which, are directly involved in oyster production. Almost all of those people live within one mile of the centre of Whitstable. Profits made by the Appellants' other commercial operations are used to subsidise oyster cultivation. Those other businesses have and will always be ancillary to oyster production. Without oyster production, neither of the Appellants would continue with their other commercial operations. In order to transform oyster production into a profit-making, sustainable operation, production needs to be conducted efficiently on a large scale. To achieve this, oysters must be farmed through the use of mesh bags and trestles. If the Appellants cannot conduct operations using trestles, then the ability to continue oyster production in Whitstable would be lost forever.

Trestles

19. The use of trestles to farm oysters goes back to 2008 when the Appellants resolved to produce oysters on a commercial, profitable and sustainable basis. Initially the Company used a mixture of both wooden trestles constructed in situ on the beach and prefabricated metal trestles made from steel. Following advice received from the LPA in 2010, we moved exclusively to the use of metal trestles. The reason for that is that the LPA advised the use of metal trestles would not constitute 'development' and they were not therefore controllable under planning legislation whereas in the LPA's opinion, wooden trestles would constitute 'development' as they were constructed on location and were said to have a degree of permanency. A copy of the LPA's letter dated 30 July 2010 (the "**LPA Advice Letter**") confirming this is at [1-2/1].
20. The trestles are manufactured from steel in standard sizes and are purchased from a supplier in France. When placed on the beach, trestles are put out, by hand, in lines that are 20 trestles long. Each trestle is a free standing unit but each trestle in a single line of 20 is connected to the next trestle by a plastic sheath. The plastic sheaths are designed to keep the trestles aligned, there is no structural element to the sheaths. The separate individual lines of trestles (in twenties) are typically arranged in blocks with an orientation towards the north east to reduce wave action. It is accepted that each individual line of 20 trestles would constitute a 'building' for the purposes of the Town And Country Planning Act 1990 (as amended) but not that the entire matrix of trestles as a whole constitutes 'development' or when taken as a whole, a single 'building', nor that each individual trestle in isolation constitutes a 'building'. the LPA's position appears to be that the entire matrix of trestles as a whole constitute a single building, notwithstanding many are situate below the mean low watermark, as set out in their letter of 9 January 2018 [3-6/1].

Enforcement Action

21. On 6 July 2018 the Local Planning Authority served an enforcement notice (the "**Enforcement Notice**") [7-28/1]. The Enforcement Notice was served on some nine different parties, including the Appellants.

22. Prior to service of the Enforcement Notice, in May 2017 following a letter from the LPA dated 13 April 2017, I completed a Planning Contravention Notice (“**PCN**”). A copy of the Local Authority’s letter and the completed PCN is at [29-36/1].
23. Mr James Green, on behalf of the Appellants, met with David Bloom, an Enforcement Officer at Canterbury City Council on 19 December 2017 together with the Appellants’ Planning Consultant and Solicitor to discuss the LPA’s concerns and the motivation behind serving the PCN. Mr Bloom confirmed the LPA had received a complaint regarding the trestles and that the LPA’s motivation for serving the PCN and for contemplating enforcement action were founded on concerns as to the risk to navigational safety and the visual impact/amenity of the trestles.
24. It can be seen from the PCN that the estimated number of trestles were as follows:
- a. 2010: 250 trestles
 - b. 2011: 500 trestles
 - c. 2012: 750 trestles
 - d. 2013: 1,000 trestles
 - e. 2014: 1,250 trestles
 - f. 2015: 1,750 trestles
 - g. 2016: 2,400 trestles
 - h. 2017: 2,400 trestles
25. The LPA has been aware of the use of trestles since at least 2010 (and more likely before this date) and have been actively consulted by both the Company and the Trading Company. The LPA also gave advice, including written advice, in the form of the LPA Advice Letter.
26. Any suggestion the LPA is not aware of the exact numbers of trestles deployed at any given time and their precise location since 2008 is simply not credible.

27. The Enforcement Notice was served on 6 July 2018 and is said to take effect on 17 August 2018. The Enforcement Notice sets out a time period for compliance of 2 calendar months after the Enforcement Notice takes effect.

28. The Enforcement Notice requires us to:

- 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.*

29. It would appear that the basis for enforcement action has dramatically altered since the Planning Authority advised that, in their view, planning permission is now required for the trestles. The earlier correspondence which contemplated enforcement action was advised to be on the basis of visual amenity and the safety/risk to navigation. Mr Bloom again confirmed this at the meeting on 19 December 2017.

Previous CLEUD Applications & Enforcement Notice

30. An initial CLEUD application in respect of certain trestles was lodged on 29 March 2018 the “**First CLEUD Application**”).

31. The First CLEUD Application was refused by the LPA on 1 June 2018. A copy of the Decision Notice is attached [37-39/1].

32. Attached to the First CLEUD Application was a photograph showing the trestles in situ taken from Google Earth on 4 July 2014. The earliest an application for a CLEUD that could be made based on that photograph was 5 July 2018, the day before the Enforcement Notice was served.

33. The First CLEUD Application has not been appealed as it was decided to make a fresh application for a CLEUD based on the Google Earth photograph of 4 July 2014 which clearly shows trestles in situ on the beach as at that date and from which exact GPS coordinates can be taken.
34. When lodging the First CLEUD Application the Appellants were clear and gave an open undertaking that, once a prior existing lawful use has been established, they would lodge a planning application to regularise the use of any other trestles situate above the mean low watermark that are not covered by any certificate of lawful use. The rationale for that is clear; any subsequent application for consent must be considered in light of any lawful or existing use which required the First CLEUD Application to be finally determined first.
35. A second application for a CLEUD was prepared and lodged using the Google Earth photographs (the **“Second CLEUD Application”**). The Second CLEUD Application was lodged on 13 July 2018 but was withdrawn on 16 July 2018 due to an error in the documentation submitted on 13 July 2018. The email withdrawing the Second CLEUD Application was clear that a revised application would be resubmitted with corrected documents.
36. The Appellants will lodge a third application for a CLEUD based on the Google Earth 4 July 2014 photograph but are awaiting certain clarification from the LPA with regard to the plan attached to the Enforcement Notice. To date, that clarification has not been provided and it has not therefore been possible to submit the revised (third) application for a CLEUD.

Regulatory Authorisation

37. Oyster production is heavily regulated and the Appellant's have all the requisite consents and authorisations required. The Company is registered with the Centre for Environment, Fisheries and Aquaculture Science (**“CEFAS”**) under the Aquatic Animal Health (England and Wales) Regulations 2009 under authorisation number EW026-C-028 and has been since 27 March 2009 when those Regulations came in to force. Prior to that the Company was

registered under the Registration of Fish Farming and Shellfish Farming Businesses Order 1985 under the registration number ESS00219A. A letter from CEFAS dated 9 March 2017 confirming this to be the position is at [40/1]. The Company registered with CEFAS when it started using trestles to cultivate oysters and the letter evidences that use pre-dated 27 March 2009.

38. Despite the Appellants having the requisite regulatory consents, authorisation and permissions to conduct their oyster propagation and cultivation operations, it has been suggested in objection to the First CLEUD Application that the Appellants lack certain consents to carry out oyster production. This is an unsupported bare assertion and is not the case at all. Not only has CEFAS granted registration, the Marine Management Organisation (the “**MMO**”) accept that the Appellants do not require a marine licence pursuant to section 65 of the Marine and Coastal Act 2009. The basis for their conclusion, as can be seen from the MMO’s letter of 9 January 2018 [41/1] is that Article 13 of the Marine Licensing (Exempted Activities) Order 2011 applies. Articles 4 and 13 of the Marine Licensing (Exempted Activities) Order 2011 provides an exemption to the need for a marine licence as follows:

“4 Exemption from need for marine licence

- (1) A marine licence is not needed for an activity that is an exempt activity.*
- (2) An activity is an exempt activity to the extent that—*
 - (a) it is an activity to which this article applies, and*
 - (b) where the application of this article to an activity is subject to a condition specified in Part 3, that condition is satisfied in relation to that activity.*
- (3) But this is subject to paragraph (4) and article 5.*
- (4) Nothing in this Order makes an activity an exempt activity to the extent to which the carrying on of the activity is contrary to international law.”*

“13 Shellfish propagation and cultivation

- (1) Article 4 applies—*
 - (a) to the deposit of any shellfish, trestle, raft, cage, pole, rope[, marker] or line in the course of the propagation or cultivation of shellfish;*

(b) to a removal activity or dredging activity carried on for the purpose of moving shellfish within the sea in the course of its propagation or cultivation.

[(1A) Paragraph (1) is subject to the condition that notice of the intention to carry on the activity must be given to the licensing authority before the activity is carried on.]

(2) But article 4 does not apply—

(a) to any such deposit made for the purpose of disposal;

(b) to any such deposit made for the purpose of creating, altering or maintaining an artificial reef; or

(c) to any such deposit that causes or is likely to cause obstruction or danger to navigation.”

39. A copy of the MMO's letter confirming that Article 13 applies is at [41/1]. The letter was dated and received on the exact same day as the letter from the LPA's enforcement officer David Bloom [3-6/1].

40. For the exemption to apply the trestles must not cause or be likely to cause an obstruction or danger to navigation. The MMO took expert advice from a leading Marine risk assessor, Marico Marine, who produced a full risk assessment and listed the steps that need to be taken to minimise any conceivable risk presented by the trestles. A copy of the Marico Marine report is attached [213-272/2]. The Appellants have implemented all the measures set out in the Marico Marine report. The measures adopted included the following:

- i. Lodging Notice to Mariners with various organisations including the UK Hydrographic Office.
- j. Identifying the precise location of the trestles using 15 'special marker buoys'. Special marker buoys are approved under an international navigation system and their exact color scheme, size, top-markers and the wording applies to them were approved by Trinity House, a body with statutory powers and duties to safeguarding shipping and seafarers.
- k. Withies were installed to mark each line of trestles.
- l. The 'holding area' at the foot of the Horsebridge (which is featured in the enforcement notice) was removed by May 2017.

- m. Further signage was erected warning of the presence of trestles.
- n. The inner eastern special marker buoys were realigned to allow more sea room for the Yacht Club.
- o. Any protrusions were removed from the trestles.
- p. Notices to Mariners were issued to local water users.
- q. Solar powered lights were placed on the four corners of the oyster farm;
- r. A further twelve withies were installed at the ends of each block of trestles to emphasise the location of each block.
- s. Both the local RNLi and the Fire Brigade will be invited to view the trestles and to conduct training exercises and/or mock rescue operations should they so wish.

Survey Records & Requests for Information

- 41. The Company started producing oysters using trestles and bags in 2008. The scale of production has increased gradually over time so as to achieve a level of production that is sustainable.
- 42. The LPA conducts photographic surveys for the purposes of beach monitoring as part of the Regional Coastal Monitoring Programme and surveys are conducted three times per year in spring, summer and autumn. On each survey photographs are taken looking up at the Beach, to the East and to the West. The Council has photographs in its possession from that process showing the numbers of trestles in situ since 2008.
- 43. On 21 March 2018 [42-43/1] the Company's and Trading Company's solicitors sent a request for information to the LPA pursuant to the Freedom of Information Act 2000, alternatively, the Environmental Information Regulations 2004. The request sought copies of those photographs taken from 2008 up to and including the spring survey in 2014 as these were clearly relevant to the First CLEUD Application.

44. No response was ever received, despite the request being sent via the Document Exchange (DX) and email.

45. On 6 April 2017, in a response to an earlier request for information made on the Company's behalf to the Whitstable Harbour Board (part of the LPA), the LPA provided a full list of the concerns, complaints, incidents and accidents reported in respect of the oyster trestles on the Company's Land up to 1 January 2017. A copy of that email and the list is at [44-48/1]. It can be seen from the LPA's response that:

- t. By January 2010 the LPA was aware of the trestles;
- u. that from February 2010, the LPA aware metal trestles were being used;
- v. In March 2010 a complaint was made to the LPA's planning enforcement department;
- w. In April 2010 – a planning enforcement complaint form was completed and lodged with the LPA;
- x. In May 2010 the number of trestles had increased; and
- y. No further concerns, complaints, incidents or accidents were reported between June 2010 and April 2015.

46. The Appellants consulted with the LPA throughout and during 2010 but were not made aware of the complaints and reports made to them. The Appellants director, James Green, met with the LPA's Planning Enforcement Officer, Mr Terry Dawson, on several occasions around this time and spoke with him on the phone numerous times. Mr Green also allowed him to arrange a survey and site inspection of the Company's land to record the exact location of the trestles. When that process concluded, Mr Dawson sent the LPA Advice Letter which appears at [1-2/1]. It was following that advice that the Appellants moved exclusively to using metal trestles.

47. In addition to the request made of the LPA, on 2 March 2017 similar requests were made of the Marine Accident Investigation Branch, Trinity House, Kent County Council and the MMO for details of a list of all complaints, incidents, or accidents following the deployment of trestles by the Appellants. Copies of those requests are at [49-52/1].

48. The responses to those requests were as follows:

- a) On 9 March 2017 Kent County Council responded stating they did not hold any information. Their response is at [53-54/1].
- b) Trinity House responded on 10 March 2017, Neil Jones, the PR and Records Manager responded to the request attaching 'two documents being an email from Mr McNally of the Whitstable Beach Campaign dated 10 December 2016 and a response to him dated 20 December 2016 confirming the Appellants were made aware of any markers that should be deployed but any complaint regarding the trestles should be made to the MMO. Copies of the emails are attached [55-58/1]. It should be noted the email exchange took place during the course of a public inquiry to register the Company's land as a new town or village green under the Commons Act 2016, an application brought by Mr McNally.
- c) The Marine Accident Investigation Branch responded on 22 March 2017. A copy of their response is at [59-61/1]. They were clear that there were two incidents but neither related to trestles.
- d) On 30 March 2017 the MMO responded refusing to comply with the request. A copy of their letter is attached at [62-64/1]. They do however now conceded that the Article 13 exemption applies.

49. In its newsletter of summer 2010 [65-78/1] (on page 4 [68/1]) the Whitstable Yacht Club made reference to the Company's use of trestles on its land. The newsletter states:

“Oyster Trestles

In case you haven't yet spotted the multiplicity of 5-litre plastic bottles, random yellow and red buoys and a couple of withies with flags on, there are oyster trestles to the west of our starting line which dry out at Low Water. Boats with shallow foils can get away with sailing over them at High Water but in general you are warned to keep clear.

These are commercial oyster rearing structures and unfriendly to boats, sails and people....”

50. Although the Company has been using trestles on its land since 2008 for the production and cultivation of oysters, it is difficult to give exact numbers and to state precisely which trestles were placed on the beach and when. The Appellants have invoices for the purchase of trestles but the Company's records do not go back further than 2013.

51. Initially I was supplied with some metal trestles by the Seasalter Shellfish Company who have an oyster farm (again who use bags and metal trestles to produce oysters) in Seasalter.

52. When we moved to using metal trestles (in 2010) the Company started to take delivery of metal trestles from France which were put out by hand in the intertidal zone. As the Appellants only keep records that go back 5 years we have no invoices for trestles between 2010-May 2013.

53. I have located an invoice dated 20 March 2013 [79/1] which shows the Company took delivery of 100 trestles from its supplier which would have been placed on the beach in the intertidal zone following delivery on 22 March 2013.
54. When making the First CLEUD Application, the Appellants were clear from the outset that a planning application would be lodged to regularise the balance of trestles which fell outside the scope of any CLEUD issued pursuant to the First CLEUD Application but only once any pre-existing use had been validly determined. This was made clear in a letter sent by the Appellants' solicitors to the LPA's Head of Planning, Simon Thomas, on 21 March 2018 [80-81/1].
55. The letter was clear that the First CLEUD Application would be lodged and that no application would be made for planning permission unless and until such time as the First CLEUD Application had been validly determined. Any subsequent application for planning consent would have to be considered in light of any lawful or existing use. Once finally determined, both Appellants openly gave undertakings to lodge an application for planning consent in relation to any trestles that do not constitute lawful existing use or development within 28 days of the deadline for a High Court challenge to the determination of the First Application having expired without challenge or within 28 days of the final determination of any such challenge if made.
56. The letter was also clear that given the length of time the trestles have been in place, the LPA's knowledge of them and the content of the LPA Advice Letter, that it would not be expedient nor in the public interest to contemplate enforcement action in advance of the First Application or any subsequent application for planning consent being validly determined.
57. No response was ever received to that letter, despite being sent via the Document Exchange (DX) and email.
58. The basis for the refusal of the LPA was stated in the notice as follows:

“The evidence submitted with the [First Application] is inconclusive and does not demonstrate that the development is lawful pursuant to Section 171B(1) of the Town and Country Planning Act 1990. It is therefore reasonable for the [LPA] to conclude that the applicant has not shown that on the balance of probabilities that 320 or fewer trestles (or substantially the same trestles) have been in situ on the land since March 2014”

59. I cannot accept that this is a reasonable conclusion and no LPA acting reasonably could make such a decision. It is clear that certain trestles had been in place for more than four years.
60. The plan attached to the notice refusing the First Application also related to a far larger area than that identified within the First Application and extending beyond the LPA’s jurisdiction.
61. Almost all of the comments made in opposition to the LPA did not bear any relation to the issue to be decided. However, one set of representations was clearly relevant in terms of supporting the First Application (albeit unintentionally) being those submitted by Sally Newcombe on behalf of the Whitstable Beach Campaign in her letter of 10 May 2018 [82-119/1] (the “**WBC Representations**”).
62. The WBC Representations attached various documents and evidence to demonstrate Ms Newcombe’s belief that the number of trestles could not have totalled the 320 trestles on 29 March 2014 as set out in the evidence lodged in support of the First Application.
63. The WBC Representations clearly evidence the trestles in situ as at June 2010. It appears from the WBC Representations that the June 2010 evidence relied on is a survey undertaken by the LPA which appears at page 23 [108/1] of the annexes to the WBC Representations.

64. The WBC Representations then go on to refer to a further survey carried out by the LPA in June 2013. Pages 24 and 25 [109 and 110/1] of the annexes to the WBC Representations attach a photograph of the June 2013 survey and a further photograph which is said to show the 2013 survey superimposed on to the June 2010 survey. The WBC Representations aver that the June 2013 aerial photograph shows approximately 100 trestles in place.
65. Pages 23-25 [108-110/1] of the WBC Representations appear to suggest the photographs in question were provided by the LPA in response to a request for information made under the Freedom of Information Act 2000 to the LPA seemingly under the reference number 3928.
66. As at 4 July 2014 I estimate that the total number of trestles in place was in the region of 228. However a number of these are sited outside the City Council's administrative boundary and will not therefore be subject to LPA's jurisdiction nor any revised CLEUD application. Of those 228 trestles, approximately 146 of them were in place at 4th July 2014 and within the City Council's boundary.
67. It is extraordinary that the LPA refused the First CLEUD Application in circumstances where it has evidence in its possession of the numbers of trestles in situ in 2013, where it has seemingly shared that information with conscientious objectors to the First CLEUD Application and where information provided in the WBC Representations proving this to be the case was clearly made available to the LPA during the decision making process.
68. Whilst it would appear the LPA happy to share information with those objecting to the First CLEUD Application, various requests for information have been made to the LPA by the Appellants' legal and planning representatives but the LPA has either delayed, postponed, failed to cooperate or declined to respond. This is despite the Appellants' representatives making clear that the NPPF makes reference to circumstances where the LPA has information which may assist an applicant, they should make this available. The LPA deliberately and consistently failed to do so.

69. The Appellants' solicitors made a request for information of the LPA on 19 December 2017 [120/1] under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 for details of any complaint received by the LPA pertaining to the trestles on the land. On 18 January 2018 the LPA refused to provide the information requested [121-123/1]. On 19 January 2018 the Appellants' solicitors made a request for an internal review of the LPA's decision not to disclose the information requested [124-130/1]. On 23 February 2018 the LPA, acting by its Principal Regulatory Lawyer, Peter Kee 'upheld' its initial decision not to provide the information requested [131/1].
70. Prior to the refusal of the First CLEUD Application, on 24 May 2018 a further request was made by the Appellants' solicitors to Mr Kee at the LPA [132-133/1]. The request sought confirmation as to whether the June 2013 aerial photograph attached to the WBC Representations is a document derived from the LPA and confirmation of the exact date of it. The basis of the request was obvious, if the photograph was dated June 2013, it clearly demonstrated the trestles in situ on the beach and a CLEUD should have been issued pursuant to the First Application. The email also requested confirmation as to how many other aerial surveys of the site the LPA had conducted since 2010 and requested copies together with any other photographs during the period 2010 to the present day. The email also attached the previous letter to the LPA's Head of Planning, Simon Thomas, of 21 March 2018 [42-43], which had again been ignored, requesting a response.
71. Mr Kee responded on 25 May 2018 [134/1], pledging to respond once he had met with those in the LPA's planning team to take instructions. Mr Kee estimated it would take a period of two weeks to respond.
72. Save for the holding email of 25 May 2018, no response was received to the 21 March or 24 May requests for information until 27 July 2018 when two emails were received from the LPA some information in response to the requests made. Copies of those responses are attached [135-179/1].

73. The first email in response was sent in response to request EIR/FOIA5904. A copy appears at [135-179/1]. That request pointed out that as part of the LPA's coastal monitoring programme it conducts photographic surveys of the beach from various locations throughout the year. Photographs looking west from the east of the Horse Bridge and the Yacht Club and the Lifeboat Station were requested for the period from 2008 to 2014. In response the LPA provided 44 photographs but no trestles are shown in situ until 2015. No photographs have been provided for the location where trestles are shown in 2015 for the period between 2008 and 2014.
74. The second email was sent in response to request EIR/FOIA6320. A copy appears at [180-189]. The request initially sought confirmation as to how many other aerial surveys the LPA conducted together with photographs and clarification as to whether the 2013 photograph showing the trestles in place originated from the Council and the date of it. In responding to that request the LPA confirmed that there are three types of photography, aerial photography flights for 2003, 2008, 2012 and 2015 and aerial flights every year as part of the coastal monitoring programme between 2000-2015. Those photos are said to have been provided in response to EIR/FOIA5904 although the Appellants reiterate none of them show trestles in situ until 2015 and photographs for the same locations (which do show trestles in 2015) have not been provided of the period 2008 – 2014.
75. The third set of photographs are part of the Regional Coastal Monitoring Programme, a national project with the local office. Aerial surveys were commissioned in 2005, 2008, 2013 and 2016. The response and photographs are attached which clearly show trestles in situ in 2013, 2015 and 2016.
76. The second part of that request related to clarification on the 2013 photograph provided by one of the objectors in relation to the application for the First CLEUD Application. The LPA has confirmed that the request was made (and responded to the very same day) on 10 March 2017. A copy of the request and response which appears at

<https://www2.canterbury.gov.uk/your-council/freedom-of-information/3601-3650/3627-erection-of-oyster-trestles-on-west-beach-whitstable/> is attached [190-195/1].

77. Despite responding the very same day to the individual making the request, Ms Sally Newcombe, also a member of the Whitstable Beach Campaign who was actively involved in the Village Green Application, the LPA did not provide the information requested to the Appellants until 27 July 2018. It is clear from the response that the Local Planning Authority was not only aware of certain trestles on the beach, they in fact undertook GPS survey in 2010 which recorded the exact position and extent of the oyster trestles at that time. The response includes four photographs showing those trestles using black, annotated points. Those trestles are then imported into aerial photographs taken during subsequent surveys conducted in 2013 and 2016. The more recent photographs show the expansion of the numbers of trestles in 2013 and 2016. It is clear therefore the LPA can pinpoint the exact number of trestles shown in the GPS survey in 2010 and subsequent surveys in 2013, 2016 and 2017.
78. On 7 June 2018 [196-205/1], the Appellants' Planning Consultant emailed the LPA again requesting information. The 'discrepancy' in the plan attached to the notice refusing the First Application was also raised with the LPA. Clarification was also sought as to why the LPA had unilaterally altered the boundary of the land subject to the First Application without reference to the Appellants or their representatives.
79. Again, no response was ever received in writing.
80. A further email was sent by the Appellants' Planning Consultant on 19 June 2018 [206/1] to the LPA's Chris Pragnell requesting a response to the 7 June email.
81. Again, no response was received in writing.

82. A further request [207/1] was sent by the Appellants' Planning Consultant to the LPA on 28 June 2018 requesting a response to the 7 and 19 June emails.
83. On 2 July 2018, Mr Pragnell responded [208/1] stating "*I've been out of the office. I'll call later today or tomorrow.*"
84. Despite the pledge in his email, Mr Pragnell never responded in writing. Instead, on 6 July 2018, the LPA served an Enforcement Notice (the "Enforcement Notice") [11-20/1].
85. The basis on which the Enforcement Notice was served was entirely different to the rationale explained in the LPA correspondence in 2017 and the meeting at the LPA's offices on 19 December 2017, namely risks to navigation and visual awareness.
86. The Marico report clearly set out the measures required to minimise risk which the Appellants have implemented and the MMO accept that Article 13 applies. By definition, for that exemption to apply, the trestles must not cause or be likely to cause an obstruction or danger to navigation.
87. I also cannot accept that the trestles have an adverse impact on visual amenity. They are an attraction and postcards featuring the trestles are on sale in Whitstable. The beach itself is a working beach and has been since time immemorial. To the East of the trestles is a working harbour, aggregate dock and asphalt plant which has a large industrial furnace and tower. There is also a windfarm clearly visible from where the land has been enforced. Any suggestion that the trestles have an adverse impact on visual amenity is simply not credible.
88. It would be impossible to remove the oysters within the timescale stipulated. They are livestock and would need to be relocated to another intertidal zone where bags and trestles would still be required. They could be removed gradually as they mature at the end of the lifecycle and certain trestles could be removed when those oysters are not replaced and as

numbers reduce but this would be a process that would take four to five years, the lifecycle of the oysters.

89. At Appendix 1 is the photograph from Google Earth dated 4 July 2014 showing certain trestles in situ. The photograph was included in the First CLEUD Application and will form the basis of the intended revised CLEUD Application. At least 228 trestles are clearly visible from the photograph. It is also possible to take the exact coordinates of the trestles shown on the Google Earth Photograph and plot those GPS coordinates on a map showing the exact location of the trestles shown in the photograph. The position of those trestles has not changed, they have been in situ since at least 4 July 2014. The photo shows a total of 8 rows of trestles that are 86 metres long and each trestle is 3 metres long, a total of 228 trestles. Approximately 146 of those are above the mean low watermark and within the LPA's boundary.

90. When making the First CLEUD Application, drawing number P3701-PL-(00)—X-002 1ST lodged with the First Application showed the area of trestles shown on the July 2014 Google aerial photograph. That drawing outlined the application site and the extent of the trestle area within the LPA's jurisdiction, i.e. that area down to the mean low water mark.

91. Those trestles could also be identified by virtue of a wooden post put in place complete with a sign telling people that oysters were being cultivated in that area which marked the start of the trestles. A photograph of that post and the sign is exhibited at page [273/3]. The Appellants have the coordinates for the location of that post.

92. Exhibited at [274-287/3] are a series of photographs all of which are marked with date and time stamps taken between 6 February 2013 and 31 May 2014 which show:

- z. trestles which have been delivered waiting to be set out on the beach [274-275/3] both dated 6 February 2013;

- aa. oysters being graded and bags ready to be filled to be put on the trestles [276/3] dated 12 March 2013;
 - bb. bags being assembled to be placed on trestles; [277/3] dated 13 March 2013;
 - cc. seed oysters having been delivered ready to be placed in bags [278/3] dated 13 March 2013;
 - dd. cultch placed on the beach to be used for seed oysters to spawn [279/3] dated 15 April 2013;
 - ee. trestles and bags in situ on the beach [280-284/3] dated 15 May 2014;
 - ff. trestles and bags in situ on the beach [285-286/3] dated 24 May 2014; and
 - gg. trestles and bags in situ on the beach [287/3] dated 31 May 2014.
93. Electronic copies of those photographs can be provided on request. The same offer was made in the First CLEUD Application but the LPA did not make any request for them.
94. As at 5 July 2018, those trestles had been in position for more than four years. On 6 July 2018, the LPA served the Enforcement Notice.
95. For reasons unbeknown to me, operations which have been carried out by the Appellants on the Company's private land in the same way for more than ten years without incident and which generate environmental, economic and tourism benefits for the area are now the subject of enforcement action by the LPA. That is despite the content of the LPA Advice Letter confirming that metal trestles do not constitute development and therefore are not controllable under planning legislation and the LPA's acute knowledge that trestles have been deployed on the land since 2008. The Appellants relied on the LPA Advice Letter before making significant investment in the trestles and associated infrastructure.
96. The Appellants have openly undertaken to lodge a planning application once the prior existing lawful use has been established, to regularise the use of any other trestles situate above the mean low watermark that are not covered by any certificate of lawful use. Any subsequent

planning application for consent must be considered in light of any lawful or existing use which will require the revised CLEUD application to be finally determined first. That said, once that application has been finally determined the Appellants have undertaken to lodge (within 28 days of the deadline for a High Court challenge to the CLEUD determination having expired without challenge; or with 28 days of the final determination of any such challenge if made) an application for planning consent in relation to any trestles that do not constitute lawful existing use or development.

97. Given the length of time the trestles have been in place, the LPA's knowledge of them and the advice previously given upon which the Appellants' relied, the Appellants cannot accept that it would be either expedient or in the public interest to pursue enforcement action.
98. There is no evidence whatsoever of any irremediable harm which necessitates urgent enforcement action now in advance of the determination of any revised application for a CLEUD or any subsequent planning application. Put simply no reasonable planning authority would consider acting that way. The Appellants' solicitors wrote to the LPA on 21 March 2018, drawing this to their attention and inviting them to withdraw the Enforcement Notice yet they have refused to do so. A further letter was sent on 10 August 2018 again inviting the LPA to withdraw the Enforcement Notice [209-212/1].
99. Once any revised application for a CLEUD has been finally determined, an application for planning consent shall be lodged in respect of any trestles that do not constitute lawful existing use or development. The rationale for deferring any application until such time is clear; any subsequent application for consent must be considered in light of any lawful or existing use which will require any revised application for a CLEUD to be finally determined first.
100. An application for planning consent in relation to any trestles that do not constitute lawful existing use or development application will be lodged within 28 days of the deadline for a High Court challenge to the determination of any revised application for a CLEUD having

expired without challenge; or within 28 days of the final determination of any such challenge, if made.

101. These Submissions are made entirely without prejudice to any of the Appellants' rights of appeal in respect of the First CLEUD Application, the Enforcement Notice, any revised Application for a CLEUD or any complaint to the Information Commissioner and/or Information Tribunal as a result of the LPA's failure to properly answer requests for information.

IN THE MATTER OF:

THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

THE WHITSTABLE OYSTER FISHERY COMPANY (1)

THE WHITSTABLE OYSTER COMPANY LIMITED (2)

THE WHITSTABLE OYSTER TRADING COMPANY LIMITED (3)

APPENDIX 1

IN THE MATTER OF:

THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

THE WHITSTABLE OYSTER FISHERY COMPANY (1)

THE WHITSTABLE OYSTER COMPANY LIMITED (2)

THE WHITSTABLE OYSTER TRADING COMPANY LIMITED (3)

APPENDIX 2

IN THE MATTER OF:

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THE WHITSTABLE OYSTER COMPANY LIMITED (2)

THE WHITSTABLE OYSTER TRADING COMPANY LIMITED (3)

APPENDIX 3

82. A further request [207/1] was sent by the Appellants' Planning Consultant to the LPA on 28 June 2018 requesting a response to the 7 and 19 June emails.
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