



# Appeal Decision

**by Mark Yates BA(Hons) MIPROW**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 05 March 2020**

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## **Appeal Ref: FPS/W2275/14A/19**

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of Kent County Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 17 May 2015 was refused by the Council on 26 February 2019.
- The appellant claims that a footpath running through Coldblow/Horseshoe Woods at Ripple ("the claimed route") should be added to the definitive map and statement for the area.

## **Summary of Decision: The appeal is allowed.**

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### **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. All of the points referred to below correspond to those delineated on the attached version of the map produced by the Council when it determined the application.
4. The appellant recently requested that I accept a legal submission on whether Crown immunity is applicable to the claimed route. It is now over five months since the end of the exchange of the written representations between the parties. There was ample time for the appellant to seek advice bearing in mind the Council's view on the matter was set out in its decision of 26 February 2019.
5. Despite my concerns regarding the lateness of this submission, I do not turn it away lightly. However, in light of my decision involving this appeal, the appellant will have a further opportunity to make any representations on this matter and no apparent prejudice would ultimately arise if the submission is not accepted at this stage. Therefore, I considered it reasonable to decline to accept this submission and I have not had sight of it.

### **Main Issues**

6. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other
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relevant evidence, shows that "*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...*".

7. In considering this issue there are two tests to be applied:
- Test A: Does a right of way subsist on the balance of probabilities?
  - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

8. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way. Statutory dedication does not apply to land belonging to the Crown<sup>1</sup>, except under a special agreement pursuant to Section 327(2) of the 1980 Act.
9. If statutory dedication is not applicable, I shall consider whether an implication of dedication can be shown at common law. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

## **Reasons**

### ***Background matters***

10. The claimed route generally runs parallel to existing public rights of way, namely Footpath EE443 (points A-B), Bridleway EE442 (points B-C) and Footpath EE438 (points C-D). The route is located within two distinct parcels of land either side of the solid line at point Y (referred to below as the southern and northern areas). Both areas were previously within the ownership of the Ministry of Defence ("MOD").
11. The details provided reveal that the northern area was owned by the MOD until November 1978 when it was sold to a company formerly owned by the late Mr Ledger. The southern area was sold to Mr and Mrs Luckhurst in November 1992. This plot was subsequently sold to TG Claymore (UK) Ltd ("Claymore") in May 2012. During the time the land was owned by the MOD it would have been Crown land and could not have been dedicated under statute. I address below the event that brought the status of the route into question for the

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<sup>11</sup> Including government departments

purpose of statutory dedication. The timing of this event will determine whether there is a twenty-year period available following the sale of the land by the MOD.

12. I note the Council's view that the claimed route should be considered in its entirety. Nonetheless, in light of the way that the ownership of the land has evolved, there is the potential for different sections of the route to be considered separately under statute and common law. There is also the potential for me to approve the appeal for only part of the claimed route. However, it is normally the case that a public right of way would connect with another highway or place of public resort.
13. The appellant raises the issue of the claimed route potentially corresponding with part of Footpath EE443. This is something the Council does not accept to be the case. The application relies on evidence of use by the public in support of the dedication of a right of way. It does not involve the deletion of any part of Footpath EE443 on the ground that this path is incorrectly recorded. In terms of the appellant's request that the definitive statement is modified in respect of the description of Footpath EE443, this is going beyond the scope of the application that is the subject of this appeal.
14. An application to record the southern and northern areas as a town or village green ("TVG") was considered following a public inquiry held in June 2014. Whilst the Inspector's report may provide some assistance on factual matters, the issue that she had to consider was different to the application before me. She was not tasked with determining whether there were any public footpaths across the site.

### ***Evidence of use***

15. A public footpath involves a right for people to pass and repass on foot over a defined route. It follows that any dedication could only arise from such use. Other activities undertaken on the land in relation to the TVG application would not count in support of the present application.
16. Fifty-five user evidence forms ("UEFs") were submitted in support of use of the claimed route. The Council undertook interviews with a proportion of these users and additional user evidence has been provided in connection with this appeal. Whilst I have only been provided with a summary of the original UEFs, it is not disputed that the claimed route has been used by members of the public for recreational purposes such as dog walking and exercise.
17. The Council accepts that the evidence of use was sufficient to have brought it home to the landowner that the claimed route was being used by the public. Only one of the users is stated to clearly have had permission to be on land crossed by the route.

### ***When the status of the claimed route was brought into question for the purpose of statutory dedication***

18. Claymore erected barbed wire across access points and placed notices stating "Ringwood Cricket Club No Trespassing" on 27 August 2012. This action would have clearly challenged public use of the southern section. It could have also served to bring the status of the claimed route into question in its entirety.

19. The Council draws attention to action being taken in respect of the northern area in October 2012 in the form of challenges and the erection of a bund and posts. The appellant disputes that Mr Ledger challenged users. He submits that use of the northern section was brought into question by the application to modify the definitive map in May 2015. However, by that date, the Inspector had considered the TVG application following a public inquiry. Whilst the two applications involve the registration of different rights, it is likely that any use of the site would have been brought into question by the application for a TVG on 27 November 2012 at the latest.
20. I have highlighted above that it may be appropriate to consider the different sections of the route separately. In terms of the southern section, there is not a full twenty-year period that is potentially available between the land ceasing to be Crown land and the action taken in August 2012. This means that the evidence needs to be considered under the common law.
21. There is the potential for the northern section to be considered under statute. I do not accept that the status of this section was brought into question as late as 2015. In my view, this should be taken to have occurred by 27 November 2012. It is possible that the status of this section was brought into question slightly earlier in 2012. However, nothing appears to turn on the precise date when use in relation to the northern section was brought into question. This means that the relevant period for the purpose of statutory dedication ("the relevant period") should be taken to be 1992-2012.

### ***The northern section***

22. As outlined above, it is not disputed that people have used the claimed route, including the northern section. The UEFs are stated to provide evidence of regular use throughout the relevant period. There is nothing that appears to indicate that the use of the northern section was not as of right.
23. The Council and Claymore consider that dedication could not have arisen in this case as the use of the claimed route arose from people having to deviate from the existing public rights of way due to sections of them being impassable. In support, reference is made to the case of *Dawes v Hawkins [1860]* where it is held that the public could not gain a right by deviating from a highway that was unlawfully obstructed as they had a right to deviate.
24. There is some evidence that points to the existing public rights of way being affected by a growth in vegetation and ploughing. This issue seems to be different from the circumstances in *Dawes v Hawkins*. Further, the appellant asserts that use of the claimed route within the woodland was a matter of choice rather than arising from the obstruction of the public rights of way nearby. In respect of the relevant section of Bridleway EE442, he says that it was never obstructed for pedestrians. I note that the Council acknowledges people used the woodland tracks by choice even when the existing rights of way were clear of vegetation and not ploughed. The growth in vegetation on the rights of way could possibly reflect a lack of use arising from the preference for the claimed route.
25. The Council says the original evidence is supportive of access being gained at points A, B, C or D. In contrast, following the submission of the appeal, there is some additional evidence of people connecting with Bridleway EE442 at point Y. The appellant asserts that this matter was something not previously raised

with the users. There may be some doubt regarding whether people used this access point to any significant extent prior to the action taken to obstruct the remainder of the claimed route in the summer of 2012. However, this matter is only relevant if the evidence does not support the making of an order in terms of the southern section. In such circumstances there is the potential for the northern section to be a cul de sac.

26. The Council accepts that there is no evidence that the landowner took action during the relevant period to demonstrate a lack of intention to dedicate a footpath.
27. The details provided indicate that the UEFs are supportive of widespread use throughout the relevant period and there is nothing to show that the landowner demonstrated a lack of intention to dedicate a footpath. These matters could lead to a finding that a public footpath has been dedicated in accordance with Section 31 of the 1980 Act. The evidence could also potentially support a finding of dedication under common law. It follows from these conclusions that a footpath can be reasonably alleged to subsist over the northern section. However, I also need to have regard to the position in relation to the southern section.

### ***The southern section***

28. I have taken the view that the southern section needs to be considered under common law. It is not necessary for there to be positive action on behalf of a landowner to raise an inference of dedication at common law. A lack of action in response to heavy and/or longstanding use of a way may be sufficient to raise an implication of the dedication of a public right of way.
29. From looking at the TVG report it is apparent that Mr Luckhurst repaired gaps in the fencing and erected signs after he purchased the land. These signs were quickly torn down and it appears that he gave up trying to secure the site by 1994 or 1996. Dover District Council also issued a direction under Article 4 of the Town and Country Planning (General Permitted Development) Order 1995 regarding the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure involving this land. Mr Luckhurst obtained planning permission to repair the fence in 1998 but he did not ultimately undertake the works.
30. The appellant questions whether the site fencing impacted on the claimed route and he asserts that the action was not aimed at walkers. Nonetheless, the fencing of the site is likely to have served to exclude walkers from the land. This action is not indicative of the landowner dedicating a footpath. The signs briefly in place would also have served to challenge the public irrespective of the purpose of their use.
31. The actions of Mr Luckhurst during the early part of the 1990s is not indicative of him intending to dedicate a footpath over his land. It is apparent that he gave up trying to secure the land despite obtaining consent to do so. There is nothing to suggest there was any change in his attitude on this matter despite the subsequent lack of action to secure the site. The cutting of fencing and removal of signs also raises the question of the extent to which use by some people was by force and not as of right. Although the appellant refers to fences being cut by others such as motorcyclists. In my view, the evidence does not generally point to the dedication of the southern section during the

period that Mr Luckhurst owned the land. I address below the position regarding the period the land was owned by the MOD.

32. The southern area was used for a period of time as a sports ground for the marines. Claymore place some reliance on Mr Horne's evidence that as a youngster in the early 1980s he climbed over chain link fencing to access the site. In addition, Mr Horne recalls a sign that stated the land was MOD Property and no admittance was permitted. Claymore submit that the conduct of the MOD in securing the site is not indicative of an intention to dedicate.
33. In contrast, the appellant says the signage only stated that the site was MOD property and served to inform people of the identity of the owner of the land. He also says that the fencing generally fell into a state of disrepair during the MOD's ownership and access was available at various points. It is estimated that this occurred during the late 1970s and early 1980s. He states that no attempt was made to stop people using the route and the MOD staff were friendly when they encountered walkers. These points appear to be supported by the user evidence. The Council acknowledges that as the MOD's use of the land lessened so did the maintenance of the site and that it appeared to tolerate use. It submits that as the MOD did not necessarily encourage use dedication at common law cannot be demonstrated.
34. I have outlined above that use of a way may demonstrate both dedication by the landowner and acceptance of the dedication by the public. The details provided indicate that a number of the users made use of the claimed route during the period the land was owned by the MOD. There is conflicting evidence regarding the extent to which the site was secured during the MOD's ownership. However, it is apparent that the fencing fell into a general state of disappear. This suggests that there was no need for the public to use force in order to walk along the claimed route for a period during which the land was owned by the MOD. The attitude of the MOD in response to the public use appears to be one of acquiescence.
35. There is a conflict of evidence in the written submissions of the parties. Nonetheless, there is no incontrovertible evidence that a right of way could not be reasonably alleged to subsist. I find that the evidence is sufficient to reasonably allege that there was the dedication of a footpath over the southern section during the time the land was owned by the MOD. There is also the potential for the dedication of the two sections to have occurred during the same period.

### **Other Matters**

36. The impact of the claimed route being recorded as a public footpath is not relevant to my decision.

### **Conclusion**

37. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

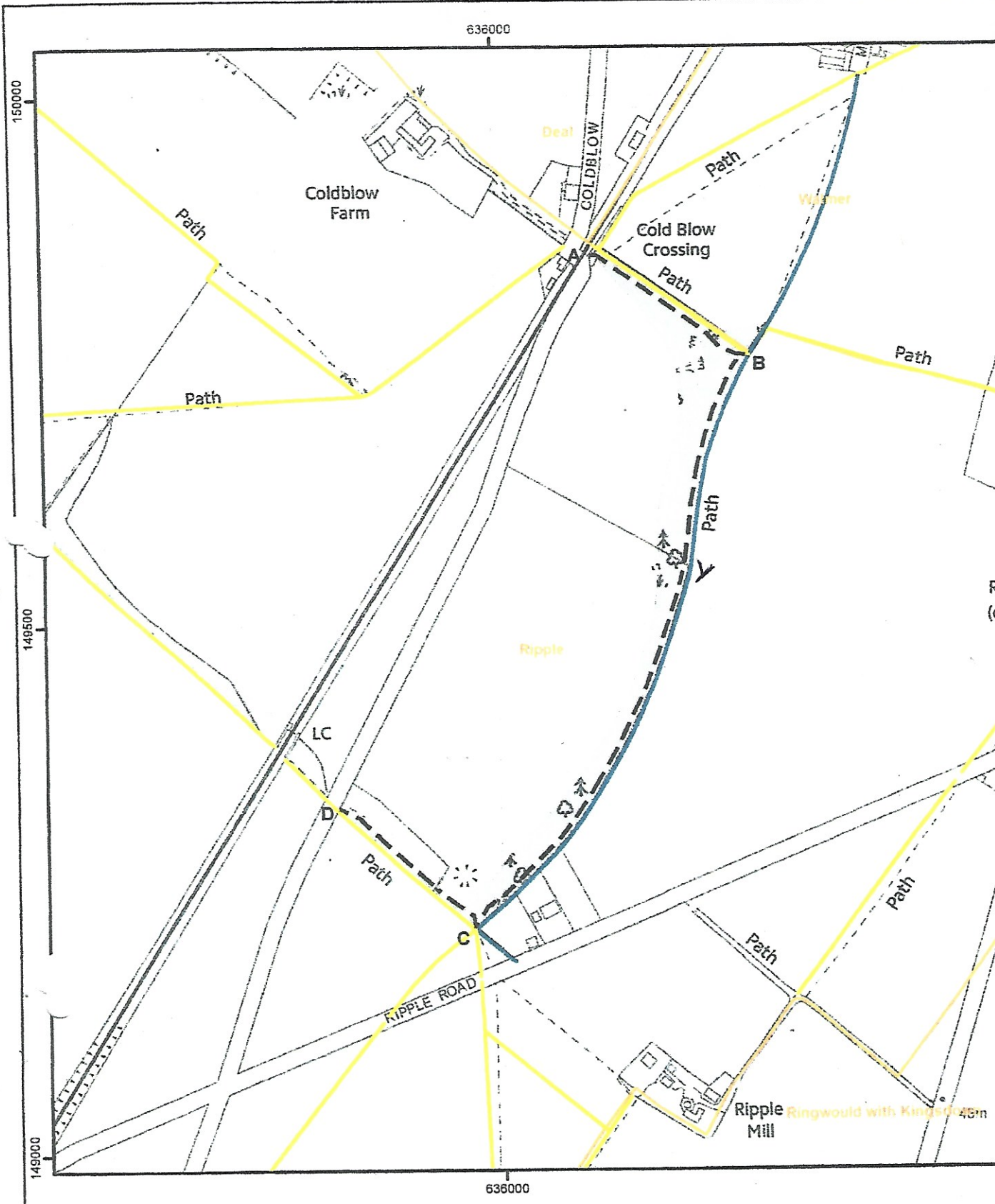
### **Formal Decision**




38. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Kent County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a

footpath over the route as proposed in the application dated 17 May 2015.  
This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Mark Yates*

**Inspector**

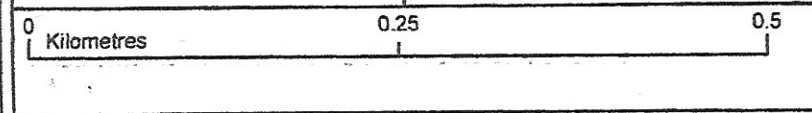


Key	
	Public Footpath
	Public Bridleway
	Claimed path

**Claimed footpath running through Cldblow Woods/Horseshoe Woods at Ripple, Deal**

Produced by the KCC Public Rights of Way and Access Service  
 Please note: this map extract is not a legal record of the alignment or existence of a public right of way. No measurements should be taken from it.

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