



Appeal Decision

by Alan Beckett BA MSc MIPROW

appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 17 JUNE 2020

Appeal Ref: FPS/W2275/14A/21

- 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 and order under Section 53 (2) of that Act.
 - The Application dated 7 December 2017 was refused by the Council on 7 November 2019.
 - The Appellants (Faversham Reach Residents Association) claim that the definitive map and statement of public rights of way should be modified by deleting part of footpath ZF5 Faversham, as shown on the definitive map at the time of the application shown by ZF5 A – B on the plan appended to this decision as Appendix A. The current definitive alignment of footpath ZF5 and ZF43 is shown F – E – D – C – B – A on the plan appended to this decision as Appendix B.
 - **Summary of Decision: The Appeal is dismissed.**
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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. This appeal has been determined based on the papers submitted.

The Main Issues

3. The Appellants contend that footpath ZF5 was erroneously added to the Definitive Map and Statement and should be deleted. The deletion of a public right of way is provided for by Section 53 (3) (c) (iii) of the 1981 Act. Section 53(3)(c)(iii) provides that a modification order should be made by the surveying authority following the discovery of evidence which (when considered with all other relevant evidence available to them) shows that there is no public right of way over land shown in the map and statement as a highway of any description. The main issue in this case is whether the evidence discovered demonstrates, on a balance of probabilities, that there was no public right of way over ZF5 at the time it was first recorded on the definitive map.

Reasons

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties; the relevant part of the Wildlife and Countryside Act 1981; the findings of the Court of Appeal in the *Trevelyan*¹ case and the guidance given in Defra Rights of Way Circular 01/09 (version 2, October 2009).

¹ *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266

5. In the Trevelyan case, Lord Phillips MR held that *"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*
6. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the surveying authority to demonstrate that the map was correct.
7. Circular 18/90 has been superseded by Defra Circular 01/09. Circular 01/09 says at paragraph 4.33 *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
 - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
 - *The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.*
 - *The evidence must be cogent."*
8. The burden of proof lies with the Appellants and the standard of proof to be satisfied in relation to the proposed deletion of footpath ZF5 is the civil standard of proof; that is, the balance of probabilities.

Background

9. The land crossed by that part of footpath ZF5 at issue is currently occupied by housing, the development of which commenced around the mid-1980s. Prior to the re-development of the land for housing, the land crossed by footpath ZF5 had been the West Yard of Pollock's barge building business with such operations having been undertaken on the West Yard site from its creation around 1936-8 until 1970 when Pollock's had closed. The shipbuilding yard lay vacant until 1972 but was leased to another firm which operated until 1976, then lay dormant again until 1979 when activity resumed until 1981. Following

- the closure of the barge building business in 1970, the West Yard remained disused until being redeveloped for housing in the 1980s².
10. Footpath ZF5 was first recorded following a revision of the definitive map by the Council in 1970. As part of the consultation process, Faversham Borough Council ('FBC') were asked to reassess the public rights of way in its area and to make recommendations for the revision of the definitive map. One of the routes which FBC considered should be added to the revised map was the path at issue.
 11. The route of the footpath was described as "*from junction of Front Brents with Brent Hill Road in north-easterly direction along Front Brents, across Crab Island to the boundary of Shipyard, then n.w. along boundary wall of shipyard to commencement of FP5*". Whilst the review was ultimately abandoned on the direction of the Secretary of State following the introduction of the continuous review process under the 1981 Act, those modification to the definitive map to which no objection had been made were given effect. As no objections had been made to the proposed addition of footpath ZF5, it was added to the revised definitive map and has been depicted on subsequent revisions of the map published in 1987 and 2013.
 12. Consideration had been given to the extinguishment of this part of footpath ZF5 in 2014 under the provisions of section 118 of the Highways Act 1980 although that order was not confirmed³.
 13. The application was supported by documentary evidence including aerial photographs of the West Yard site during the early part of the twentieth century, local histories and the recollections and personal evidence of individuals who had been employed at Pollock's shipyard during its operation. In addition, the Council has undertaken an examination of these and other documentary sources, together with other witness evidence as part of its investigation.
 14. Little evidence has been submitted which sheds light upon the question of the nature of the evidence which would have been taken into consideration when the path was first added to the definitive map. In 1970, the Council may or may not have had access to the aerial photographs and other documents submitted by the applicants. In the absence of evidence to the contrary, I am prepared to accept that new evidence has been adduced in relation to FZ5 sufficient to engage the provisions of section 53 (3) (c) (iii) of the 1981 Act.
 15. It is the Appellants' case is that footpath ZF5 was erroneously added to the definitive map during the 1970 review and that the route as originally recorded (shown by ZF5 A – X on the plan appended to this decision) should be deleted. The public right of way along that part of ZF5 A – E and X – F was extinguished in 2018 with B – C – D – E and F – G – H – I – J being created in substitute⁴. It follows that if there was no public right of way of any description over the original line of footpath ZF5, there would be no public right of way over what is now shown as parts of footpath ZF43 which were created as a substitute for the original line and would also need to be deleted.

² The later history of the site is described in Chapter 10 of 'A Sideways Launch' by Anne Salmon

³ Planning Inspectorate reference FPS/W2275/3/12.

⁴ The combined effect of the Kent County Council (Public Footpath ZF43(Parts) Faversham Public Path Creation Order 2016 and the Kent County Council (Public Footpath ZF5 9Parts) Public Path Extinguishment Order 2016: planning Inspectorate ref ROW/3175170 and ROW/3175171)

16. The Appellants advance five grounds for Appeal – (1) Errors of process; (2) the identification and treatment of evidence; (3) the map used for 1970 definitive map being of date; (4) the misinterpretation of consistency guidelines and case law; and (5) the denial of natural justice.

Ground 1 - Errors of process.

17. It is contended that as the determination of the application was made by a Director and not by elected members of the Council the decision was void as it did not comply with the requirements of The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2583/2000). The Council submits that the procedures and the legal tests applied are a matter of law and Government guidance which has been correctly followed. The decision was made in accordance with the Council's Constitution and Scheme of Delegations.
18. Under the Council's Scheme of Delegations, the Council's duty under section 53 of the 1981 Act is delegated to the Director of Environment Planning and Enforcement and through further delegation to the PROW and Access Service Manager and is not a function for which decision making has been reserved to elected Members of the Council. I have not been provided with any evidence which suggests that this Scheme of Delegation is contrary to the 2000 Regulations. Even if it were, the Appellants are unlikely to have been prejudiced as paragraph 4 (1) of Schedule 14 to the 1980 Act provides a mechanism whereby the decision of the Council can be appealed. This ground of appeal is dismissed.

Ground 2: Identification and treatment of evidence.

19. I have not been provided with copies of many of the documents which the Council have taken into consideration and my understanding of these documents is based on the description of those documents found in the appendix to the Council's report to the Director of Environment, Planning and Enforcement dated 6 November 2019 and from the Appellants' analysis of those documents.
20. There is a dispute between the parties as to whether the first edition Ordnance Survey 6-inch to the mile map shows the line of ZF5 or just a path running along what may have been the towing path alongside Faversham Creek. The copy extract of this map among the Appellants' documents is unclear and difficult to interpret.
21. The six-inch OS map of 1898 shows by means of peck lines a track or path following the northern bank of Faversham Creek with a foot bridge providing a means of crossing an arm of the creek at the Brents; the land which became West Yard is to the north and east of this arm and the map shows a means of access over the land at the side of the creek with another path or way running north-west from the houses at The Brents. The revised six-inch map published in 1909 depicts the land at issue in the same way as had been shown on the 1898 map; there is no evidence on any of these maps of industrial activity on the north side of the creek in the vicinity of what became Pollock's boat building yard.
22. The 6-inch map was revised in 1938 but not published until 1946. This map shows that the area to the north-east of the land at issue had been developed with the buildings that formed Pollock's East Yard being present. There is no

- evidence on this map of the development of the West Yard and the map shows a track or path running along the north bank of the creek which then turns north-west towards the houses at The Brents and then north-east along the outside of the East Yard.
23. The Appellants submit that this OS map was out of date when it was published as Pollock's had begun construction of the West Yard in 1936 and by 1938 that yard had been enclosed by a wall on the south-west and north-west sides. The history of the shipbuilding business on the Creek described in "A Sideways Launch" states that the West Yard had been laid out in 1936 to meet increased demand for barges. Publication of the 1938 revision of the map may have been delayed by the Second World War.
24. All OS maps have, since the late nineteenth centuries carried a disclaimer to the effect that any track or way shown is not an indication of the existence of a public right of way. However, the depiction of a route on such maps provides evidence of the physical existence of a route on the ground. Although the map published in 1948 did not include the development of West Yard, it shows, along with earlier OS maps that prior to the development of West Yard, there had been a means of access along the north bank of the Creek on the general alignment of footpath ZF5.
25. Aerial photographs dated 1927, 1946 and 1950 show the development of the area during that period. The 1927 photograph shows the collection of buildings which comprised Pollock's East Yard. The land which became West Yard is undeveloped and a track or path runs along the north side of the creek to the East Yard boundary where it then turns north-west towards the houses at The Brents. The copies of the photographs supplied are of indifference quality, but the western boundary of the shipyard appears to be marked by the walls of buildings or workshops. A track or path on the alignment of footpath ZF5 to the north-west of point X is also clearly shown.
26. The 1946 photograph shows that the land at West Yard had been developed as part of the barge building operation with seven partly constructed barges lying on the site. West Yard is shown as being enclosed by a wall which extends from point X around the site and runs almost to the edge of the creek. There appears to be a track or path around this wall on the alignment of footpath ZF42. Although it is not clear from the photograph, there appears to be some structure at the junction of the East and West Yards which may have been a gatehouse or other such point of entry to the Yards.
27. The 1946 photograph is monochrome, and the continuous wall is a uniform colour in the reflected sunlight, whereas that section of the boundary from the wall end to the creek appears to be made of two different materials to the wall as they are different shades of colour to the wall. This suggests two different features were present between the wall end and the creek which are likely to be the gate and corrugated iron fence referred to by witnesses at the inquiry into FPS/W2275/3/12 who stated that it had been possible to walk through the West Yard and out through the main gate by attracting the attention of the resident caretaker. The feature adjacent to the wall may also have been the access which is said to have been "forced" on Pollock's by Faversham Navigation to ensure the towpath along the creek was maintained⁵.

⁵ A History of Faversham and Oare Creeks and the Faversham Navigation", Taylor F, 2002

28. Although there is some evidence that it may have been possible to access footpath ZF5 through West Yard when it was a going concern, other evidence presented at the 2014 inquiry suggests that the gates were always kept locked and access was not possible. I accept, as the Inspector at the 2014 inquiry did, that any use of the line of the path when the land was in use as a shipyard would have been very limited.
29. The 1950 aerial photograph shows the West and East Yards little changed from the 1946 photograph. There are fewer partly completed barges in West Yard which is again shown bounded by a wall. The copy submitted suggests that the boundary closest to the Creek may have been comprised of different materials as it is of a different colour to the wall which is of a uniform shade. In both the 1946 and 1950 photographs there does not appear to be any fence or wall separating the two yards.
30. Reference is made by both parties to aerial photographs from 1990 and 2008, however copies of these photographs were not submitted. The latest photograph in the bundle is one said to have been taken in the mid-1980s and shows the West Yard site covered by grass; due to the orientation of the photograph, it is not possible to determine what may have been present at the boundary with the Creek. It appears that a track or path was available around the former shipyard wall.
31. Although the Appellants refer to the Rights of Way Act 1932, no maps or plans associated with this legislation has been submitted. Footpath ZF5 is not shown on the map prepared by the parish council as part of the survey of public rights of way undertaken under the National Parks and Access to the Countryside Act 1949 (the 1949 Act). Footpath ZF5 was not shown in the draft, provisional or first definitive maps; no objections or representations were made to the omission of the path.
32. The 1949 Act provided for the review of the definitive map to be carried out at five-year intervals, although such frequency was seldom achieved. The Council conducted a review and published a revised map in 1970. It was during this review that FBC recommended the addition of what became footpath ZF5. The description given by FBC is set out in paragraph 11 above; the description of the path in the definitive statement reads "*Bramble Hill Road and front of Brent's shipyard N.W. across fields to FP2 at junction with Ham Road*". The map used for the review had been published in 1946 and did not show the West Yard extension. No objection was made to the proposal to add footpath ZF5 to the definitive map.
33. As noted above, although the review was eventually abandoned, those proposals which were not contested were added to the definitive map; footpath ZF5 has been shown on successive definitive maps. It is the Appellants' case that the description of footpath ZF5 does not reflect the route requested to be recorded by FBC or the route shown in the definitive map. The Appellants' view is that the route described could not have run through West Yard and would have run from Bramble Hill Road to the front of the shipyard then run north west to join Ham Road; the 'front' of the shipyard being that part outside the main entrance gates on the opposite side of the site from the Creek.
34. The Appellants put forward an alternative interpretation of the description of the path which FBC sought to be added at the 1970 review of the definitive map. It is submitted that what FBC sought to add was a footpath which ran

- around the boundary wall of the West Yard to connect with footpath 5 at the eastern end of Upper Brents. The Appellants submit that an error was made in transcribing this description onto the map as it showed the path passing through a concrete wall over the launching slipways of West Yard to emerge through the front gate of the shipyard.
35. The Council does not agree with the Appellants' interpretation of the definitive statement. The Council says that the definitive statement describes the whole length of footpath ZF5 and is not detailed enough to conclude which side of the shipyard was considered to be the 'front'; this may have been the side of the shipyard facing Faversham Creek. The Council considers that the description of the path which FBC sought to have added is more detailed as to the alignment of the path; the Council submits that the route described was that which had been open and available for use prior to the laying out of West Yard; the map used to show the footpath being accurate as to what had been available.
36. Evidence of use of the path over the land which became West Yard is provided by Mr Osbourne who states that he had walked and cycled and over that route before the shipyard was extended. The route he took crossed Crab Island and led to the boundary wall of East Yard with an alternative path around the West Yard wall (now footpath ZF42) having been provided when West Yard was constructed. Mr Osbourne's evidence is that he was a member of the relevant sub-committee of FBC in 1969 which sought the addition of footpath ZF5 on its pre-war alignment. Mr Osbourne submitted that the description of the path given by FBC had not been misinterpreted.
37. The Appellants submitted statements from those who had been involved with the operation of the boatyard to the effect that when West Yard was in operation, access along footpath ZF5 had not been possible. The Appellants also provided a series of maps annotated to demonstrate how the path network in the area had altered over time. A path along the north bank of the Creek is shown both before and after the straightening of the Creek in around 1842; these plans also show the impact the development of Pollock's shipbuilding yard would have had on that Creekside path. The Appellants describe the route through what became East Yard as a 'permissive only towpath' which had not been recorded as a public right of way.
38. The Appellants submit that access through a working shipyard would not have been permitted under wartime regulations and that the re-routing of the footpath outside the West Yard wall would have been a logical and practical solution which appeared to have been accepted by all.

Conclusions on the evidence

39. The evidence put forward by the Appellants in relation to the definitive statement and the claim made by FBC is not new, simply a re-interpretation or an alternative interpretation of matters known at the time the definitive map was published. Although the Appellants may have undertaken significant research to familiarise himself with the history and development of the site, the claim made by FBC and the terms of that claim would already have been known to the Council at the time the definitive map was produced, the claim of FBC being the basis of footpath ZF5 being added to the map.
40. The aerial photographs from 1927 demonstrate the existence of a route along the north bank of the Creek to the eastern end of Upper Brents on the

alignment of footpath ZF5 which was used by Mr Osbourne and other members of the public prior to West Yard being developed. It also appears that Pollock's made provision for access through the yard via a gate in the wall although I accept that it would be unlikely for there to have been significant levels of public use of the footpath during that period when West Yard was part of an active shipyard.

41. In my view, the description given by FBC reflects the route which had been present, available and used by the public prior to the development of West Yard. The path is described as running along Front Brents to "*boundary of Shipyard, then n.w. along boundary wall of shipyard to commencement of FP5*". If FBC had sought the addition of footpath ZF42 that description would have been to '*boundary wall of shipyard then n.w and n.e to commencement of FP5*'. The description given by FBC is precise in terms of direction and reflects what would have been present on site prior to the development of West Yard; the 1927 photograph shows the western boundary of East Yard being defined by the buildings which fronted onto the path then available.
42. The depiction of footpath ZF5 on the 1970 definitive map was therefore an accurate representation of both the description of the path provided by FBC and reflects what had been available and in use prior to the development of West Yard. It follows that I do not consider the evidence submitted to be sufficient to displace the presumption that the definitive map is correct. This ground of appeal is dismissed.

Ground 3: Use of out of date mapping

43. The Appellants contend that the application made by FBC in 1969 to add a footpath had been mis-interpreted by the Council of the day as it had used an out of date map without the benefit of any sketch, survey or site visit. The Appellants points regarding this map, and the historical availability of a route on the alignment claimed by FBC have been considered in relation to ground 2 above. This ground of appeal is dismissed.

Ground 4: Misinterpretation of consistency guidelines and case law

44. The Appellants contend that the Council has failed to present and weigh the evidence against the balance of probabilities test, and that the Council has mis-interpreted the requirement concerning new evidence as set out in the consistency guidelines and case law, and that the Council had failed to take into account the unavailability of the route due the concrete walls around West Yard or the lack of protests when the route was progressively built over. The Council submits that it has not mis-interpreted case law regarding new evidence and submits that what the Appellants seek is the modification of the definitive map based on a re-interpretation of material which was known at the time footpath ZF5 was first recorded in the definitive map.
45. I have addressed the question of whether new evidence has been discovered to trigger a review of the definitive map in paragraph 14 above. The documentary evidence submitted suggests, on a balance of probabilities that it would have been possible for the public to use footpath ZF5 prior to the construction of West Yard. This ground of appeal is dismissed.

Ground 5: The denial of natural justice

46. The Appellants submit that they were denied the opportunity to review the Council's report before it was submitted to the decision maker, contrary to natural justice and Article 6 of the Human Rights Act 1988. The Council submits that delegated authority reports are never issued prior to officer recommendation being considered by the decision maker, and that the Appellants would not have suffered prejudice as Schedule 14 provides an opportunity to appeal the Council's decision.
47. Article 6(1) provides that in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Council's internal procedures are not matters within my remit but given that Schedule 14 of the 1981 Act provides applicants with a right of appeal against the Council's decision, I do not consider that the Appellants' Article 6 rights would have been infringed. This ground of appeal is dismissed.

Overall conclusion

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

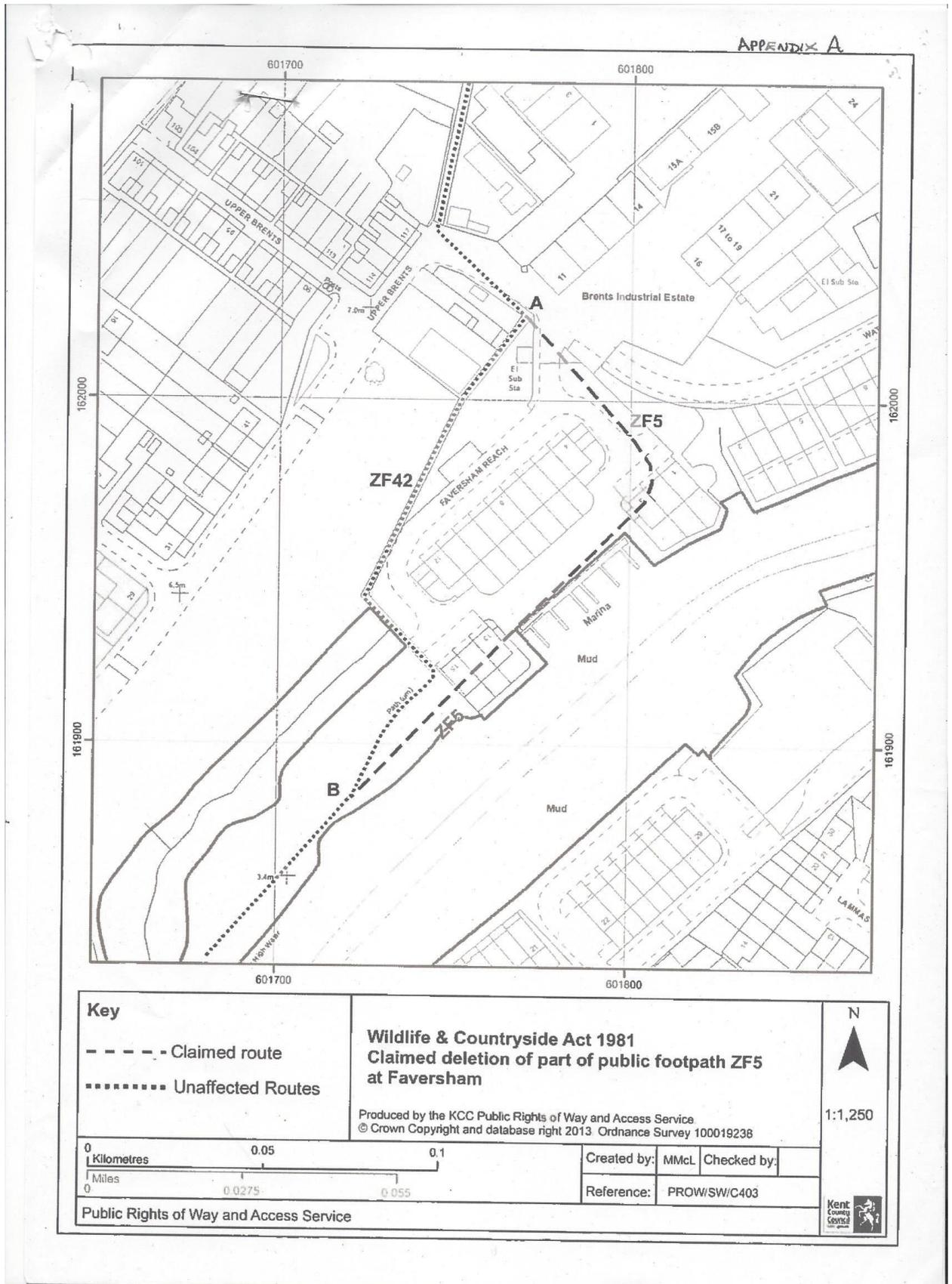
Formal Decision

49. I dismiss the Appeal.

Alan Beckett

Inspector

Appendix A



Appendix B

