



# Appeal Decision

by **Joanne Burston BSc MA MRTPI**

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

Decision date: 27 March 2018

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## Appeal Ref: **FPS/W2275/14A/18**

### **Claimed public footpaths running through Hoades Wood at Sturry**

- 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 6 May 2014 was refused by the Council on 28 September 2017.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding footpaths A (running from Hawe Lane to junction of Hawe Lane/Babs Oak Hill), B (Junction of Hawe Lane/Babs Oak Hill to path C) & C (Chestnut Drive to junctions with path B St Nicholas Close and Hawe Lane) as shown on the plan appended to this decision.

### **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 this appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This appeal has been determined on the basis of the papers submitted

#### **Main Issues**

3. Section 53(3)(c)(i) of the 1981 Act provides that an Order should be made to modify the Definitive Map and Statement if evidence is discovered which, when considered with all other relevant evidence available shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
4. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 (Bagshaw)*:

**Test A:** Does a right of way subsist on the balance of probabilities? This requires me to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

**Test B:** Is it reasonable to allege that a right of way subsists? If the evidence in support of the claimed path is finely balanced but there is no incontrovertible

evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

- Where it is claimed that a public footpath has come into existence through long use, the claimant is required to demonstrate that there has been uninterrupted use by the public for a period of not less than 20 years prior to the right to do so being brought into question. Furthermore, such use has to have been 'as of right'; that is, without force, secrecy or permission. If the user evidence can be said to satisfy these tests, then a presumption arises that the way has been dedicated as a public footpath. This is however, a rebuttable presumption, and can be defeated if there is sufficient evidence to show that during that 20-year period there was no intention on the part of the landowner to dedicate such a public way.

### **Assessment of the available evidence**

- A plan<sup>1</sup> accompanied the '*Application for Modification Order*'. The claimed footpaths are shown as Path A (coloured orange), Path B (coloured yellow) and Path C (coloured green). I note that the Definitive Map base identifies a track following the alignment of claimed route 'B' and 'C', nevertheless, this does not indicate the existence of public rights over the route. However, I also acknowledge that the area of Hoades Wood has been historically used for quarrying operations. Therefore the tracks through the wood could have been created by the landowner's necessity to access and remove the mineral from the wood.
- The application was made following the sale of the land, over which the claimed routes run, and Deposit notices<sup>2</sup> were posted on site in late 2013. Local residents were concerned that the land would be developed and submitted the '*Application for Modification Order*'. The available evidence suggests that the public use of the claimed route was brought into question in 2013, by the events which took place on site. Consequently, for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period of use is 1993-2013.
- Fifty-two letters were submitted with the '*Application for Modification Order*' and further evidence of use was provided as a result of the informal consultation. These describe use of the route from the 1940's until the application date, although the majority of witnesses claim to have used the path from 1963 onwards. Reasons given for using the path range from dog walking and recreational pursuits to provide access to local services and facilities.
- Nonetheless, I have evidence that landowners have challenged users of the routes and that paths have been obstructed to prevent access, particularly the spurs leading from St Nicholas Close<sup>3</sup> and Chestnut Drive<sup>4</sup>. As part of the management of the woodland additional signs have also been erected to inform the public that the land is private.
- In 1995 and 2002 the then landowner made a Deposit for its land at Hoades Wood, which was followed by a section 31 (6) deposit and statutory declaration to show that no ways have been dedicated as public rights of way over the

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<sup>1</sup> Provided at Appendix 1

<sup>2</sup> those made under section 31(6) of the 1980 Act

<sup>3</sup> Fence erected sometime between 2004 - 2008

<sup>4</sup> Fence constructed from 1989 (intermittently vandalised) & wall constructed in 2014

property and a lack of intention to grant any public rights of way. Accordingly, the claimed paths were not recognised as public rights of way.

11. The appellant has questioned the use of the 20 year period from 1993, as the Council had failed to give consideration to an earlier period of use. However, this does not alter the fact that there is evidence of the paths being obstructed. Whilst I acknowledge that there is sufficient evidence of public use of the claimed paths for a period in excess of 20 years, the landowners have shown a lack of intention to dedicate any public rights of way.
12. On the evidence before me, a claim made under s31 of the 1980 Act would fail as there is sufficient evidence that the landowner had no intention to dedicate these public footpaths. Consequently the appeal cannot succeed against either Test A or Test B as set out in paragraph 4 above as it would not be possible for the Appellant to reasonably allege the existence of the claimed footpath.

### **Conclusion**

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

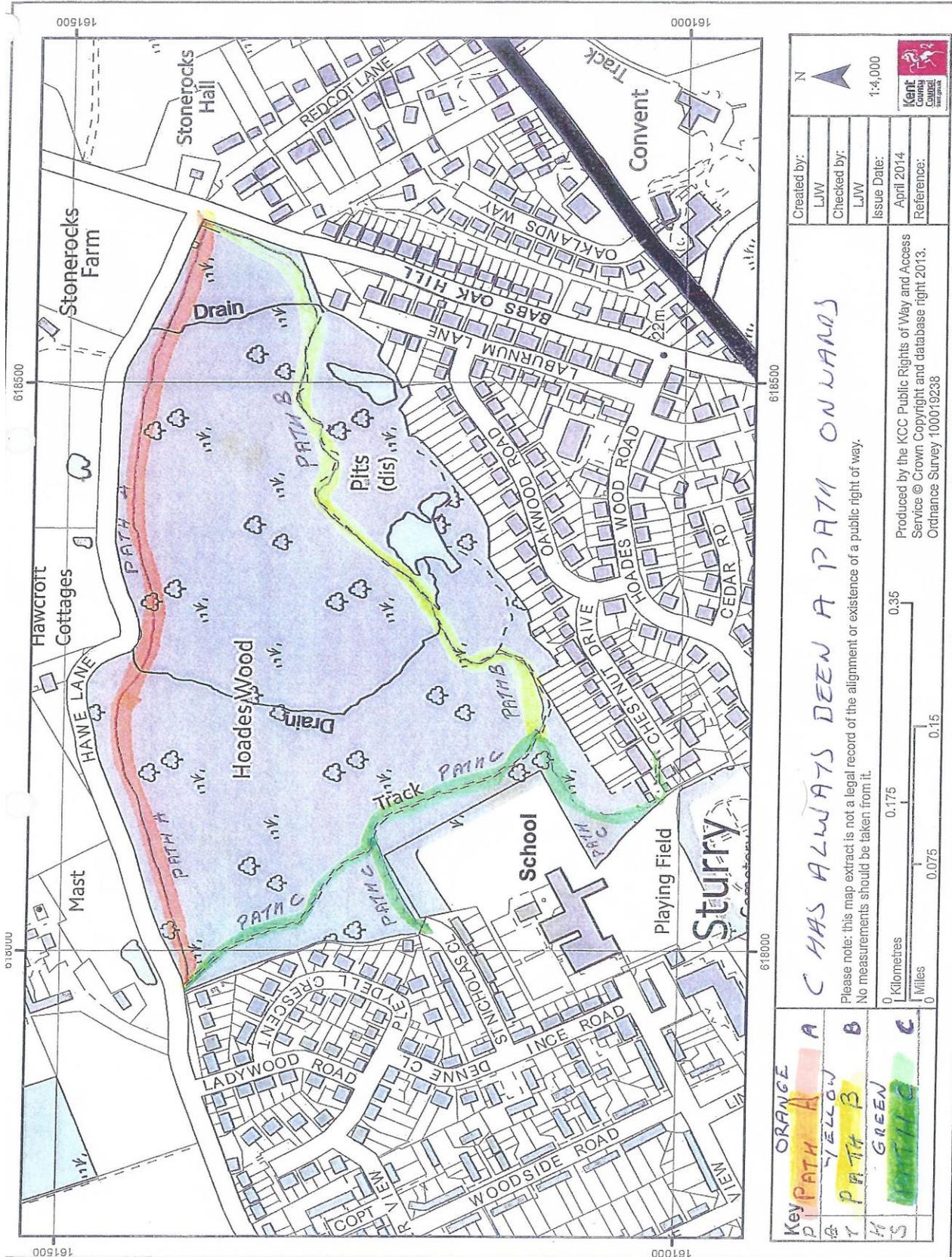
### **Formal Decision**

14. The Appeal is dismissed.

*Joanne Burston*

INSPECTOR

Appendix 1



Map not to original scale