

From: Maria McLauchlan (Public Rights of Way Officer – Definition Team)
To: Director of Environment, Planning & Enforcement
Subject: Claimed deletion of part of public footpath ZF5 at Faversham
File Ref: PROW/SW/C403 District: Swale

Summary: To seek delegated authority to decline to make an Order to modify the Definitive Map and Statement by deleting part of public footpath ZF5 at Faversham

FOR DECISION

Introduction

1. The County Council is the Surveying Authority for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 31st May 2013. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review.

Procedure

2. The Countryside Access Improvement Plan, Operational Management document (2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date and ensuring that the status and alignment of all PROW are correct in accordance with statutory duties by:
 - a) Investigating and determining all claims in accordance with the statement of priorities
 - b) Investigating and determining anomalies in accordance with statement of priorities
 - c) Processing applications to change PROW in accordance with policy and statement of priorities.
 - d) Ensuring all changes are covered by a formal Order

Definitive Map modification cases will normally be investigated in the order in which applications are received, except in any of the following circumstances, where a case may be investigated sooner:

- Where it will satisfy one or more of the relevant key principles set out in paragraphs 4.14 – 4.25 of the CAIP Operational Management document,
 - Where the physical existence of the claimed route is threatened by development,
 - Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.
3. The investigation of this particular issue has been carried out in accordance with the report to the Sub-Committee in February 1990, which outlined the procedures to be used for sources of evidence and the legal tests to be applied.

Legal Tests

4. (a) Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification it shall, by Order, make such modifications to the Map and Statement as appear requisite.

(b) Section 31 of the Highways Act 1980 states that "where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it". The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

(c) Alternatively, a public right of way may be established over a shorter period of time under Common Law. In *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route "for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was", i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

(d) Paragraphs 4.30-4.35 Defra Circular 1/09, Version 2, October 2009 set out guidance relating to deletions of PROW. Paragraph 4.33 sets out the need to fulfil certain stringent requirements:

- 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.

(e) The case of *Trevelyan v. Secretary of State for the Environment, Transport and the Regions* (2001) reinforced earlier Defra Circulars with regard to cogency of evidence. In this case Lord Phillips stated:

"Where the Secretary of State or an Inspector appointed by him has to consider whether or not a right of way that is marked on a definitive map exists, he must start with an assumption that it does. If there were no evidence which made it reasonably arguable that such a right existed, it should not have been marked upon the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus 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 a right of way exists is no more than a balance of probabilities. But evidence of some substance must be put into balance, if it is to outweigh the initial presumption that the right of way exists".

The Case

5. A plan showing the route as claimed is included at **Appendix A** to this report and a plan showing changes to the claimed route made as a result of the confirmation of *The Kent County Council (Public Footpath (parts) Faversham) Public Path Creation Order 2016* and *The Kent County Council (Public Footpath ZF5 (parts) Faversham) Public Path Extinguishment Order 2016* is included at **Appendix B**. Definitive Map extracts can be found at **Appendix C** and a detailed description of the case can be found in **Appendix D** to this report.

Investigation

6. Investigations have included the inspection of County Council records and documents available from other sources.
7. I have considered all the evidence available. The documentary evidence and the results of the legal tests applied are set out and examined in **Appendix D**.


Conclusion

8. Investigations have been carried out in accordance with procedures and proper legal tests have been applied to the evidence gathered during the investigation. The result of the investigation is that there is insufficient evidence to show that an error was made in the drafting of public footpath ZF5 on the Draft Revised Map of 1970.

Recommendation

9. I recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by deleting part of public footpath numbered ZF5, as shown now numbered part of ZF43, on the attached plan at **Appendix B**.

Signature



Director of Environment, Planning & Enforcement

Date

6/11/19

Background Documents:

APPENDIX A - Plan showing the claimed route as recorded

APPENDIX B - Plan of The Kent County Council (Map Sheet 135 (TR06SW)) Definitive Map Modification Order No.1, 2019 which reflects the 2016 Creation and Extinguishment Orders

APPENDIX C - Extracts from the Definitive Map and Statement, Sheet 135 (TR06SW), prior to and post the *The Kent County Council (Map Sheet 135 (TR06SW)) Definitive Map Modification Order No.1, 2019*

APPENDIX D - Main report

Contact Officers:

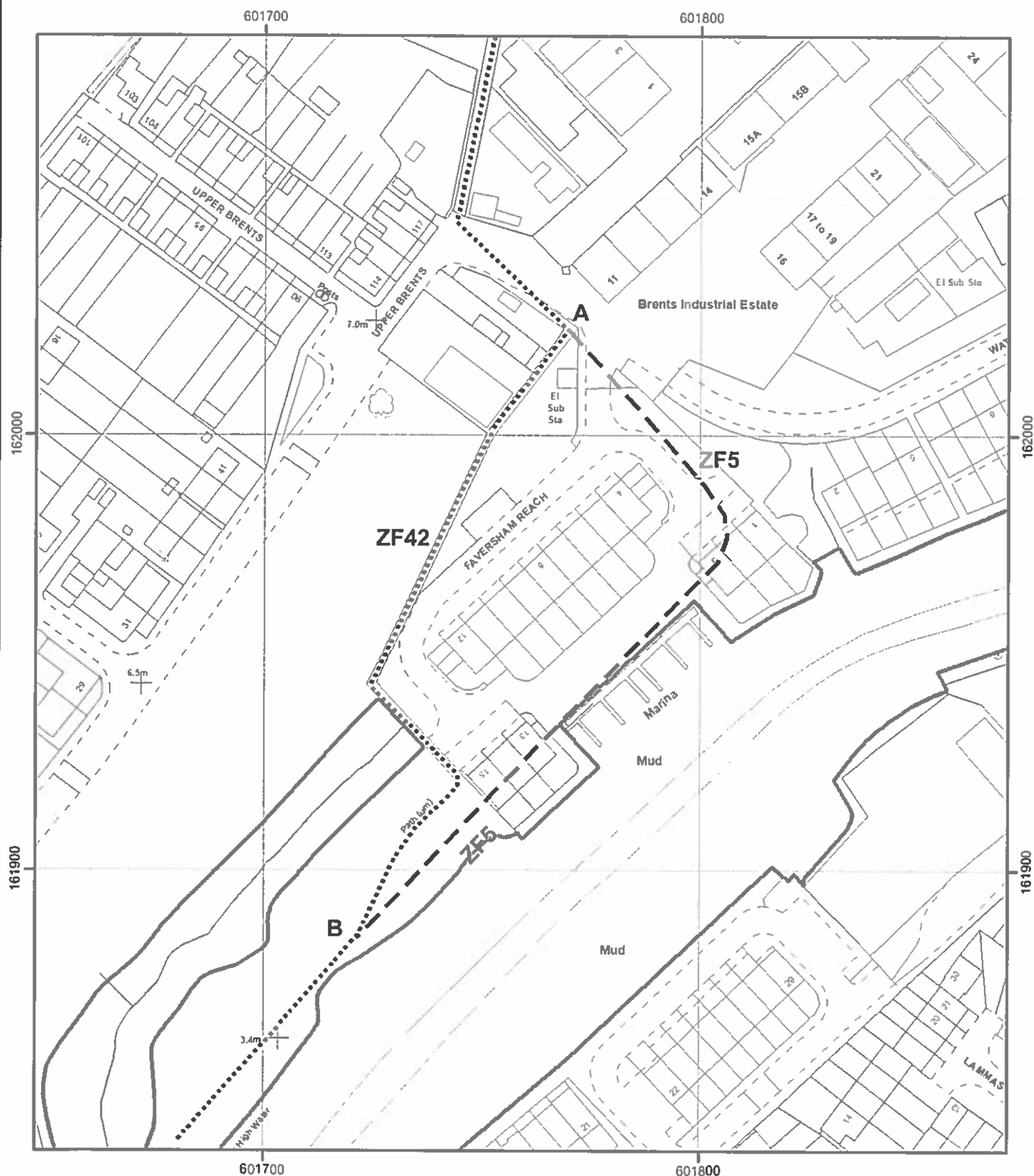
Mrs Maria McLauchlan

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&

Mrs Laura Wilkins

(Tel: 03000 413480; email: laura.wilkins@kent.gov.uk)



Key

- - - - - Claimed route
- Unaffected Routes

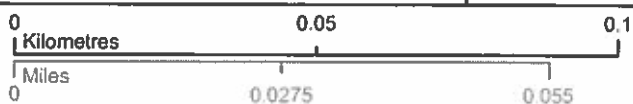
Wildlife & Countryside Act 1981 Claimed deletion of part of public footpath ZF5 at Faversham

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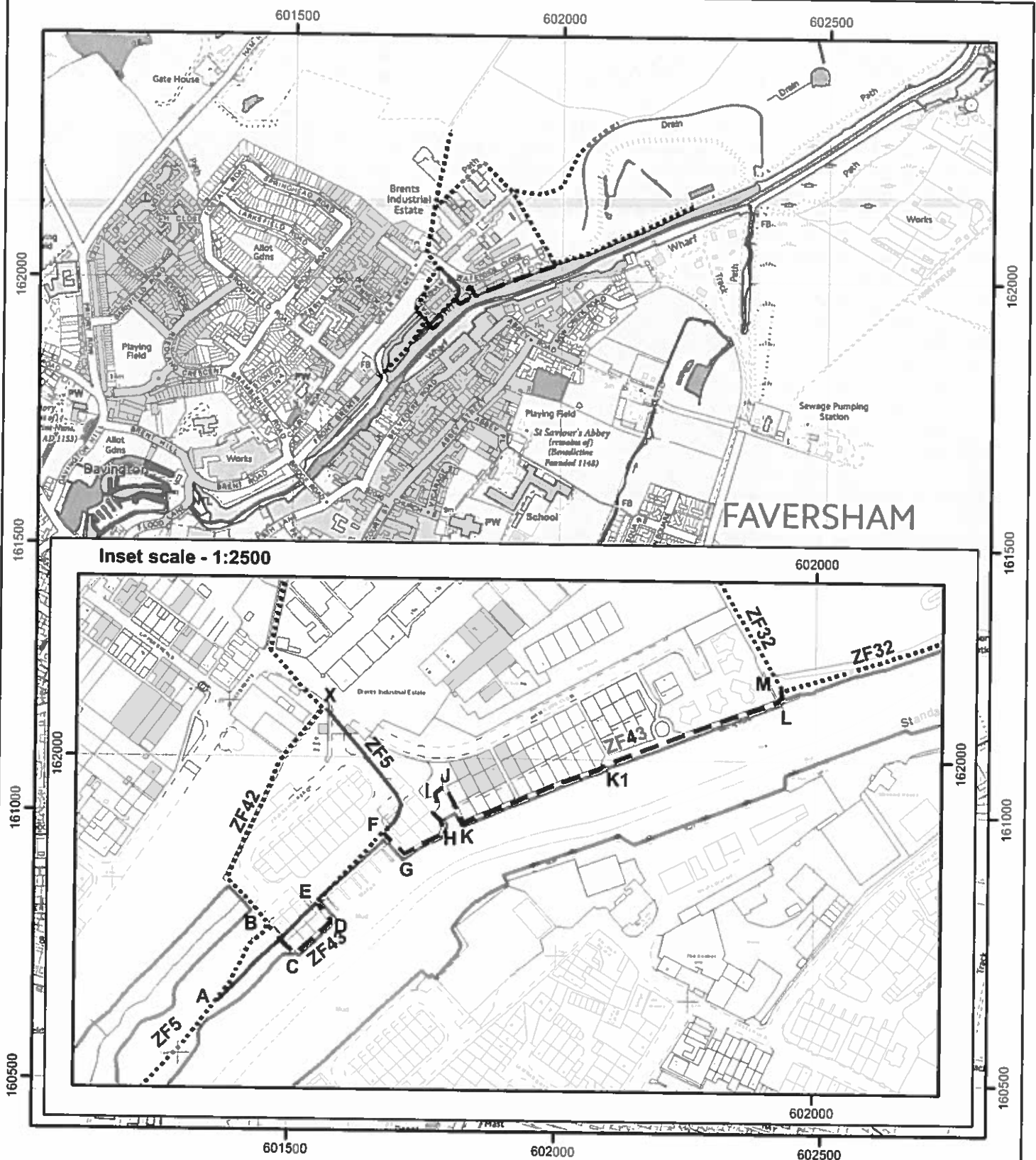
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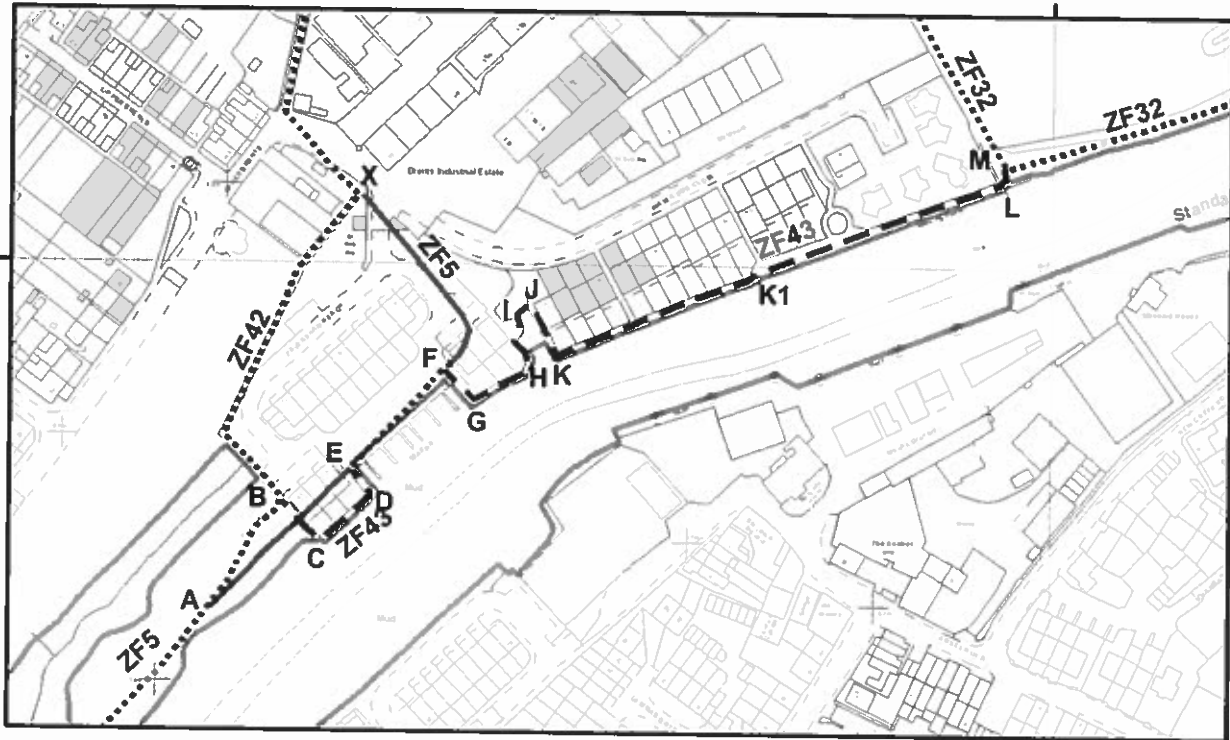
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| Reference: | PROW/SW/C403 | | |

Public Rights of Way and Access Service





Inset scale - 1:2500



Key

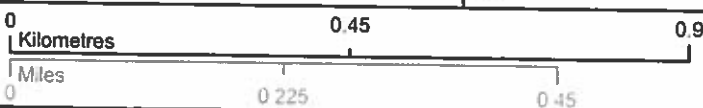
- Route to be deleted
- - - Route to be Added
- Unaffected Routes

Wildlife & Countryside Act 1981
The Kent County Council (Map Sheet 135 (TR06SW))
Definitive Map Modification Order No.1, 2019

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1:10,000



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| Created by: MMCL | Checked by: CW |
| Reference: ZF5, ZF43 Faversham | |

Public Rights of Way and Access Service





- Footpath
- Bridleway
- Restricted Byway
- Byway Open to All Traffic
- Point path number or status changes
- Boundary of area covered by 1:2500 scale Network Map
- ▨ Area covered by 1:2500 scale Network Map

**EXTRACT OF THE WORKING COPY OF THE
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FOR THE COUNTY OF KENT**

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Created by:

NB

Checked by:

GR

Issue Date:

25/04/2017

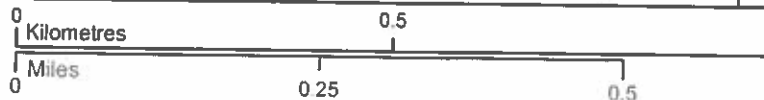
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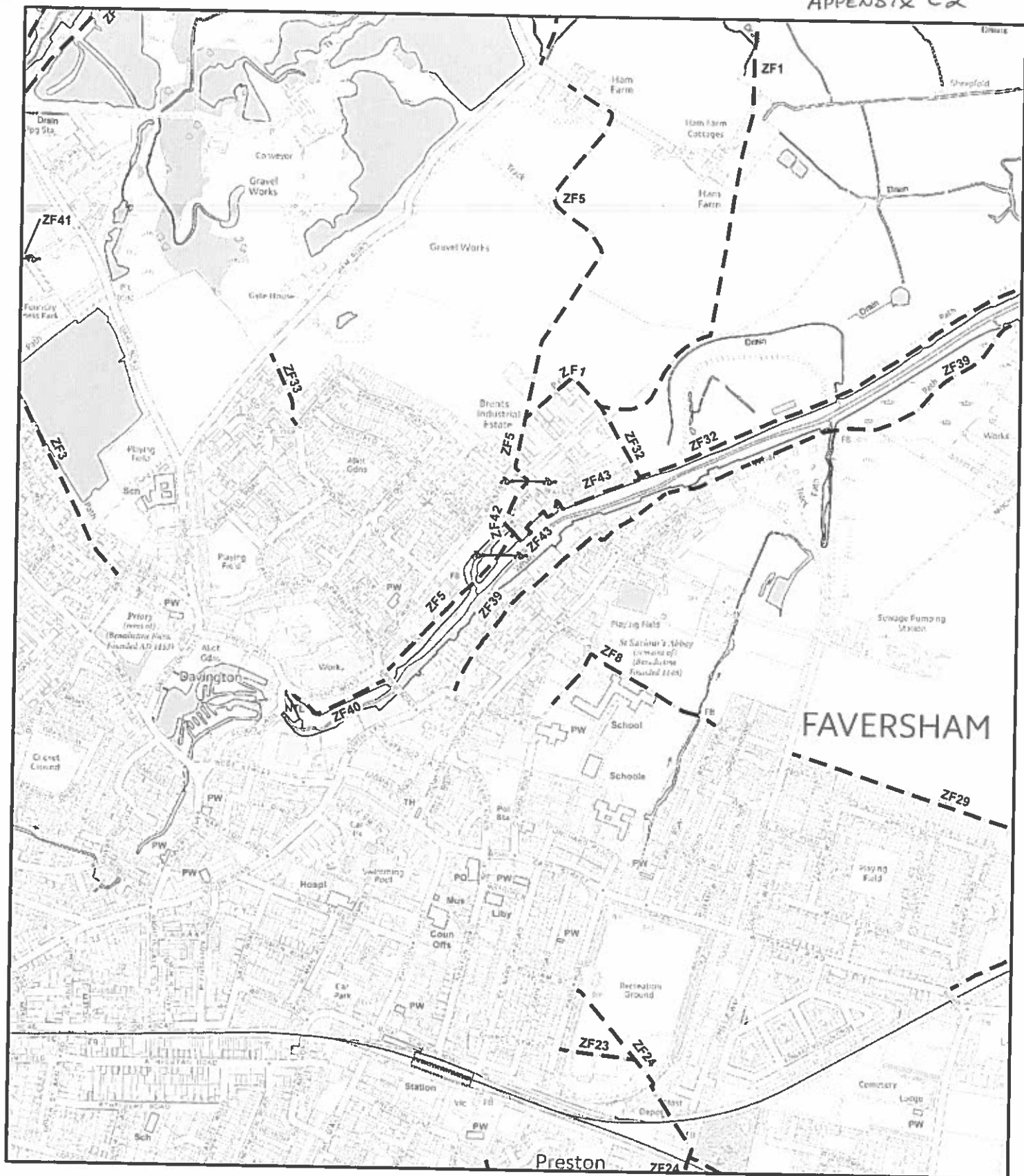
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| <ul style="list-style-type: none"> Footpath Bridleway Restricted Byway Byway Open to All Traffic Point path number or status changes Boundary of area covered by 1:2500 scale Network Map Area covered by 1:2500 scale Network Map | <p>EXTRACT OF THE WORKING COPY OF THE DEFINITIVE MAP OF PUBLIC RIGHTS OF WAY FOR THE COUNTY OF KENT</p> <p>© Crown Copyright and database right 2013. Ordnance Survey 100019238</p> <p>FOR REFERENCE ONLY – NO FURTHER COPIES MAY BE MADE</p> <p>Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings.</p> <p>Produced by the KCC Public Rights of Way and Access Service</p> | <p>Created by:</p> <p>MMcL</p> <p>Issue Date:</p> <p>05/09/2019</p> <p>Reference:</p> <p>PROW/SW/C403</p> | <p>N</p> <p>1:10,000</p> |
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Case Title: Claimed deletion of part of public footpath ZF5 at Faversham

Ref: PROW/SW/C403

APPLICANT'S SUBMISSION

10. This application was made by the Company Secretary of the Faversham Reach Residents Association Limited ("the applicant") on 6th December 2017 (Schedule 7 date). The applicant has applied for an Order under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area by deleting part of public footpath ZF5 at Faversham ("the claimed route") on the basis that it was incorrectly recorded. The applicant considers the line drawn on the 1970 Draft Revised Map (and subsequent Definitive Maps) and its description in the 1970 Draft Revised Statement do not agree with the request made to extend FP5 by the Borough of Faversham Council to Kent County Council in July 1969.

11. In support of the application, the applicant has provided copies of the following:

- 1952 Definitive Map
- Copy of the Borough of Faversham Council Minutes July 1969 645/69 item (e)
- Letter from the Borough of Faversham Council to the Clerk of the County Council dated 23/7/1969
- 1970 Draft Revised Map
- 1970 Draft Revised Statement

The applicant subsequently submitted a copy of a narrative and illustrations which were summarised from the applicant's Statement of Case as submitted in response to the 2016 Extinguishment and Creation Orders and to the 2018 Public Inquiry which considered and confirmed those Orders. In addition, following a meeting with the applicant, 3 'Heritage Maps' dated 1971-1890, 1897 and 1970-1923, and some extracts from the books '*A History of Faversham and Oare Creeks*' by Frank Taylor and '*A Sideways Launch*' by Anne Salmon were submitted in support of the application.

Description of route

12. The claimed route, as originally recorded, and shown on the plan at **Appendix A**, commences at its connection with public footpath ZF42 (point A) and runs generally south-east for approximately 58 metres then south south-west for approximately 124 metres to another connection with public footpath ZF42 (point B). Following the confirmation of the 2016 Extinguishment Order, the claimed route is now slightly different to that originally claimed (as two parts no longer exist, and the remaining part is renumbered as ZF43). See **Appendix B** for a copy of the Order plan for *The Kent County Council (Map Sheet 135 (TR06SW)) Definitive Map Modification Order No.1, 2019*, which reflects the 2016 Creation and Extinguishment Orders. To put this into context, an extract from the Definitive Map and Statement can be found at **Appendix C**, showing the route prior to the Creation and Extinguishment Orders (C1) and following those Orders (C2).

MAPPING EVIDENCE

The Wildlife and Countryside Act 1981 requires that, when investigating such applications, the County Council must consider 'all other relevant evidence available'. I have therefore interrogated the following documentary evidence:

Tithe Map (circa 1840)

13. Tithe Maps were produced by the Tithe Commissioners, under the 1836 Tithe Commutation Act, to record all parcels of land that generated titheable produce. The Tithe Maps were concerned solely with identifying titheable land but nonetheless can sometimes provide useful supporting evidence about public rights of way.
14. In this case, the Tithe Map for Preston, dated 1840, appears to show part of ZF5 along The Brents, following the line of the Creek. However, as this was before the Creek was straightened, it does not really assist.

First Edition Ordnance Survey ("OS") 1:2500 Map and Book of Reference (circa 1860)

15. The First Edition 25" OS Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights but do provide useful information as to the existence of the routes on the ground at that time.
16. The First Edition OS Map was scrutinised only as a black and white electronic version. It was not considered necessary, in this case, to view the original coloured maps as the black and white version indicated this would not provide any further details. This map shows the line of ZF5 following the creek, which had been straightened by this time. The Second Edition OS Map continues to show the line of ZF5, including where it turns to head north-west. The Third Edition OS Map shows the line of ZF5 in the same manner as the Second Edition Map.

Finance Act 1910 and Valuer's Field Book

17. The Finance Act 1910 Maps and Valuer's Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer's Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for public rights of way admitted to exist at the time by the landowner.
18. In this case, the Finance Act map was not scrutinised as the Third Edition OS Map, which is used as the base mapping, did not indicate that it would assist. However, the Third Edition Map does show a route running along the same alignment of what is recorded as ZF5.

Parish Map (1950)

19. In consequence of the National Parks and Access to the Countryside Act 1949, County Councils were required to undertake a survey of *'all lands in their area over which a right of way... [was] alleged to subsist'* and then to prepare a draft map showing on it those footpaths, bridleways and roads used as public paths which the County Council as Surveying Authority considered to be public rights of way. In practice, the initial surveys were undertaken by the Parish Councils who were required to call a Parish Meeting to consider the information to be provided and who then submitted maps and statements showing the alleged rights of way within their parish.
20. The Parish Map does not show ZF5 marked for inclusion.

Draft Maps (1952)

21. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Parish Map.
22. The Draft Map does not show ZF5 marked for inclusion.

Provisional Maps (1952)

23. The Provisional Map for Faversham with a relevant date of 1 December 1952 does not show ZF5. There was opportunity for landowners, lessees and tenants to object to this map but no objections were received to ZF5 not being included at this stage.

Definitive Map (Relevant date 1st December 1952)

24. The first Definitive Map and Statement of Public Rights of Way for the County of Kent (based upon the information contained within the Parish and Draft maps) was published with a relevant date of 1st December 1952.
25. The original Definitive Map for the County of Kent did not show ZF5 recorded, although the line of the path is shown on the base mapping. Nor did it show ZF42 recorded. FP1 is shown running from The Brents, alongside the north end of the original shipyard. The Statement entry records: "From N. of The Brents leads N.E. and N. to The Ham continuing N.W. by Faversham Creek to the Shipwrights Arms at Hollow Shore."

Review of survey (1970)

26. Following the publication of the Definitive Map in 1952, the County Council, under the National Parks and Access to the Countryside Act 1949, had a duty to produce a revision of the original map. Consequently, and following broad consultation, the County Council published a Draft Revised Map with a relevant date of 1st October 1970.
27. In 1969 Faversham Borough Council was asked to reassess the PROW for the area. The Borough Council recommended that a path, amongst others, be added "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 join commencement of FP5." The footpath was drawn on the Draft Revised Map of 1970 accordingly and the accompanying statement records: "Bramble

Hill Road and front of Brents' Shipyard N.W. across fields to FP2 at junction with Ham Road." Although the Review was partly abandoned on direction of the Secretary of State, effect was given to changes on the Draft Revised Map to which there were no objections lodged during the relevant period. No objections were received in regard to the recording of this footpath. It is important to note that the alignment of FP1 changes to run around the north extension of the shipyard.

Definitive Map (Relevant date 1st April 1987)

28. The 1987 Definitive Map of Public Rights of Way shows ZF5 recorded in the same position as the 1970 Draft Revised Map.

Definitive Map (Relevant date 31/5/13)

29. The current Definitive Map of Public Rights of Way also shows ZF5 recorded as it was originally.

DOCUMENTARY EVIDENCE

In addition to the historical mapping above, the following documents have also been scrutinised:

Aerial photographs 1946, 1990, 2008

30. The earliest available aerial photograph that the County Council was able to access was 1946, after the shipyard was extended and enclosed. Therefore, the 1946, 1990 and 2008 aerial photographs do not assist. However, the applicant provided copies of an aerial photograph dated 1927, when only one part of the shipyard was in operation and prior to it being extended. This clearly shows a path on the alignment of ZF5 alongside the Creek.

Documents submitted by the applicant

31. **1952 Definitive Map Extract** – Discussed at paragraphs 24 & 25 above.

32. **Borough of Faversham Council Minutes 645/69 item (e)** – Discussed at paragraph 27 above.

33. **Borough of Faversham letter F/7/OEB dated 23 July 1969 to the Clerk of the County Council** – Provides the same information as discussed at paragraph 27 above.

34. **1970 Draft Revised Map extract** - Discussed at paragraph 27 above.

35. **1970 Draft Revised Statement** - Discussed at paragraph 27 above.

36. **Narrative and Illustrations summarised from the applicant's Proof of Evidence and Statement of Case for the 2018 Public Inquiry** – The illustrations consist of aerial photographs, Ordnance Survey maps, maps from the Definitive Map process, Order plans and a statement from the Managing Director of Pollock & Sons Ltd Shipyard between 1968-70, who could not recall anyone asking to use the creek side towpath.

37. **Heritage Maps (OS Maps dated 1871-1890, 1897, 1907-1923, 1965)** – The applicant has annotated the maps to show what he considers shows the changes to the alignments of the footpaths surrounding the Shipyard as it developed.
38. ***A History of Faversham and Oare Creeks* by Frank Taylor** – References are made to underlined passages from the book. Page 46 "...there is a footpath which runs between The Sump and the Brents at Faversham over the marsh still called Drudger's Walk." The applicant refers to the relocation of this route on at least three occasions and which is reflected on the Definitive Map (footpath ZF1). Page 55 "There was a path which ran from the bridge which connected the Front Brents to Crab Island and which continued round the perimeter fence of the shipyard. Faversham Navigation had forced Pollock's to provide access through their boundary to maintain the tow path." The applicant considers this to mean that Pollocks agreed "to provide permissive access along the route of the towpath through the Shipyard, but only as required for movement of vessels and only on specific demand, which has been reported by others as virtually non-existent."
39. ***A Sideways Launch* by Anne Salmon** – The applicant underlines a variety of passages from Chapter three of this book to illustrate the changes to the area as a result of the developing shipyard, although no direct reference is made to the claimed route.

CONSULTATIONS

County Member & Swale Borough Councillor

40. County Member, Anthony Hook and Borough Councillor Mike Henderson were consulted but no responses were received.

Swale Borough Council

41. Swale Borough Council was consulted but no response was received.

Faversham Town Council

42. Faversham Town Council was consulted. It responded that it had no additional evidence.

User Groups

43. The Ramblers, Open Spaces Society and British Horse Society were consulted. The Ramblers' and Swale Footpaths' Group representative responded that he has only known ZF5 since 1971 and no other members of the Group were able to offer any further information. No responses were received from the Open Spaces Society or the British Horse Society.
44. The Faversham Footpaths Group representative responded that the Group considers there is no evidence to support the claim that the path was recorded in error and that this was proven at the last public inquiry in January 2018. Reference is made to the 2014 Public Inquiry and the Inspector's decision letter which states: "*KCC accepts that the public is entitled to use footpath ZF5 and there is no suggestion that it has been added to the definitive map in error*" (at paragraph 60). Reference is also made to

Andrew Osbourne's Proof of Evidence put forward at the 2018 Public Inquiry which detailed the history of the path and in particular that the directions given by the Borough Council for the path corresponded with the route on the Definitive Map and not the route suggested by the FRRA. Reference is made to the County Council's Proof of Evidence to the 2018 Public Inquiry (at paragraphs 46-52), which also sets out why the County Council was happy with where the path was recorded. The Footpaths' Group does not consider any of the evidence put forward with this application is genuinely new, that it was known at the time of the recording of the path, and that the applicant is just putting forward a different interpretation. Also, the evidence submitted with the application is not of sufficient substance to displace the legal presumption that the Definitive Map is correct.

Area Public Rights of Way Officer

45. The East Kent Area Public Rights of Way Officer covering Swale responded that he had no evidence to support or negate the claim.

USER EVIDENCE/WITNESS STATEMENTS

46. Although this application is based on documentary evidence, it is appropriate to regard the limited witness statements available relating to use of the path. From evidence given at the Public Inquiries and statements subsequently submitted, there is a conflict of oral evidence in relation to use of the path. Some evidence has been put forward by people who state they have used the path themselves many years ago, on the alignment that is recorded. This sometimes involved the gate in the shipyard boundary being opened for them, but also use continued for a time after the shipyard ceased operating. Some evidence has been submitted via statements from people who worked for a time at the Shipyard (various times) and who state that the gates were never opened to let people walk through as it would have been too dangerous.

LANDOWNER

47. The land over which the claimed route runs is owned by the Faversham Reach Residents Association Limited, who has made this application.

STATUTE AND LEGAL TESTS

48. Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification it shall, by Order, make such modifications to the Map and Statement as appear requisite
49. Section 31 of the Highways Act 1980 states that 'where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
50. Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. In *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route "for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was", i.e. the dedication of a way as a Public Right of Way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.
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- "Where the Secretary of State or an Inspector appointed by him has to consider whether or not a right of way that is marked on a definitive map exists, he must start with an assumption that it does. If there were no evidence which made it reasonably arguable that such a right existed, it should not have been marked upon the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus 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 a right of way exists is no more than a balance of probabilities. But evidence of some substance must be put into balance, if it is to outweigh the initial presumption that the right of way exists".*

HISTORICAL SUMMARY

53. The following is a summary of the history of footpath ZF5:

- Path is shown on the 1st Edition OS Map after the creek had been straightened and also on the 2nd and 3rd Editions.
- Path is shown on the 1927 aerial photograph.
- Path is likely to have originated as a tow path.
- First part of the Shipyard was constructed in about 1916 but there was no formal boundary to the site originally.
- The shipyard was extended due to the war (1938/39) and a wall was built around the land over which ZF5 ran. A gate was installed between the wall and corrugated iron fence at the instruction of the Faversham Navigation, although possibly not quite on the line of ZF5. The gate must have been provided to enable access to the path only as it served no purpose for the shipyard.
- A route was provided around the outside (now ZF42) possibly as a permissive route and to encourage people not to use the path through the shipyard.
- Neither ZF5 nor ZF42 were marked for inclusion on the 1952 Definitive Map.
- 1969 Faversham Borough Council recommended that ZF5 be added as part of the Special Review.
- The Shipyard officially closed in 1970 but had effectively ceased operations a couple of years earlier.
- 1980s a number of houses were built over ZF5.
- 2012 application to divert ZF5 declined by Members at Regulation Panel.
- 2012 Orders made to create and extinguish part of ZF5. Objections received.
- 2014 Public Inquiry into the creation and extinguishment Orders. Orders not confirmed.
- 2016 DMMO made to record footpath ZF42.
- 2016 new Orders made to create on a different alignment and extinguish part of ZF5. Objections received.
- 2017 Application received to delete part of ZF5.
- 2018 Public Inquiry into the 2016 creation and extinguishment Orders. Orders confirmed.

ANALYSIS

54. With reference to paragraphs 51 & 52 above, footpath ZF5 has been the subject of a variety of Orders over the past few years to try and resolve the issue of its obstruction by some of the houses of Faversham Reach, and which has resulted in two Public Inquiries. Although these Public Inquiries both dealt with Creation and Extinguishment Orders (as opposed to a Definitive Map Modification Order where historic research would have been undertaken as a matter of course), historic evidence was put forward on both occasions. This included the 1970 Draft Review Map and Statement. Mr Osbourne, who had been on the Faversham Borough Council at the time, stated in his proof of evidence that the depiction of footpath ZF5 on that map was as it was intended to be shown. Following the 2014 Public Inquiry, the Inspector's decision letter stated: *"KCC accepts that the public is entitled to use footpath ZF5 and there is no suggestion that it has been added to the definitive map in error"* (at paragraph 60). The Inspectors at both the 2014 and 2018 Public Inquiries accepted the recorded alignment when considering the Orders before them. It is difficult, therefore, to consider that the evidence that the applicant has submitted is in fact new evidence. There is not anything

that has been submitted in terms of historical evidence that was not available at the time the path was recorded.

55. The historical documentary evidence, both mapping and aerial photographs support the fact that there was a path running on the alignment of ZF5 as recorded on the 1970 Draft Revised Map. There appears to be consensus that there was a path running on that alignment prior to the shipyard being constructed and that it was a tow path. However, tow paths can also be public rights of way. In this case, there is evidence that the general public used the tow path as a public right of way prior to the shipyard being built. There is a conflict of evidence regarding public use after the construction of the wall and gate, but it would not be unusual for the limited use that was alleged to have taken place to have occurred without some of those witnesses, who attested to the gates never having been opened, knowing about it.
56. If the claimed route was not considered a public path, the question remains as to why Pollocks would provide a path around the outside of the shipyard (now recorded as public footpath numbered ZF42). Unlike footpath numbered ZF1, which was recorded on the 1952 Definitive Map, and which was diverted and altered on the Definitive Maps as a result, ZF5 was only recorded at the 1970 Draft Review. It is quite likely that this was not included in the 1950s due to the Shipyard still being operational, but what is notable, is that the path provided around the outside of the Shipyard (ZF42) was also not recorded on the 1952 Definitive Map. This may be due to it not being considered as a public right of way at that time. This strengthens the argument that ZF5 had not been diverted (like ZF1), but that ZF42 was just an alternative provided by Pollocks to discourage use of the path running through the Shipyard.
57. The crux of this application lies within the interpretation of the wording of the description of the path contained within the Minutes of the Faversham Borough Council (repeated here for ease of reference): "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 join commencement of FP5." The applicant contends that the 'boundary' referred to has to be the concrete boundary wall; Mr Osbourne in his previous statement for the Public Inquiries contends that the 'boundary' referred to was the original boundary of the shipyard prior to its extension. His explanation for this was due to the western end of the shipyard area (now occupied by Faversham Reach Housing Estate) having been cleared and the land vacated prior to its full closure, and that the path could be recorded on its original alignment.
58. The County Council cannot help but agree with this, as if the path to be recorded was intended to be on the alignment of that held by footpath ZF42, the description would have had to include a further directional change heading north-east (or possibly north north-east), otherwise it would not have connected properly.

CONCLUSION

59. In conclusion, therefore the County Council does not consider that the evidence submitted is new. It is based on a re-examination of evidence known at the time the Definitive Map was surveyed and made, and a different interpretation given of that evidence, in particular the wording relating to the description of the route to be recorded within the Faversham Borough Council minutes in 1969. It is not sufficient to state that the path was a tow path without public rights or that the path provided around the outside of the shipyard (ZF42) was a diversion, as these two effectively contradict each other. For these reasons, the County Council does not consider the evidence (even if it was considered to be 'new') is of sufficient substance to displace the presumption that the Definitive Map was correct, nor that the evidence is cogent.

RECOMMENDATION

60. I therefore recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by deleting part of public footpath numbered ZF5, now shown as numbered part of ZF43, on the attached plan at **Appendix B**.