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## Appeal Decisions

**by J Ingram LLB (Hons) MIPROW**

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

Decision date: 1 April 2025

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### Appeal Ref: ROW/3340047

### Application A

- 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.
- By an application dated 26 September 2017, the applicant claimed that a restricted byway should be added to the definitive map and statement (DMS) for the area between Sandwich Road and Grannies Lane in Nonington.
- The application was refused by the Council and the applicant was formally notified on 5 February 2024.

**Summary of Decision: The Appeal is allowed.**

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### Appeal Ref: ROW/3340052

### Application B

- 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.
- By an application dated 22 August 2017, the applicant claimed that Public Footpath EE323 should be upgraded to restricted byway status on the DMS for the area.
- The application was refused by the Council and the applicant was formally notified on 5 February 2024.

**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 these appeals on the basis of the papers submitted. I have not visited the sites, but I am satisfied that I can make my decisions without the need to do so.
  2. In writing these decisions I have found it convenient to refer to certain points on the application routes as shown on the plans. I have attached copies of the Council's plans which I have annotated for ease of reference with the same letters referred to by the applicant in their submissions.
  3. On the 5 February 2024 the Council resolved not to make an Order for both application A and application B. For application A they concluded that there was insufficient synergy between the available historical evidential sources to conclude that a public right of way is reasonably alleged to subsist. For application B,
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although it was acknowledged to be a finely balanced case, the Council concluded the evidence was insufficient for an Order to be made to show the footpath as a higher status.

4. For application A the claimed restricted byway runs between the junction with Sandwich Road at point A and Grannies Lane at point B. Opposite point A is Gooseberry Hall Lane, which is a recorded byway open to all traffic (BOAT), it is also known as Cherrygarden Lane. The claimed route forms a crossroads with Sandwich Road and Cherrygarden Lane. Grannies Lane joins Sandwich Road to the south west of point A and forms an arc to the south of the crossroads to point B.
5. For application B the claimed restricted byway is currently recorded as footpath EE323. It runs from BOAT EE335 at point A and follows a north westerly direction to the Chillenden to Barfrestone road. This junction at point D was formerly known as Cold Blow Corner.
6. Comments have been submitted by a representative of the Knowlton and Kittington community in objection to both applications. I will refer to them in this decision as 'the objector'.

### Main Issues

7. The original applications were made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their DMS under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
8. For application A the relevant event is cited in Section 53(3)(c)(i) of the 1981 Act. This provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates.
9. As made clear by the High Court in *Secretary of State for the Environment ex parte Bagshaw and Norton (QBD) [1994] 68 P & CR 402 [1995]* ('Bagshaw and Norton') this involves two tests:

**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 exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

10. In relation to Test B, the Court of Appeal recognised in *R v Secretary of State for Wales ex parte Emery [1998]* ('Emery') that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that "...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."
11. For application B where it is proposed that an existing way should be upgraded from footpath to restricted byway status, Section 53(3)(c)(ii) of the 1981 Act

specifies that an Order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that '*a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description*'. The evidential test to be applied is the balance of probabilities.

12. In both cases the appeals seek to show the application routes are public carriageways. However, Section 67 of the Natural Environment and Rural Communities Act 2006 extinguished public rights for mechanically propelled vehicles unless one of the exceptions contained in that section of the Act applied. Neither route is recorded as publicly maintainable in the List of Streets held by the Council under Section 36(6) of the Highways Act 1980 (the 1980 Act). In both cases none of the other exceptions apply, the appeal for both routes therefore relates to an application for the status of restricted byway.
13. The evidence submitted in support of the applications was documentary evidence, no user evidence was submitted for either application. For documentary evidence, section 32 of the 1980 Act requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. Therefore, I must consider whether or not the documentary evidence available to me, when considered as a whole, shows that public carriageway rights have existed historically over the application routes.
14. The applicant and the Council also refer to the principle of synergy, this was referred to in the case of *Todd, Bradley v Secretary of State for the Environment Food and Rural Affairs* [2004] 4 All ER 497. The Council state that insufficient synergy has been demonstrated in both cases. They conclude the evidence even when taken together, does not demonstrate a synergy of evidence sufficient to prove the restricted byway status as claimed by the applicant.
15. In arriving at my conclusions, I have taken account of the evidence and cases submitted by the parties, the relevant parts of the 1981 Act and the findings of the Courts in the cases referred to above.

## Reasoning

### ***Documentary evidence***

#### *Medieval evidence (late thirteenth century)*

16. The applicant refers to two grants of land at Mounton, which they claim is near to point A on Cherrygarden Lane (application A). The grants refer to the 'King's highway' bounding the land to the north. The applicant claims this must be Cherrygarden Lane as it is the only highway passing through the hamlet from approximately east to west, and therefore the highway would lie to the north of the land. The applicant also states this route is recorded on the early Ordnance Survey (OS) mapping and OS new series as the '*Supposed Pilgrims Way*'. In addition, in a 1511 quitclaim it is referred to as '*Saint Margaret Strete*', which can be followed to St. Margaret's at Cliffe, a coastal village between Dover and Deal. The applicant concludes that Cherrygarden Lane is at least medieval in origin and must have continued beyond point A, along the application route. They claim it then continued beyond that in a south eastly direction and along what is now footpath EE323 (application B).

17. The Council states that in the absence of any accompanying plans the medieval evidence is ambiguous, and they claim there is no evidence that pilgrims actually used the way. From the description of the grants of land I consider that it is possible that the reference to the king's highway is referring to Cherrygarden Lane. However, there is no description of a continuation along the application routes, from point A opposite Cherrygarden Lane in a south easterly direction, it is an assumption that the routes existed at this time. Therefore, little weight can be given to this evidence.

*Map of the St Alban's estate c.1629*

18. This is believed to be a map of the St. Alban's estate and has a suggested date of 1629. The map shows the crossroads junction at point A (application A) and there is also a fifth spur leading from the crossroads in a south westerly direction. For application A the claimed route is shown between a solid line and a dashed line. The route continues with this depiction in a south easterly direction and the extent of the map just shows the northern end of footpath EE323 (application B). The land adjacent to the routes, with parcel numbers 6 to 8, is described as 'St. Alban's Downs'.
19. The applicant claims this map shows that the application route between points A and B (application A) and beyond along Grannies Lane, is a continuation of Cherrygarden Lane. At that time, it appears to be the only route in a south easterly direction to Cold Blow Corner (Point D application B). The applicant indicates that other routes shown are now recognised public roads, they therefore believe the route A-B (application A) to be a public road. The objector comments that this is an overly simplistic interpretation, and such a conclusion can only be valid if it can be shown the other routes were public roads at the time of the preparation of the map.
20. The Council comments that the map shows what is now a bridleway in the same manner as the other trackways. In addition, a trackway is shown on the map as only giving access to a field, and this has no public status now. I consider that as the route for application A, and part of the route for application B, are shown and appear to be part of a continuous route, which includes what is now known as Cherrygarden Lane and Grannies Lane, it is likely this was a public route at the time. Given the age of this map it is likely that it was used on foot and on horseback, and maybe also by horse and carriage. A moderate amount of weight can be given to this map, it appears to show a reasonable amount of detail, however, it is not dated, and its purpose is unclear.

*OS drawings 1797*

21. Both application routes are shown in their entirety on this map. The applicant claims the drawings provide good evidence of the existence of the routes at the end of the eighteenth century. The Council points out that both Cherrygarden Lane and Bridleway EE279, which extends from Cherrygarden Lane, are shown in the same manner. In addition, there are routes that are now recorded as public footpaths that are shown in the same manner. The objector comments, in relation to application B, that the drawings do not provide evidence of the higher public rights claimed. I consider that although the OS drawings do not give an indication of status, it is clear that both routes were in physical existence and formed part of a significant through route at the time.

*Barlow-Hasted map of Kent 1797-1801*

22. This map is in two parts for the hundred of Eastry and the hundred of Wingham. The Eastry map shows the route of application B between point A and just beyond point B where it stops at the boundary. The route is shown as double continuous lines. The Wingham map does not appear to show the route, although the junction of point D is shown near to the boundary. The applicant states this is good evidence of a defined way for part of application B, but there is some uncertainty about the continuation of the way. The applicant claims the map was widely commercially published and would tend to show through routes that were public highways. I consider this is good evidence, however, the weight is limited as it does only show part of the route for application B and it is not clear whether or not the route for application A is shown.

*Mudge-Faden one inch map 1801*

23. This map shows the route of both application A and application B as double dashed lines, suggesting the routes were unenclosed. The applicant claims this map was published privately for public and not military use and is therefore likely to reflect the needs of the public. They state it is good evidence for the existence of a defined way along the claimed routes and its depiction is consistent with a public highway.
24. The Council state that the map was produced in an attempt to map all routes capable of use by the military in the event of invasion. The purpose was to record all routes available for use and no differentiation was made between public and private routes. The Council claims that the map shows routes that are now public footpaths or bridleways, and routes that are no longer in existence, in the same manner. I consider this map is good evidence of the existence of the application routes. The routes are shown as through routes, and it is likely they would have been used by the public and the military. They would be considered routes of some importance to be shown on a map of this scale.

*Patterson's Roads, a directory of main roads 13<sup>th</sup> edition 1811*

25. This map by J Thomson appears to be derived from the Mudge-Faden map referred to above, but the map has been revised to include the Dover, Deal and Sandwich turnpike. The route of application A is shown on this map and the applicant states that, although it is probably based on the Mudge-Faden map, it has been simplified and revised and is therefore good evidence of at least bridleway status along the appeal route. I would agree that the map is good evidence for application A.
26. The applicant states that part of the route for application B is shown on this map depicted by double pecked lines, however, I consider the route that is indicated may not be part of the application route. It may be that the applicant has indicated the road known as Kelk Hill as this takes a more southerly direction from point D.

*Greenwood's map of Kent 1819-20*

27. This map shows the route of application A between two solid lines, the route of application B is shown in its entirety between double dashed lines. This map is the first map to show the arc route of Grannies Lane between point B and Sandwich Road, to the south west of point A.

28. The map key refers to the routes as 'cross roads'. The applicant states, and I agree, that in this context a cross road means a highway linking more major roads, typically turnpike roads.
29. The Council once again states that this map depicts other ways in the area which are now recorded on the Definitive Map as a public footpath or bridleway, or not recorded at all. The applicant accepts that not every road shown on Greenwood's map as a cross road would be public, there are exceptions. However, it is submitted that where a road is connected to highways at either end it is more likely than not to be shown because it was a recognised cross road and was in use by the public.
30. I consider this map to be good evidence of public rights, both application routes are shown as through routes. It is suggestive of a status of at least bridleway, and possibly carriageway.

*OS old series one-inch map 1831*

31. Although this map was published later it is based on the same survey as the Mudge-Faden map referred to above. Application A is shown between a solid line and a dashed line and extends from the cross road junction. The route of application B is shown between a solid and dashed line between points C and D, the remainder of the route is between 2 dashed lines.
32. For application A the current arc shaped route of Grannies Lane, between point B and Sandwich Road, to the south of the cross roads is not shown. A route is shown however, linking Sandwich Road to Cold Blow Corner, which is on an alignment that is slightly further south than the current footpath EE309. This route was shown on the St. Alban's estate map but was omitted from the Mudge-Faden map. The Council once again state that the map shows a number of routes that are either no longer in existence today or are recorded as a lesser status. In relation to application B the objector states, that even if the route was capable of accommodating ridden horses, and carriages, this cannot imply that any such use was public.
33. As with the Mudge-Faden map I consider this is good evidence of the existence of the routes at this time. In addition, due to the scale of the map I consider that the routes must have been considered to be of some importance, and most likely capable of use on horseback and possibly carriageway. It is likely, as they are shown as through routes, that they were used by the public and the military.

*Tithe Map and apportionment for Nonington 1841*

34. The Tithe Map for Nonington does not show the route of application A, or any of Grannies Lane, including the arc route between point B and Sandwich Road. This is unusual given that it was shown on Greenwood's map. In addition, Grannies Lane and the application route have been shown on earlier maps. The routes pass through parcel number 11, this is recorded in the tithe apportionment as 'St. Alban's Downs' and is described as 'down'. The applicant states that one explanation for the omission of the routes within this parcel is that no entries appear for rent charge in relation to this land. The estate was formerly owned by the Abbot of St. Alban's until the dissolution of the monasteries, it therefore appears to be free from any liability to tithes. It is suggested that the detail of what was on the land was

immaterial to the survey and therefore only the external boundaries of the parcel of land have been plotted on the map.

35. The Council find it strange that the route of application A is not shown on the tithe map, indeed this is given as one of the reasons for refusing the application. They seem to imply that as the route is not shown this would indicate it was considered productive land at the time. However, it is clear from earlier mapping that the routes were in existence and no tithe has been charged.
36. I agree with the applicant's interpretation, it is clear from the earlier maps that both Grannies Lane and the application route were in existence at this time, it was common practice not to show the detail of land not subject to tithe payments. I therefore consider that the tithe map in relation to application A is neutral.
37. For application B the full length of the route is shown on the tithe map between double dashed lines. The route marks the boundary from the adjacent parcels of land which all have parcel numbers, the route therefore appears to be excluded from the tithable parcels and is not numbered. The applicant states the route is shown in the same manner as what is now the road from Cold Blow Corner to Kittington and Barfrastone. I consider that the tithe map is good evidence for application B, it is suggestive of public rights higher than that of footpath.

*Inclosure Act 1845, Order of Exchange*

38. An order of exchange map made in 1854 under section 147 of the Inclosure Act 1845 shows the first few metres of the route of application B at the northern end (point D). The route is coloured ochre the same as the road known as Mill Top, and short sections of Kelk Hill and Thornton Road, which are the roads either side of the application route. The applicant claims this is indicative of it having been regarded as a public way of at least bridleway status. The route of application A is not shown on this map as the land forming part of the exchange is further south. It is noted that a spur is not shown for Grannies Lane, and this may be if the map is based on the Nonington tithe map, on which it was also not shown. The objector has commented that they believe this evidence does not demonstrate the existence of any higher rights on the appeal route for application B. In addition, as it only covers a small part of the route, it cannot be considered as evidence for the remaining significant length of the route.
39. I consider this map is good evidence for application B, it is suggestive of public rights higher than that of footpath, although it is limited in that it does only show a small part of the route.

*Poor Law Commissioner's survey 1859*

40. The applicant has submitted a plan and apportionment of a survey ordered by the Poor Law Commissioners in 1859 of all the lands in Nonington parish. The purpose of the survey was to establish the lands liable to poor rates in the parish.
41. The entire length of the routes of both application A and B (including Grannies Lane which is the section in between the routes) is shown on the plan and given the number 614. The arc of Grannies Lane from point B (application A) to Sandwich Road, south west of point A, is also shown and given the number 615. In the apportionment the landowner for both of these parcel numbers is given as 'Nonington Highways, Surveyors of'. Parcel 614 is described as 'Road from

Gooseberry Hall Corner to New Purchase Firs' and parcel 615 is described as 'Junction near Gooseberry Hall Corner'. It is clear that parcel 614 relates to the application routes.

42. The applicant states that public roads maintained by the parish vestry were not liable to assessment, the survey expressly identifies those roads. The applicant claims that bridleways are annotated on the map but not recorded in the apportionment, with the exception of one which is specifically described in the apportionment as 'bridleroad'. The applicant also states that one road or track is annotated on the plan as 'Private Road'. There does therefore appear to be a distinction between public roads, maintained by the parish, and private roads. Of the 28 roads listed in the apportionment 25 are public roads today, the remaining three are designated as footpaths and are all subject to applications to be upgraded.
43. With regard to application A, the Council comment that on the plan the junction of the claimed route at point A, where it meets Sandwich Road, is shown north of its junction with Cherrygarden Lane. They query whether the road shown is the claimed route or a track on an alignment to the north of the claimed route. I consider that the word 'track' as shown on the modern OS base map (the Council's map attached to this decision showing the application route) may be referring to the claimed route, there is no evidence of a track immediately to the north of the claimed route.
44. The cross road junction at point A (application A) does appear staggered on the Commissioners plan. However, I consider that Cherrygarden Lane does appear slightly narrower than Grannies Lane on this plan, and it may be Cherrygarden Lane that is on a slightly different alignment rather than the claimed route. The claimed route is coloured ochre and joins Sandwich Road on the same alignment as it has been shown on earlier maps. I therefore consider that it is reasonable to conclude that the plan and apportionment are referring to the claimed route.
45. For application B the objector comments that the colouring of the route on the map is not apparent. However, on closer inspection of the unannotated copy of the map I consider it is coloured, although in some places it is not as clear. The objector also claims that the map was prepared without the input of landowners, and it should therefore be given less weight. The applicant disputes this and states that the vestry was constituted by the landowners of the parish. The landowners could also appeal to the Quarter Sessions against the valuation where there was disagreement.
46. I consider the Poor Law Commissioners survey to be significant evidence for both applications. The routes are recorded and labelled on the plan and referred to in the apportionment as roads. I consider this evidence shows the routes were publicly maintainable and considered to be of a status suitable for vehicles at the time.

*Ramsgate, Sandwich, Deal and Dover Railway 1861*

47. This railway was proposed to cross the route of application B between points A and B. The plan refers to the claimed route as 'Public Road or Occupation Road' and it was proposed to be crossed on the level. The book of reference, however, refers to it as 'Public Road' owned by the surveyor of the parish. The railway plans were not



enacted into law and the railway was never constructed; however, the applicant states the evidence should not be diminished as the same requirements were imposed on all railway companies seeking legislative authority.

48. The Council disagrees and claims the plans may not be as reliable as those that passed through the whole parliamentary process. In addition, they claim the plan is ambiguous as it refers to the route as 'public road or occupation road', and the book of reference should not override the plan. The applicant states that the book of reference should be preferred, and it is most likely that the railway surveyor established that the appeal route was a public road after the preparation of the plans.
49. I consider that this is good evidence of the route of application B having public carriageway status at this time. Although the Bill was withdrawn and the railway not built, the railway company will have followed the requirements of the Parliamentary Standing Orders. It can therefore be given a reasonable amount of weight in consideration alongside the other evidence.

*Walmer, Deal and Adisham Railway 1871*

50. This railway was proposed to cross the route of application B just to the south of its junction with footpath EE264 (south of point B). The plan shows the way as 'Public Road', however the book of reference records it as a 'footpath' in private ownership. The applicant states that the book of reference consistently failed to record the correct status of rights of way, and therefore the reference to the route as a footpath is unreliable. The Bill was deemed non-compliant with Parliamentary Standing Orders and was not proceeded with; in these circumstances I therefore place little weight on this evidence.

*Public Path Diversion Orders St. Alban's Court 1863 and 1873*

51. This evidence is for application A. Three footpaths across the St. Alban's Court estate were diverted by order of the magistrates, one in 1863 and two in 1873. The three plans all show the first part of the claimed route from point A at the junction with Sandwich Road. The short stub of the route that is shown, is coloured in a way that is consistent with the other public highways.

*OS boundary records 1867-9*

52. This is evidence for application B. The field boundary sketch map shows the application route as forming the parish boundary from point A to a point between C and D. The application route is marked 'C.R' indicating that the boundary ran along the centre of the road. The applicant claims this is suggestive of an ancient way which is likely to be a public road. The objector comments that the evidence needs to be more than 'suggestive' and must show that the route was more likely than not a public vehicular road.
53. I consider that the purpose of this sketch plan was to record the boundary, the fact that the application route is referred to as a 'road' could reflect its usage at the time, there may also be some significance of the historic boundary running along the route. Some moderate weight can be given to this evidence, which is considered alongside the other evidence.

*The National Gazetteer of Great Britain and Ireland 1868*

54. This map is submitted as evidence for application B. The applicant states the map is selective in the routes that are shown, it does not show Sandwich Road, Thornton Road or Thornton Lane. It does, however, show a route that appears to be the claimed route for application B. The applicant states that as this route has been recorded in preference to other routes, it suggests it was regarded as a significant local road. I consider that it is difficult to be certain if this is the application route, due to the scale of the map, although it does appear to be. I consider that this is good evidence that the route was considered of some importance at this time.

*OS 1<sup>st</sup> edition 25-inch map 1871 and 1872*

55. For application A the claimed route straddles two map sheets. The cross road junction at point A is shown on the northerly sheet. Sandwich Road and Cherrygarden Lane are both coloured ochre. It is difficult to see as only a very small part is shown, however, the claimed route does appear to join Sandwich Road, but it is not coloured. The southern map sheet does show the continuation of the claimed route between double dashed lines, and it is coloured ochre, it joins Grannies Lane at point B. The arc of Grannies Lane is also shown coloured between point B and Sandwich Road, to the south west of point A. Grannies Lane including the arc route does appear wider than the claimed route.
56. The claimed route is braced with the adjacent woodland and given a parcel number 111; this is described as 'wood' in the book of reference. Whereas, Grannies Lane and the arc, which is a continuation of Grannies Lane has a separate parcel number and is described as 'road'.
57. The Council assert that the depiction of the claimed route and the fact that it is braced with the adjacent land rather than having a separate number, indicates the way was considered private. The applicant disagrees and states the depiction shows that the route was not considered sufficiently well-defined or important to merit having a separate parcel number. It is the applicant's view that this does not indicate it was private, many cart tracks and paths are shown braced with surrounding land. Furthermore, the Council have stated that the OS plans were essentially topographical surveys and were not concerned with land ownership or public/private rights.
58. I agree with the applicant that as the arc of Grannies Lane is shown as being wider than the claimed route, and it is now part of Grannies Lane with the separate parcel number, this suggests that the majority of traffic would be using this route, rather than the claimed route, to link Grannies Lane and Sandwich Road. The claimed route is shown as coloured for its most part, the omission on the northern sheet may have been a mistake as only a very small section of the route is shown on that sheet. The colouring may indicate it was a surfaced road suitable for vehicles.
59. For application B the map shows the full length of the claimed route, it is annotated '(supposed) Pilgrim's Way', this is referred to in paragraph 16 above. Between point A and B the route is coloured ochre. The route is partly enclosed on one side and partly unenclosed where it is shown as a double dashed line. The route does not have a separate parcel number and is braced to the adjacent land.

60. I consider that there is a clear physical depiction of the application routes on this map. I consider that this is good evidence of the physical existence of the routes at the time. From 1888 OS maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. Although the first edition OS map is prior to this date. However, the colouring may give an indication of the type of use the route was suitable for at the time. Taken in isolation the OS maps consequently hold some evidential weight, although in relation to the status of the route, due to the disclaimer, the weight is limited.

*OS 25-inch maps 1896-1938, OS 1-inch new series 1858-1909, OS Popular edition 1-inch 1914-1936, OS 7<sup>th</sup> series 1-inch 1954-1968, OS 1:25,000 1905-1957, OS 6-inch 1956, Bartholomew's half-inch map 1904-1953*

61. The applicant has submitted all these maps in relation to the claimed route for application A, the extracts provided only show the immediate area around that route. They all show the claimed route and some also show the southern spur of Grannies Lane linking to Sandwich Road. They all show the physical existence of the route, and some give an indication of the surface conditions, there does appear to be a gradual transition in importance from the claimed route to the Grannies Lane arc route. In relation to the status of the route I consider the maps to be of limited weight.
62. In relation to application B the Council comment that the 1904, 1922 and 1941 editions of Bartholomew's map do not show the claimed route.

*Finance Act records 1910*

63. For application A the working copy plan depicts the hereditament boundaries with coloured lines. Grannies Lane, from point B (application A) in a south easterly direction is clearly excluded from the hereditament. At point B there is a break in the pink line, which then continues on the north side of the claimed route to the edge of the map sheet. If the claimed route were excluded from the hereditament, it would be expected that the pink line would be to the south of the route, therefore it must be assumed that it is included within the hereditament.
64. There are two map sheets for the record plan for application A. The northerly sheet only shows a very small section of the route at point A. It is possible that the route is excluded from the hereditaments, however, it is difficult to be certain as the area of land is small. The southern sheet shows the hereditaments as colour washed rather than marked boundaries. The St. Alban's Downs hereditament is colour washed in a pale yellow which makes it difficult to see the adjacent uncoloured roads clearly. However, I consider on this sheet the claimed route does appear to be excluded from the hereditament, along with Grannies Lane from point B in a south easterly direction. The arc route of Grannies Lane appears to be included within the hereditament. The applicant and the Council refer to the evidence as neutral, however, I consider that the route does appear excluded and therefore some weight can be attached to it. The applicant does however mention that other roads with known public status are shown variably. There does appear to be some conflict between the working copy and record plan, however, I consider the record plan to carry the greatest weight as this is the final version of the document.

65. For application B on the working copy plan only part of the claimed route is shown excluded from the adjacent hereditaments. That is a section extending from point A to part way between A and B. This section is shown on map sheet LVIII/1, the remainder of the route is shown on the adjacent sheet and is included within the hereditaments. The record plan appears to show the whole route included within the hereditaments, although it may be possible that the same section which is excluded on the working plan is also excluded on the record plan, however, with the faded colour wash it is not certain. There are no deductions made for rights in relation to the adjacent hereditaments. The applicant claims that the partial exclusion of the route on the working copy provides some support for its status as a public road. The objector states that the evidence must represent more than a reasonable allegation to meet the legal test.
66. I consider that the route does appear partially excluded on the working copy and there is a possibility it may also have been partially excluded on the record plan. Therefore, some weight can be attached to it, however, due to the disparity between the two map sheets this does limit the weight.

### **Conclusions**

67. As set out above; in order to justify the making of a DMMO to add a public right of way under sub-section 53(3)(c)(i) of the 1981 Act it is necessary to provide sufficient evidence to show that a right of way which is not shown subsists or is reasonably alleged to subsist.
68. For application A it is clear that the route has origins as early as c1629 as it is shown on the St, Alban's map. The OS drawings 1797, Mudge-Faden map 1801 and the OS 1-inch old series map 1831 all show the claimed route but are reproduced from the same survey data. The route is also shown on Patterson's map of 1811 and Greenwood's map of 1819-20. At this time and on maps of this scale the route must have been considered of some importance to be shown.
69. The route was obviously in existence but was not shown on the Tithe map of 1841, this appears to be because the land was not subject to tithe payment and so the detail of that parcel of land was not drawn. I consider the 1859 Poor Law Commissioners survey to carry significant weight, the route is shown on the plan and is described in the apportionment as a public road. The Council consider that the OS 25-inch 1<sup>st</sup> edition map of 1871 asserts that the route is private, as it is not given a separate parcel number. However, as the Grannies Lane arc route appears wider than the claimed route, the claimed route may have become less important by this date and did not merit having a parcel number. This does not necessarily give an indication of status, and the colouring may imply it was surfaced and therefore suitable for vehicular use but again does not give an indication of status. Finally, the Finance Act maps add some weight that the route may have been considered to be public at that time.
70. In this case I consider the evidence, when taken as a whole, is sufficient to show there is a reasonable allegation of the existence of public carriageway status. However, Section 67 of the Natural Environment and Rural Communities Act 2006 extinguished public rights for mechanically propelled vehicles, therefore I consider an Order should be made for the status of restricted byway.

71. The making of an Order will give the opportunity for public consultation and further evidence may be discovered. In addition, if objections are made there would be an opportunity for the conflicting evidence to be tested more thoroughly and the issues determined at an inquiry.
72. For application B, in order to justify the making of an Order to upgrade a public footpath under sub-section 53(3)(c)(ii) of the 1981 Act it is necessary to provide sufficient evidence to show 'on the balance of probabilities' that the status should be a restricted byway.
73. For application B again it is clear that the route has early origins, possibly from c1629 as it is partly shown on the St. Alban's map. The OS drawings 1797, Mudge-Faden map 1801 and the OS 1-inch old series map 1831 all show the claimed route but are reproduced from the same survey data. The route is also shown on Greenwood's map of 1819-20. At this time and on maps of this scale the route must have been considered of some importance to be shown.
74. The full length of the route is shown on the Tithe map of 1841 and appears separate from the adjacent land parcels. I consider this to be good evidence of public rights higher than that currently recorded. As stated above, I consider the 1859 Poor Law Commissioners survey to carry significant weight, the route is shown on the plan and is described in the apportionment as a public road. In addition, the railway plan of 1861, the OS boundary records 1867-9 and the National Gazetteer 1868 are all around the same time period and are all suggestive of public carriageway status. The OS 25-inch 1<sup>st</sup> edition map of 1872 shows the physical existence of the route, part of it is shown coloured (southern end from point A), which may indicate the route was surfaced. A similar length of this part of the route is shown excluded on the Finance Act working plan, and possibly on the record plan. This seems to suggest that use of the route as a through route for vehicles had diminished by this date.
75. I conclude that the documentary evidence is sufficiently indicative of higher public rights having existed than those currently recorded. I consider the evidence, when taken as a whole, on the balance of probability, is sufficient to show the existence of public carriageway status. However, as stated above, Section 67 of the Natural Environment and Rural Communities Act 2006 extinguished public rights for mechanically propelled vehicles, therefore I consider an Order should be made for the status to be upgraded to restricted byway.
76. Having regard to these and all other matters raised in the written representations I conclude that the appeals should be allowed.

## **Formal Decisions**

### **Application A**

77. The appeal is allowed.
78. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Kent County Council is directed to make an Order under section 53 (2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the restricted byway proposed in the application dated 26 September 2017 and shown on the plan appended to this decision.

79. 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.

**Application B**

80. The appeal is allowed.

81. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Kent County Council is directed to make an Order under section 53 (2) and Schedule 15 of the 1981 Act within three months of the date of this decision to upgrade footpath EE323 to restricted byway as proposed in the application dated 22 August 2017 and shown on the plan appended to this decision.

82. 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.

*J Ingram*

Inspector





