

PART 1 – SECTION A – ITEM 1

ALLEGED PUBLIC FOOTPATH ALONG THE NEATH TENNANT CANAL TOWPATH

COMMUNITIES OF ST. THOMAS, COEDFFRANC, DYFFRYN, CLYDACH AND BLAENHONDDAN

PURPOSE OF REPORT

To consider whether a footpath modification order should be made in respect of the towpath of the Tennant canal.

BACKGROUND

- 1.1 In 1990 the Neath Community Action Group made an application to register the Neath and Tennant Canal towpath as a public right of way on foot.
- 1.2 Informal consultations were initiated in 1993 and given the length of the route under consideration it is necessary to establish which people had walked the various sections concerned. Unfortunately the response from individuals to provide additional information has been poor and so this report can only deal with the information that is available.
- 1.3 Fifty nine evidence forms were submitted in support of the claim and thirteen additional persons have been interviewed who have provided more details as to the precise section of the path they have used.
- 1.4 In terms of numbers of claimants there are two sections of the path that are supported by a significant number of people, (Section A-H and T-V).

i.e. from Dan y Graig to Jersey Marine and from the footbridge across the River Neath at Neath Comprehensive School to Aberdulais. The remainder of the path being claimed as a public one is supported by fewer numbers of people.

The first section (A-C₁) therefore lies within the City and County of Swansea.

- 1.5 The condition of this path varies. The original path as claimed at the point it commences in Port Tennant is inaccessible as it is permanently flooded. Some sections, for example near Skewen are very boggy and prone to flooding but can still be followed, whilst other sections are in a good condition for example at Jersey Marine the path comprises a firm earth stone base surface.

FOR INFORMATION ONLY

1.6 Whilst the application has to be considered on its merit it is worth mentioning this Council entered into an access agreement with the Tennant Company (who own the entire length of this path) on the 26th March 1997. (Details of that agreement are available in the background papers). This agreement grants the public consent to walk the path for a period of twenty years but can be terminated by the Company at any time provided three months notice is given to this Council in writing.

THE CLAIMED PATH T-V

(PEDESTRIAN BRIDGE NEAR NEATH COMPREHENSIVE SCHOOL TO STATION ROAD, ABERDULAIS)

- 2.1 Point T marks the access point via a stone ramp to the pedestrian footbridge which links Bridge Street to Cadoxton Road across the River Neath.
- 2.2 Proceeding approximately northwards alongside the Tennant Canal, the path comprises a well worn stone based path approximately 2 metres wide. Some 300 metres north of this footbridge the path is prone to flooding where the path passes under the railway bridge at point U. Two site visits revealed that this flooding can make the path impassable (unless a person is wearing waders).
- 2.3 At point U₁ some 340 metres north east of this railway bridge the footbridge across the canal carries the registered footpath no. 23. There is a worn path under the arched bridge even though the path becomes very narrow and headroom limited. However the worn path curves around the outside of the approach to the bridge.
- 2.4 Between points U₁ and U₂ the path is prone to being overgrown and is predominantly a narrow earth path passing through various grasses, gorse and bramble for some 1100 metres.
- 2.5 At point U₂ the path passes under the A465 dual carriageway and becomes a concrete channel. At the time of one of the inspections in December of 1999 it was flooded for about 50 metres. At this point the path is effectively an overflow channel, some of which lies below the level of the canal.
- 2.6 The final 500 metres or so of the path is easily accessible varying between 1 and 2 metres.

- 2.7 Throughout various sections of its length and noted in site inspections undertaken on the 6th July 1993 and 14th December 1999 there were various quantities of mud deposited on the path having been dredged from the canal.
- 2.8 Whilst the deposits would not necessarily prevent access, they could obviously make progress more difficult.
- 2.9 The connection to Station Road from the path is via a two metre gap in an adjacent fence which continues along a tarmacked path.

THE LANDOWNER

- 3.1 The entire length of this path is under the ownership of the Port Tennant Company Limited who have objected to this application.
- 3.2 All the usual organisations were consulted, including the Local Member and Community Council. The Dyffryn Clydach Community Council supported the claim in a letter received on the 5th July 1993.
- 3.3 *For Section 31(i) of the Highways Act 1980 to operate and give rise to a presumption of dedication the following criteria must be satisfied:-*
- (a) The physical nature of the path must be such as is capable of being a public right of way.*
 - (b) The use must be "brought into question", that is challenged or disputed in some way.*
 - (c) Use must have taken place without interruption over the period of twenty years before the date on which the right is brought into question.*
 - (d) Use must be as of right, that is without force, without stealth or without permission and in the belief that the route is public.*
 - (e) There must be no evidence that the landowner was able to refute the claim.*
 - (f) Use must be by the public at large.*

EVIDENCE IN SUPPORT OF THE APPLICATION

SECTION T-V

COMMENT

A total of fifty nine application forms were submitted in support of the whole length of the path, one end being in Port Tennant and the other in Aberdulais. Forty nine of these forms were not clear enough to be able to identify whether those claimants had walked the entire length and if not, which section of the path they had used. Of those who came forward to be interviewed, seven indicated they had used the section T-V.

- 4.1 Mrs. Bridle stated she had never walked along the path where it passes alongside “Canal Side” (between U₃ and V). The following have used the path for the period quoted:-

Mrs. Bridle (1966-1993), Mr. Ashmead (1963-1993), Mrs. Seiger (1976-1993), Mr. Osborne (1970-1993) and Mrs. King (1957-1993) all said it was not possible to walk under the A465 at point U₂. Mr. Osborne indicated it was never too deep to walk through if he was wearing wellington boots, whilst Mr. Ashmead stated he would remove his boots. Mrs. Seiger said she has only been able to use this section of the path three to four times in total.

Mr. Ashmead stated the path was flooded occasionally at this section but it never prevented him from using the path.

- 4.2 Mrs. Ashmead indicated she had organised a walk every month for her church.

Mrs. Bridle said she had never been informed by anyone that it was not a public right of way, nor was she denied access by those who were working on the canal.

Mrs. Butler (1950-1984) confirmed that she was never stopped by employees of the canal Company.

Mr. King and Mr. Osborne also said that they had never been prevented using the path.

- 4.3 Mr. Osborne, Mr. King, Mrs. Butler and Mrs. Seiger stated no notice had ever been erected on this section of the path that informed them they were not to walk over it. Two said notices had been erected which prohibited angling.

COMMENT

- 4.4 *From those who have been interviewed and from the description of the route, it can be considered that much of the path is one that is physically capable of being the subject of a dedication and therefore complies with paragraph 3.3(a) above.*
- 4.5 *The application was submitted in 1990 but no specific act has taken place that has drawn to the attention of the claimants that the owner of the land disputed their right to walk the path. Whilst the dumping of dredged soil has inconvenienced their use, apart from Mrs. Butler, who said she stopped using the path in 1984, no one has said this has prevented their use. According to the claimants it was not an act that conveyed any position from the landowner that the route was not a public one. Therefore no specific act has taken place to bring to the notice of the public that the landowner did not wish to dedicate the towpath as a public one. Because of this the statutory presumption of dedication (as provided for under Section 31 of the Highways Act 1980) can not apply as specified in paragraph 3.3. (b) above. This is because a specific date is needed when the "right" of the public to use the way was brought into question. In respect of this section of path, none of the claimants have ever considered they should not have been making use of it. Therefore paragraph 3.3(c) would also not apply. Consideration should therefore be given to the possibility that there has been a dedication under common law.*
- 4.6 *Use of the path has been open (and sometimes in full view of employees of the Company) which complies with paragraph 3.3. (d) above.*
- 4.7 *Counter evidence from the landowner is discussed below so that paragraph 3.3.(e) may not apply.*
- 4.8 *Use has been by a cross section of inhabitants and not by any one particular interest group. This complies with paragraph 3.3.(f) above.*

PRESUMPTION OF DEDICATION UNDER COMMON LAW

Under common law there is no minimum prescribed period, but the onus is on the claimant to show that the landowner acquiesced to that use. The only evidence is from Mrs. Bridle and Mrs. Butler, who said employees of the Company did not turn them away when they were walking on the path.

EVIDENCE AGAINST THE CLAIM FOR A PUBLIC RIGHT OF WAY

- 5.1 The Port Tennant Company Limited is a private limited Company the shares of which belong to the family of Mr. A. J. S. Coombe-Tennant a descendant of George Tennant who was responsible for the construction of the canal.
- 5.2 It is worth noting that it was not constructed under the power of any Act of Parliament but was an entirely private venture. Therefore there has been no primary legislation that may have made reference to public or private rights of passage.
- 5.3 The Company have submitted a statement by their foreman, Mr. A. W. Bowen in August 1991 who has been employed by the Company since 1956. The basis of the objection is based on the following.
- 5.4 At least three times every year and at different sections of the canal, detritus from the floor of the canal is dredged and deposited on the path which is left to rot. Because of this, the Company contends the path is obstructed at three different sections annually.

COMMENT

- (a) *This obviously relates to the entire length of the path, which from this Council's point of view stretches from the County Borough Boundary at point B to Aberdulais at point V. However the site visits referred to earlier revealed evidence of such deposits between points T and V where shown on the attached plan. The Company have provided examples of when detritus was dumped on the towpath and it is quite clear from the three site visits undertaken that this is a regular practice.*
 - (b) *The question therefore is whether these deposits did prevent pedestrian access and whether such deposition was an indication to the public that the Company did not wish to dedicate the path as a public one.*
 - (c) *Of the seven witnesses interviewed, only one person said she stopped using the path because of the deposits. None indicated that it was considered to be a preventative measure or a challenge to their use of the path.*
- 5.5 Mrs. Ashmead said the mud deposits whilst inconvenient did not prevent her from using the path.

Mrs. Bridle stated she would have to wear boots but it also did not prevent her walking along the path (she recalled two occasions when the dredging machine was moved out of her way by employees).

Mrs. Butler said she stopped using the path in 1984 when large quantities of mud were deposited at the south western end of the path that runs parallel to "Canal Side" (at about point U₃).

Mrs. Seiger said that provided she was wearing wellington boots she would continue to walk over the mud.

Mr. Osborne said there was a period of about one month when one deposit was too liquefied to be able to walk through as it was about 2"-6" deep.

Mr. King noted there was an occasion when the mud was some "2" deep, and described it as a slurry like deposit. However he said it did not prevent him from walking the path.

- 5.6 The Company have stated the public have never been allowed access throughout the forty years Mr. Bowen has been employed.

COMMENT

This however is contested by those who claim to have used the path. They did not seek permission to use it, nor did they consider there was any objection to them using it on account of the employees of the Company not challenging them.

- 5.7 The Company have indicated there is a policy to discourage trespass by:-

- (i) The erection of notices stating the canal land is private property (although they state these have been vandalised in recent years);
- (ii) The erection of physical barriers such as gates and fences to barricade sections of the canal when work has been in progress;
- (iii) The past prosecution of trespassers who have been fly tipping. One example of a successful prosecution in a Magistrates Court in 1984 was given and in the opinion of the company provided publicity on the Company's need to keep the public away from the canal.

- 5.8 On three site visits and according to the accounts given by the seven witnesses, there have never been any notices which made it clear that the path was not a public one. It is now accepted case law that even if notices are erected stating "private property", this in itself is not sufficient to negate an intention to dedicate a public right of way. The notice to the effect that trespassers will be prosecuted adds greater weight, although again it depends on where the notice is sited and to which portion of land the notice is giving effect. However none of those interviewed stated they recalled seeing such a notice. This coupled with the employees seeming acquiescence to their use suggests the claimants were of the belief that there was no objection from the landowner.

- 5.9 As far as the section of path under consideration is concerned, there was no physical barrier in existence across the path at the time of the three surveys. None of the claimants recall or refer to such a barrier. The implication from their testimonies is that there was no need to barricade any section, given the employees gave them the impression there was no objection to such use.
- 5.10 Past prosecutions for fly tipping is a separate matter and obviously makes no comment on the Company's policy to the acquisition of a public right of access along the path concerned. (The public can of course be prosecuted for fly tipping on a public right of way).
- 5.11 The Company have also stated that where the A465 passes over the path at U₂ it is flooded and often up to six feet in depth during the winter.

COMMENT

- 5.12 *The photograph enclosed clearly shows this path flooded, the path is at a lower level than the canal and to all intents and purposes appears to be more of an over flow drainage channel.*

Secondly if it is flooded most of the year, then this section would not be available to the public and therefore is different in character to other flooded sections of the path, which only flood at times of high water levels.

COMMENT

- 5.13 *The Company would further demonstrate that this section of the path is not capable of dedication by citing the example of the buttress of the road bridge at point U₃. The "buttress" comprises a large concrete pillar which takes up the entire width of the path although there is evidence of a worn route that deviates around this pillar. The bridge contains the "roundabout" which itself feeds the slip road to the A465 dual carriageway. Consequently prior to the construction of this bridge, the path presumably would not have been obstructed.*

- 5.14 In relation to the above, the Neath Abergavenny Trunk Road (Aberdulais to Llandarcy Side Roads) Order was made in 1970 and the plans registered in 1969.

COMMENT

It is not known precisely when work started but access along the former path would have presumably been interrupted from some time in the late 1960s. Consequently if it were argued the dedication did take place along the route but prior to the construction of the drainage channel (at point U₂) then the period of presumed dedication would have to be counted retrospectively from a date before such works were implemented. None of the claimants interviewed can show such early use.

However it could of course be argued that dedication is via a route circumnavigating the pillar since 1970, but the claim would nevertheless still be affected by the question concerning the drainage channel (at point U₂).

CONCLUSION

- 5.15 The route as claimed as a public right of way has been used for an average of thirty four years by those who have been interviewed, the respective period being shown in the graph shown in appendix 1.
- 5.16 The route as claimed, has a short section under the A465 which appears to be flooded for a substantial portion of the year, and therefore prevents uninterrupted access.
- 5.17 There is also another section of the path (point U) where it passes under the railway bridge and the bridge containing the A465. It too was discovered to be impassable on one visit, but passable on another. However the path at this point is unlike the one referred to above, it obviously forms part of the same “canal side” path.
- 5.18 If the flooding of the path at point U₂ is considered such that use can not be shown to have been continuous then the only section of the path that could be used without interruption would be by accessing and exiting the path via the registered public footpaths no. 22 and 23 (in the Community of Blaenhonddan) at points U₁ and W. Consequently it is necessary to discover if the seven claimants interviewed have used these registered public footpaths to gain access along this shorter section alone.
- 5.19 Of the seven who were sent letters on this particular point, two responded and provided additional information. One person a Mr. R. King indicated he has accessed the towpath via footpath no. 23 and walked to Aberdulais from 1957 until the present day. Also a Mr. Wallace indicated he has accessed the towpath via footpath no. 22 since 1993.

Whilst this confirms this section has been used, it is a very low number of persons upon which to base a modification order.

- 5.20 As a result of the impassable nature of the canal path under the A465, and that section of path between the registered footpaths 22 and 23 is supported by just two people, it should be considered that there is insufficient evidence to warrant making an order. However if further evidence was produced to show the use between these two public footpaths was more extensive then this Council can re-consider the legal status of the path.

Recommended: No Modification Order be made for any of the route T to V.

SECTION A-H

6.1 This commences in the City and County of Swansea where the path joins Wern Fawr Road and enters the County Borough of Neath Port Talbot at point C₁ some 1120 metres east.

BACKGROUND

6.2 Of the fifty nine evidence forms originally submitted in support, only five were specific enough to show they had walked this section of the path. Of the seven individuals that were interviewed, five said they had also walked this section of the path. The average length of use from the combined ten persons is 23 years although the evidence of those that have not been interviewed can not relied upon to the same extent. The average length of use by the five is also 23 years.

THE CLAIMED PATH

6.3 The facts concerning the shorter section in the City and County of Swansea obviously will affect the conclusions reached on the remainder of the path. There is no other independent connection to another public highway between point A and the County Borough Boundary at point C₁.

6.4 Access to the path at point A can be obtained via the last and most eastern section of Wern Fawr Road or via the road bridge at point A₂ leading to the Council refuse tip. The remains of the railway sidings are still in evidence where they cross Wern Fawr Road at point A₁.

6.5 In 1998 there was a notice on the bridge which stated that this way is not dedicated to the public but on a more recent site visit in 2001 it was absent.

COMMENT

It is difficult to say whether this notice simply refers to access via the bridge or to access areas beyond and if so, precisely access to where. Whilst it is clearly a notice by British Rail and not the Tennant Canal Company, it raises the question as to whether the public were being informed not to walk across the railway lines that bisected Wern Fawr Road.

Starting at point A there is also another stone based vehicular width track that runs approximately parallel to the “canal path”. Some claimants have referred to this as an additional route they have used particularly when the section A-B deteriorated.

- 6.6 Close to the beginning of this track and at point A there is a vehicular barrier across the end of Wern Fawr Road alongside which is positioned two offset barriers. This allows pedestrians to pass through when the vehicular barrier is closed.
- 6.7 At the other end of the path where it next joins a public highway at Ashleigh Terrace there was no notice prohibiting public access.
- 6.8 The 1971 edition of the Ordnance Survey Path denotes “towpaths” as following a line along the southern perimeter of Crymlyn Bog passing via the route A-B-C. However no path exists today nor did one in 1993. The area of land adjacent to and immediately south has been landscaped, and the line of the former path is denoted by a 8 ft. high perimeter fence, with the marsh immediately on the northern side. However the vehicular width tarmacked track running to the south and approximately parallel to this claimed public path A-B-C extends from A-D-E. At point E there are large boulders preventing vehicular access. Between points E and F the path has a new tarmacked surface some 2½ metres wide and has been upgraded to accommodate cyclists. (However it has not been given a legal status as a cycle track).
- 6.9 At point F a second path forms a spur from the canal path. The canal path on the original site inspection of 1993 was found to be very overgrown and could not be followed due to gorse bushes barring the way for about 130 metres. Thereafter and for approximately 210 metres a path could be found where it passed between very overgrown but tall grasses and reeds. After this length the path became difficult to follow again because of the gorse. This remained the case until the spur path rejoined the canal path at G. The spur path is stone based path and could be easily followed.

The remaining length of the canal path to H (at Ashleigh Terrace, in Jersey Marine) was relatively easy to follow.

- 6.10 There was evidence of dredging at point G where a 1 metre high mound of mud deposit was noted to have been dumped on the path. (However it was easy to step across).
- 6.11 No specific physical barrier was erected to prevent public access along this section, nor any notice that brought to the attention of the public that the owners did not consider there as a public right of way along the path. Consequently the path was not called into question, although the application resulted in a formal objection by the Tennant Company on the 18th September 1990. As such the statutory presumption of

dedication as provided for under Section 31 of the Highways Act 1980 would not apply.

Therefore if there has been any dedication of a public right of way then consideration must be given to whether this has occurred under common law.

EVIDENCE IN FAVOUR OF THE CLAIM A-H

- 7.1 A Mr. W. Absalom (deceased) stated he first started walking from Jersey Marine to Swansea in 1927 until 1932 because his father worked on the Trinity House Ship based in the Kings Dock. He said the path was always accessible and he used it regularly. He did not specify which of the two paths he used, whether A-B-C-H or A-D-C-H.
- 7.2 Mr. S. Absalom (son of the above) stated he walked the path from 1956 until various sections became blocked. He ceased using the route A-B-C after the new access road was built to the new landfill site but was unable to provide a date when this road was constructed.
- 7.3 He also said the section C-B had only been poorly defined for a few years prior to 1993 but that the remainder of the path has always been clear. He also stated that dredged mud has been deposited on the path, which whilst sometimes a few feet high, never prevented him from finding a way of walking along the path. He said the mud was always placed away from the canal bank, to prevent it from sliding back into the canal. Therefore it was always possible to walk around the deposit on the bank side. Consequently, it is difficult to determine for how long he had used the route A-B-C.
- 7.4 Mr. Fowler, stated he first started using both paths in 1950 until 1993. (He was born in Ashleigh Terrace). He recalls a barrier being placed across the canal towpath where it joins Wern Fawr Road, Port Tennant, but was removed when local residents objected. It was only in the few years immediately preceding 1993 that various sections of the tow path became overgrown.
- 7.5 A Mr. Osborne used both paths once every six months between 1978 and 1993. He also indicated the path between points A and B deteriorated a few years immediately prior to 1993. However he indicated he has used the alternative stone based path A-D-E along this section throughout the period quoted.
- 7.6 Mr. Lloyd stated he has not walked the "towpath" section A-B-C and F-F₁-G because he stated it was too boggy. He used the alternative path described above, (that is A-D-C and F-F₂-G). from 1947 until 1993.

EVIDENCE AGAINST THE CLAIM FOR A PUBLIC FOOTPATH A-E

- 8.1 There are only five people who can be relied on to give evidence of their use which is a low number.

- 8.2 The Company have indicated that between points A and C₁ the canal was subject to extensive dredging in the period 1972-1974 and this, the Company would say, is an indication that they had no intention to dedicate this path as a public one. Since 1974 they state this section of path has become overgrown.
- 8.3 The Company say the section of path between A and F cannot be identified as it can not be walked.
- 8.4 The section between F₁-H was subject to dredging in 1991 and again would say this is an indication that the Company had no intention to allow the public to use the path as a public one. They also indicated that in periods of drought it is subject to regular dredging which is necessary to enable industrial waste to be drawn from the Crymlyn Bog.

CONCLUSION

- 9.1 There is no record of any physical barrier or notice across the path which made it clear to the public they should not be using the path.
- 9.2 It is unclear to what area the British Rail notice was intending to prohibit access but the barriers would not have prevented pedestrian access.
- 9.3 The number of people who came forward to be interviewed is low especially as a proportion of those were asked. The total number of witnesses who could be relied upon to give evidence number only four. Whilst there is no minimum number of claimants that should be considered sufficient to make a Modification Order, this Council would be justified in expecting the support of a greater number, for an Order to be made. This Council would need to be confident that a sufficient number of people would attend a public inquiry to give detailed evidence, given an objection has been made and the evidence would be tested by an independent Inspector.
- 9.4 On the other hand the Company have not provided any irrefutable evidence to counter the claim. This latter point is important as a result of the following case listed below.

COMMENT

- (a) *Such a requirement was highlighted in a recent case concerning Regina -v- Secretary of State for Wales ex parte Emery (1996).*
- (b) *The provisions of Section 53 of the Wildlife and Countryside Act 1981 require the Council to be satisfied either a public right of way exists to make a Modification Order, or that it is reasonable to allege one exists. In other words this Council does not have to conclude a public right of*

way exists, before it makes a Modification Order. It must however, be satisfied that it is reasonable for the claimant to allege a public right of way exists.

- (c) *The case referred to above recognised that in the event of a conflict of evidence between the owner and the public if it might reasonably, following cross examination at public inquiry, be resolved in favour of the public, the Council would be acting correctly in making an Order if it regarded the public's allegation as reasonable. This could be said to be the case in the absence of any irrefutable evidence from the landowner. Therefore there is more onus on the landowner at this stage to disprove the claim provided the evidence by the claimants could be concluded to have been made out.*
- (d) *In this example there is a conflict of evidence but the landowner has not been able to provide any irrefutable evidence.*

9.5 However under common law, there must be sufficient evidence to show that the landowner was at the very least acquiescing to that use, and some evidence that they were making provision for pedestrian use.

COMMENT

- (a) *In this respect the pedestrian barriers at point A would indicate that even if the track at this point was closed to vehicles, provision was being made for pedestrians to pass through.*
- (b) *the recent improvement of the path between points C₁ and G to a cycletrack would re-enforce the idea that the public were being encouraged to use the path.*

9.6 The various periods of use are:-

1927-1932, 1956-1993, 1950-1993, 1978-1993 and 1947-1993.

Whilst no minimum period of use has ever been specified to show when dedication could have taken place under common law there, has been an example in one case where 18 months was shown to be sufficient. In this current application it is evident that there has been a long period of use.

- 9.7 Of the two paths between points A and H, there are three people who would say they have used the "tow path" section namely A-B-C-H and this includes Mr Osbourne from 1978 until approximately 1990, Mr S. Absalam from 1956 until 1990 (or when the access road was built) and his father Mr W. Absalam from 1927-1932).
- 9.8 With regard to the other route A-D-C-F₂-G-H, Mr Fowler would claim from about 1990-1993 (when interviewed).

- 9.9 Mr Osbourne from 1978-1993 (when interviewed), Mr. Absalom from possibly 1990-1993 (when interviewed) and a Mr. Lloyd who stated he started in 1947 and finished in 1993. Even assuming that their use has continued until the present day that would leave periods 1990-2002, 1978-2002, 1947-2002, effectively only two people could who could show a period in excess of twenty years.
- 9.10 Given the overall poor response to invitations for interviewers and the very low number of people who have come forward to provide evidence, it is dubious whether one can conclude a case has been made out in the first instance. Consequently, it is recommended that no modification order be made, but if members of the public are prepared to come forward and provide detailed evidence of their use in the future the matter could be re-considered at a later date.

Recommendation that no Modification Order be made for the route A-B-C-G-H nor A-D-C-F₁-G-H.

SECTION OF PATH H₁-M₁

- 10.1 This section of the path commences on Ashleigh Terrace in Jersey Marine and proceeds along the path on the northern side of the canal. Only three people have been identified as having walked the path (all of whom have been interviewed).
- 10.2 The path is well worn and from the point at which it commences on Ashleigh Terrace it is clearly defined. At the time of the 1993 survey deposits of mud were placed off and to the side of the path. The path is easily walked throughout the length concerned and can be exited at point M₁, by walking directly to an unadopted track which provides access to a lorry depot at Wernandrew Farm and thereafter to the street (and adopted highway) Pen-Yr-Heol in Skewen. Between points K and M the path is easily followed, and there is no problem in continuing under the railway bridge at point L. A small footbridge carries the path over the canal at point M to continue along a 3 metre wide path. However, where the path passes under the roadbridge at M₁ it is blocked by a metal fence. At point N the canal path is carried over the river by a metal boardwalk. The majority of the path is very well defined throughout its length.
- 10.3 None of the claimants have indicated where they walked from point M₁ because it is blocked by the fence under this bridge, that the canal path after this point (M₁) is in a very poor condition and where the path passes under the next road bridge (at point N) the path is blocked.

EVIDENCE IN FAVOUR OF THE APPLICATION

- 10.4 There are five persons who have claimed to have used this path continuously for the periods quoted. Mr. Lloyd, Mr. King, Mr. Osborne,

Mr. Davies and Mr Fowler (1947-1994, 1947-1993, 1960s-1993 and 1953-1994, 1950-1993 and 1956-?).

- 10.5 It connects to a public highway at one end and ultimately to another via unadopted roads.

EVIDENCE AGAINST THE APPLICATION

- 11.1 The Company have stated that the section of path between points H₁, K and M was dredged so extensively in the months of February and May 1970 that the path was closed.
- 11.2 The section J to K contains Red Jacket Pill which is the point where the canal can overflow at high water. Whilst a metal footbridge has been constructed across the canal the Company have indicated that the path becomes flooded and is impassable.
- 11.3 Dredging works have also resulted in the towpath being diverted at a point just south of the Gas Works.

COMMENT

The precise point at which this occurred has not been identified, nor the dates.

- 11.4 The Company also would wish to point out that there is a pole positioned on the side of the bridge that allows access to the pumphouse (near point K). This contained a notice which stated "Private Property Trespassers Will be Prosecuted".

COMMENT

If this notice was intended to warn people not to cross the bridge then it would not have had any relevance to the status of the path. In fact it would be an admission that at least the public were using the path as it was considered necessary to tell them not to wander off it.

If on the other hand the notice was intended to tell people not to walk the path why was it placed at such a point rather than where the path joins a public highway?

- 11.5 There is a metal barrier across the path at point L. The Company have not stated when this was erected. Mr. Lloyd estimated between 1986 and 1991. Mr. Absalom stated it was erected by the Skewen Angling Club to prevent motorcyclists.

CONCLUSION

- 12.1 The numbers in support of this section of path is low although there have been instances where a public right of way has been recognised by an Inspector with an equally low number.
- 12.2 The suggested notices barring the way is inconclusive. Firstly to what was the notice referring, were the words sufficient in themselves to show a non intention to dedicate. None of the claimants acknowledged seeing such notices and it is evident that the notices were not maintained.
- 12.3 The metal barrier however at point L prevents convenient access. This has the same effect as a locked gate and also has the appearance of something that is intended to prevent access by its location.
- 12.4 It is not known when the barrier was erected, secondly, whether the purpose of its construction was only to prevent motorcyclists. Its existence was not referred to by the Company as evidence in support of their objection. It was not considered as a calling into question by the claimants and whilst it can be negotiated, it is obvious it makes pedestrian access difficult and potentially hazardous.
- Mr. Absalom would say he knew this was only to prevent motorcycles and was not put up by the Company.
- 12.5 If the route has been called into question then its potential dedication can only be inferred counting retrospectively from the first date the barrier was erected.
- 12.6 The route is well defined, contains two small “bridges” (points I1 and J) and has been clearly set out for pedestrian use but even though the Company did not wish the public to use the path they have not succeeded in preventing that use and more importantly may have failed to negate a presumed dedication.
- 12.7 Conversely, only four people have come forward to support the claim and again, this is a very low number upon which to rely to provide evidence at any subsequent public inquiry or hearing that may be held to determine this application.
- 12.8 Given the evidence of use is supported by only a few people there is a metal barrier impeding convenient access, and no evidence has been forwarded to show where people were walking to from point M₁. It is recommended that no Modification Order be made. The matter can however be reviewed if further detailed evidence is forwarded.

Recommended that no Modification Order be made to register a public footpath via the route H₁-M₁.

SECTION M-R

- 13.1 This section has been used by three of the same four people as the previously described section (H₁-M) who have stated they have walked this path for the periods 1947-1994, 1947-1993 and from the 1960s-1993.

THE PATH

- 13.2 The path immediately north north west of point M₁ was in a very poor condition when it was inspected on 6/7/93 and 24/7/01. It was wet and muddy and the access under the road bridge blocked by a metal fence. There is a worn path which if heading approximately north passes up hill via the adjacent bank and back down to return to the path.
- 13.3 At point O the path passes under the A465, it is flooded and blocked by a metal gate. The only means of making any progress is to walk across the four lanes of the dual carriageway and then to walk down a slope through the adjoining field before re-joining the towpath.
- 13.4 The path then passes under another road bridge point P which was flooded with shallow water from the canal. At higher levels it would be impassable. There is another worn path which circumnavigates this bridge, but to rejoin the canal path it is necessary to clamber over a broken fence. The path continues in a boggy, waterlogged state.
- 13.5 The path then passes under another road bridge (at point P₁). It is possible to walk under the bridge via a series of stepping stones which assist passage, given the amount of flood water in evidence at the time of the inspection. There is a worn path that proceeds up the steep embankment and down the other side which avoids having to walk under the bridge.
- 13.6 At point Q there is another wide road bridge under which is a gate which has been locked by welding. It prevents passage along the path.
- 13.7 This section of path terminates at the footbridge close to the ruins of Neath Abbey. The footbridge provides access to Monastery Road (point R).

EVIDENCE IN FAVOUR OF THE APPLICATION

- 14.1 Three people who would say they have enjoyed access via this route from 1970-1990.

EVIDENCE AGAINST THE APPLICATION

- 15.1 At one location the route is barred by a locked metal gate and at another by a welded gate in a permanently closed position. At three other locations the path is difficult to access and evidently prone to flooding because of the existence of the alternative path that has become established that circumnavigates the bridges concerned.

CONCLUSION

15.2 The application is supported by a low number of claimants.

16.1 It is evident that the way is permanently obstructed, and subject to three periodic obstructions. As such no uninterrupted use can be claimed to have been enjoyed by the public.

Recommended that no modification be made for the section of path M-R.

SECTION R-T

16.1 This section of path has been used by two people for the period 1970-1990.

THE PATH

16.2 It can be walked easily, although where it passes under the A465 bridge at point O there are narrower concrete paths which could be prone to flooding.

EVIDENCE AGAINST THE APPLICATION

16.3 The Company have indicated that where the path passes under the A465 (at point S) it is permanently flooded.

COMMENT

This presumably refers to the channel, which is wide enough to allow tractors and other machines to pass through. However there is a concrete walkway which at the time of the two inspections was above the level of the water and gave the obvious impression that it was meant to be used for walking.

16.4 The number in support is again very low, it is difficult to conclude a case has been made out to justify making a Modification Order.

Recommended that no Modification Order be made.

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PART 1 – SECTION A – ITEM 2

ALLEGED PUBLIC FOOTPATH FROM BALACLAVA ROW TO DYFFRYN ROAD AND CARADOG STREET, COMMUNITY OF TAIBACH

SUMMARY

- 1.0 The application was originally supported by seven evidence forms which specified that the route which commences at the end of the underpass at point B and proceeds to the northern end of the what was Balaclava Row (C) is a public footpath.
- 1.1 This “Row” contained approximately 14 houses which it is contended were demolished in approximately 1964 to accommodate the construction of the M4. All the original claimants used to live in houses on this street and still own the plots of land which once contained three houses.
- 1.2 There is a period of use prior to 1964 when the occupiers would have been accessing their properties from Incline Row/Inkerman Row to Balaclava Row.
- 1.3 As a result of interviewing two of the original claimants and an additional seven it transpired that three other routes have been used, which provide links between the former Balaclava Row (C-B) Caradog Street (A) and Dyffryn Road (H).

THE CLAIMED PATH

- 2.0 The path commences where Incline Row ceases to be adopted (B) follows a tarmacked track leading to the former Balaclava Row. The way is “barred” at about B1 by a gate, a cattle grid and a pair of 4” x 2” timbers acting as a further barrier to any livestock that may stray from the hill immediately north of this point.
- 2.1 The path claimed, has changed due to the construction of the M4 so that route A-G-C-B is no longer available and A-G-F-D-C is being used as an “alternative”. The existing registered paths are also marked on this plan.

CONSULTATION

- 2.2 All the usual consultees have been informed of this application including two local Members.

THE APPLICANT

- 2.3 The application was made by a Mrs E. Mainwaring of 16 Knights Road in 1996 with the support of Mrs Newman, Mr P.C. Keen, Mr D.G.

Slitter, Mr E. Evans, Miss K. Hockin and Mrs G. Taylor. Mr E. Evans withdrew his support and Mr Slitter was not known at the address originally supplied. A Mr Taylor was hospitalised and therefore was unavailable for questions.

- 2.4 Further names were forwarded and interviews held with Mrs Mainwaring, her son, Mr & Mrs Newman and their son, a Mr & Mrs Lloyd, and Mr & Mrs Maddox.
- 2.5 The application was made as a result of the erection of a gate across Balaclava Row which according to Mr Newman was placed there in 1998, and according to Mr & Mrs Maddox 1995.

THE LANDOWNERS

- 2.6 The present owner, Mr Zwart purchased the area of land between points B and C in 1996, cleared the site of overgrown vegetation and started placing the various structures referred to thereafter. Mr Zwart said he recognised that certain people own plots of land and offered them keys to a lock he wished to place on the gate. However, those he approached he said refused.
- 2.7 The other owner of the land containing routes B-C, E-F-H and F-G is Mr David of Brombil Farm, whose family have farmed the area since his grandfather purchased the land from the Margam Estate in the 1960's. He has personal knowledge of the land since that time and has objected to this claim.

The Relevant Legislation to Consider

3.0 WILDLIFE AND COUNTRYSIDE ACT 1981

53. *Duty to keep definitive map and statement under continuous review*

(2) *As regards every definitive map and statement, the surveying authority shall keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.*

(3) *The events referred to in sub-section (2) are as follows:-*

(c) *the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows:-*

- (i) *that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies*

3.1 HIGHWAYS ACT 1980

31. Dedication of way as a highway presumed after public use for 20 years

Where a public way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as a right and without interruption of a full period of 20 years , the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during this period to dedicate it.

ALLEGED PUBLIC FOOTPATH A-G-C-B PRE 1964

- 4.0 Between points G and C the path passes through a considerable amount of vegetation and can not be accessed north of point C without climbing over a pig wire fence. At C₁ there is a wooden fence which prevents any pedestrian access to the M4. Between points A and G there is no worn or defined route, as the ground comprises an earth bank under the M4 sloping steeply upwards from point A to point G.

EVIDENCE IN SUPPORT OF REGISTRATION OF THE ROUTE A-G-C-B PRIOR TO 1964

- 4.1 Of the seven original plans attached to the evidence forms, only one showed a route approximately via this way and that was by a Mrs Mainwaring who was interviewed.
- 4.2 There are three people who have been interviewed and have stated they have used this path prior to 1964. are 1914, 1942 and 1957. Consequently, there are only two witnesses who can be relied upon to give evidence of a minimum of 20 years prior to 1964.
- 4.3 According to Mr Mainwaring and Mr & Mrs Newman this route has been overgrown for a considerable period. None of the claimants could say exactly when the route was last available.
- 4.4 Two residents of the former Balaclava Row a Mr Mainwaring and Mr Hockin, both recall the Council maintaining this "Row". Mr Hockin recalls one specific occasion when the road was dug and replaced with tarmac. Both said the road was re-surfaced a number of times.

COMMENT

- (a) *Neither were able to provide dates but the work would have been prior to 1960 as the houses were demolished at that time in order for the construction of the M4 to proceed.*
- (b) *The Highways Act 1980 gives this Council the power to undertake repairs on a "street" known as urgent repairs to private streets without admitting liability for its maintenance. A private street can either mean a street that is a highway but not maintainable at the public expense or not even a highway. Balaclava Row is not on the list of maintainable streets.*
- (c) *However, the Highways Act 1980 was not in force when these works were undertaken although the making up of private streets contained in this Act had its origin in the repealed Private Street Works Act 1892.*
- (d) *Consequently, such work did not mean the Council admitted Balaclava Row was maintainable at the public expense and furthermore the revised definition of a street (as contained in the new roads and Street Works Act 1991) does not necessarily mean it is a highway as already mentioned above.*
- (e) *In respect of the claim for the recognition of a public footpath, the question of the status of Balaclava Row only deals with the section B-C and not with the remainder of the cleared path A-G-B.*

The same two residents also indicated there were three street gas lights on Balaclava Row.

COMMENT

The Local Government Act 1966 was the first Act to make Councils responsible for maintaining lighting on highways. Prior to the passing of this Act, other local authorities known as Lighting Authorities, had been given the power under various statutes to light highways along with other public areas. The Parish Councils Act 1957 for example permitted Parish Councils to erect street lights but only with the consent of the landowner. Therefore this would not mean the land would have had to have been a highway.

- 4.6 Neither the evidence of previous maintenance work on the street nor the presence of lighting in itself, establishes Balaclava Row was considered to be a highway.

Secondly as it is not on the Council's adoption records, one can only conclude that it was never recognised as a maintainable highway.

CONCLUSION

- 4.7 (a) There is insufficient evidence to show the existence of a public footpath along the route A-G-C-B because all of the three persons concerned lived in Balaclava Row at that time and would represent a very limited specific user group.
- (b) No specific route can be identified due to the overgrown vegetation.
- (c) The history of the maintenance of this former "street" does not assist in determining the claim.

RECOMMENDED:- that no modification order be made for the route A-G-C-B.

ALLEGED PUBLIC FOOTPATH C-B PRIOR TO 1964

- 5.0 The case for recognising a public path via the route C-B only and prior to 1964 was supported by the seven persons who completed their evidence forms. However, only Mrs Mainwaring was available for an interview.
- 5.1 Secondly all those who completed evidence forms lived in the properties on Balaclava Row. It is evident that their use of the path C-B was simply to obtain access to and from their houses via the shortest most convenient route and for this reason, it must be concluded that this access would not represent use by the public at large.

RECOMMENDED:- that no Modification Order be made for the route C-B.

THE PATHS TODAY (A-G-F, H-F-E AND D-C-B)

- 6.0 Between points C and D there is no worn path, but the land comprises low grass, passing upslope from C-D.
- 6.1 At point E, the claimed path passed through dense fern and was difficult to follow until the landowner cleared the area in February 2002 (F-F₁). This section passes over a grassy embankment and alongside a former boundary wall of what was a row of houses. The path is particularly steep between points F₁ and H and at point H there is a wooden stile.
- 6.2 The other section of path that is said to have been used for a long period is between points F-G-A (which slopes downhill from F to A). There is no worn route between F and G, it being very overgrown with fern, some gorse, bramble and occasional shrubs. There has been some difficulty in claimants being able to identify the route because the only way to make any progress on foot is to cut the vegetation back as one tries to walk through.

- 6.3 At point G there is an old fence which leads to the steep earth bank under the motorway before reaching Caradog Street.
- 6.4 Another old fence line can be found from C₁-C-D₁ which comprises timber posts and pig wire.

HISTORIC AND DOCUMENTARY EVIDENCE

- 7.1 There are six earlier editions of the Ordnance Survey, the 1874, 1897, 1912, 1917, 1939 all of which are at the scale of 25" to one mile. The 1953 edition is at the 1:2500 scale.
- 7.2 Balaclava Row is first named on the plan of 1912, but no path is shown leading from the northern end of that street to Dyffryn Road or Caradog Street. The higher path, registered as no. 40 and locally referred to as the dramway is shown on the three earliest editions, named Constant Row, containing in excess of 25 houses. The historic connection by path to Dyffryn Road is via this Constant Row (i.e. D-E-F-H) and clearly marked, F.P.
- 7.3 (a) By 1917, there is a path marked F.P. and shown leading from the northern end of Balaclava Row to Caradog Street. (About half the distance of C-G).
- (b) The path E-F-G-A, is clearly shown and marked F.P. The plan also indicates that there was a short series of steps at what is now point G. (A number of claimants referred to the former existence of steps).
- (c) The path E-F-H is again shown and marked as F.P.
- 7.4 (a) The 1939 Edition shows for the first time a direct connection from the northern end of Balaclava Row to Caradog Street via the steps referred to above (C-G) and marked F.P.
- (b) The route E-F-H is shown marked FP.
- (c) The route F-G-A is shown as a path although it is not marked as F.P.
- 7.5 (a) The 1953 Edition shows the path from Balaclava Row to point G, although not depicted as a straight line, but curving, presumably around topographic features and denoted by the letters F.P.
- (b) The route F-G-H is also shown and marked F.P.
- (c) The path from F-H is also shown and between E and F is marked F.P.

- 7.6 There is little doubt that the two paths to Caradog Street and Dyffryn Road have existed from early in the 1900's. Whilst their depiction on the Ordnance Survey Plans, does not give conclusive effect to their legal status, the plans support the claimants opinion that such access has been available for at least the period they have stated they have used these two paths.

COMMENT

The only exception is the route D-C which does not appear on any of the Ordnance Survey Plans. However, the probable reason is that all the Ordnance Survey Plans pre-date the construction of the motorway and therefore at that time there was no need to use D-C as an alternative. Even today there is no worn route on the ground.

GENERAL USER EVIDENCE IN SUPPORT OF THE CLAIM FOR THE PATHS A-G-F, H-F-E AND D-C-B SINCE 1964

- 8.0 There are a total of fourteen people who have obtained access to Balaclava Row from Incline Row (B-C). Ten of these claimants still own plots of land at Balaclava Row which includes Mrs Taylor, Miss Hockin, Mr Evans, Mr Slitter, Mrs Keen, Mr & Mrs Newman, Mrs Mainwaring and Mr & Mrs Lloyd. Access to and from Balaclava Row via this route, could be interpreted as simply an access for those who own land. Their use representing whatever private means of access they may have prior to the demolition of those properties in 1964. Similarly the use by the sons of Mrs Mainwaring and Mrs Newman could equally be considered in the same way.
- 8.1 Use of the route H-F-E and thereafter C-D is by five people (Mr & Mrs Newman, and their son, Mr & Mrs Lloyd, Mrs Mainwaring, a Mr Mainwaring (hearsay).
- 8.2 All the above also used the section D-C-B as had Mr Hockin.
- 8.3 The section A-G-F has been used by three persons namely Mr Mainwaring, Mr Newman and Mr Lloyd.
- 8.4 For Section 31 (Highways Act 1980) to operate and give rise to a presumption of dedication the following criteria must be satisfied:-
- (a) The physical nature of the path must be such as is capable of being a public right of way.
 - (b) The use must be "brought into question", that is challenged or disputed in some way.
 - (c) Use must have taken place without interruption over the period of 20 years before the date on which the right is brought into question.

- (d) Use must be as of right, that is without force, stealth or permission.
 - (e) There must be insufficient evidence that the landowner did not intend to dedicate a right of way of the type being claimed.
 - (f) Use must be by the public at large.
- 8.5 With regard to point (a) the routes H-F was until February 2002 impassable, A-F is impassable and D-C-B is obstructed by a pig wire fence at point C. The claimants would say the overgrown nature of the path was a result of the restriction to access as a result of the Foot and Mouth disease, which came into being early in 2001.
- 8.6 With regard to (b), the route C-D-B was according to Mr & Mrs Maddox blocked by a gate across the path at point B1 in about 1995, although Mrs Newman quoted 1998.
- 8.7 It is debatable whether there has been a calling into question of the path H-E. as the existence of a wooden barrier/stile at point H may constitute such a challenge.
- 8.8 Route F-G-A is barred by an old fence at G, but contained a stile according to Mr Mainwaring and Mr Newman although the date of its removal is unknown. A timber fence sited was under the M4 between points A and G until about 1981.
- 8.9 Points (c), (d), (e) and (f) these are considered later below.

**SPECIFIC EVIDENCE REGARDING THE ALLEGED PUBLIC FOOTPATH
H-F-E SINCE 1964**

- 9.0 A Mr Mainwaring, Mr & Mrs Lloyd, Mrs Newman and her son attended site meetings on the 5th July 2001 and 7th August 2001 to confirm the routes they had used.

The average length of use is 24 years for this section of the path. An additional two people were also interviewed (Mr & Mrs Maddox) who were unable to attend, but do not own plots of land on Balaclava Row and have made use of the path for an average of 30 years.

- 9.1 At point H there is a wooden stile which according to two claimants was erected as a safety measure. The slope is very steep immediately east of point H and children are able to use its gradient to slide over the grass on cardboard sheets, much like a toboggan in snow. Given point H is alongside the road which does not contain a pavement, the claimants assumed the landowner erected the stile to prevent the possibility of children slipping in to the road.

COMMENT

According to Mr David, the landowner, a stile has been in place at this point since about the mid 1980's. He was experiencing vandalism, and because his fence was being cut, his livestock were escaping onto the road. He decided it was better to place a wooden type of barrier which could act as a stile. However the structure deteriorated and he would eventually replace it with another, although not always immediately. Sometimes he said he would place extra strands of wire across to keep the land stock proof. The present stile has only been in existence about 3-4 years.

- 9.2 According to Mr David there has been a fence across this route until the mid 1980's, and thereafter a stile which has not been maintained.

COMMENT

- (a) *The question therefore, is whether the public can show any uninterrupted twenty year period of use given climbing over a fence would not constitute uninterrupted access. The periodic cutting of the fence and its replacement could be interpreted as the public trying to exercise a right which was being denied to them by the landowner until the stile was constructed in the mid 1980's. If that is the only possible period of uninterrupted use, it would commence from the mid 1980's, which is clearly less than the statutory period of twenty years.*
- (b) *Therefore the only means of determining whether or not a public footpath exists is to decide whether or not there has been a presumption of dedication under common law.*
- (c) *Under common law there is no minimum prescribed period, but the onus is on the claimants to show that the landowner acquiesced in that use.*
- (d) *The only evidence to this effect is the stile that according to one person was specifically erected to ensure that children did not come to any danger. However, the landowner has stated this was not the reason for its construction.*

- (e) *One may infer that had the landowner not wished to dedicate the route as a public one, he or she could have left a fence across at the position of the stile. If he wished to retain access for himself then he could have placed a small gate instead and kept that gate locked. However, an examination of this site, shows that because of the gradient of the slope, a gate would be difficult to place at this location. There is of course no reason why a landowner should not prefer to have a stile for his or her own use but then that landowner will run the risk of a presumption being made that access is also being made available to the public. Nevertheless under common law a mere presumption of the landowner's intention is insufficient. The question therefore is whether the erection of a stile was a clear indication of an acquiescence by the landowner to the public's use of the route as a public right of way. Given the stile was not maintained regularly it would suggest otherwise.*
- 9.3 The landowner would also suggest that the route as claimed from F₁-F-E could not have been available for at least the last ten years because it has been overgrown, for such a period. He would suggest the size and maturity of some of the shrubs, gorse and trees would suggest this is the case.
- 9.4 Secondly, the landowner would also suggest that because of this fact, people have wandered up slope from point F1 and therefore have not been able to use any one particular route for any given twenty year period.

COMMENT

Site inspections confirm that the line of the alleged public footpath H-F-E was difficult to identify and it was overgrown until February 2002.

CONCLUSION

- 9.5 Use of any one particular route must have been as of right and without interruption for a minimum period of twenty years, to satisfy the presumption of dedication specified by Section 31 of the H.A. 1980. The only conceivable period that could satisfy this requirement and via the route claimed would be from the first time a stile was erected (mid 1980's, perhaps 1985) until the public were unable to continue to use the route as claimed until about 1991 (according to the landowner) or until approximately 1999 (according to the claimants). Thus the relevant period irrespective of which date is taken to represent the end of the period is less than the required twenty years.
- 9.6 If there is to be an inference of dedication under common law, there needs to be some evidence by the public that the owner was acquiescing to that use. Whilst the erection of the stile suggests this is the case the landowner would say he did not maintain the stile regularly because he used wire where necessary to keep any broken gaps stockproof. Furthermore his reaction to the use of the path he would argue was at the most a begrudging tolerance.
- 9.7 In this respect the Courts have in some instances refused to imply dedication where they find the use has been a result of the tolerance of landowners. As early as 1788 for example, Heath, J. in *Steel -v- Houghton* stated "it is the wise policy of law, not to construe acts of charity, though continued and repeated for so many years, in such a manner as to make them the foundation of legal obligation".
- 9.8 The question is therefore whether it is reasonable to allege a public right of way exists is (explained more fully in paragraph 6.0), given it cannot be concluded on the balance of probability, a public right of way subsists due to the conflict of evidence and no statutory twenty year period can be found.
- 9.9 It is agreed between the landowner and the claimants a stile has been in existence since the 1980's, estimates between the claimants vary to precisely when the stile first appeared.
- 9.10 Under common law a period of less than twenty years use can be sufficient to show dedication of a public right of way, but should one conclude the landowner accepted and acquiesced in the public's right of use to this way. His action was to prevent livestock straying and he also said he did not maintain the stile.
- 9.11 If he had considered a public right to exist would he not have constructed a stile when he first took over the land once he realised the fence was being cut frequently.

- 9.12 There is also the issue of whether one route was in use because of the difficult steep nature of the terrain and the gorse and bramble bushes impeding access.

RECOMMENDED:- No Modification Order be made for the route H-E.

**SPECIFIC EVIDENCE CONCERNING THE ALLEGED PUBLIC FOOTPATH
VIA D-C-B- SINCE 1964**

- 10.0 A Mr Mainwaring, Mr & Mrs Lloyd, Mrs Newman and her son attended site meetings on the 5th July 2001 and 7th August 2001 to confirm the routes they had used.
- 10.1 The average length of use is 24 years for this section of the path. An additional two people were also interviewed (Mr & Mrs Maddox) who were unable to attend, but who do not own plots of land on Balaclava Row and have made use of the path for an average of 30 years. There are also the same numbers of people who attended the site meetings, who would say they have enjoyed an average period of 20 years use of this section of the path.

COMMENT

The inference is that this length of path was called into question in either 1995 or 1996 given the application was submitted on the 5th July 1996. This was due to the erection of a wooden barrier at point B₁ by Mr Zwart.

- 10.2 According to the evidence of Mr David John, point C marks the boundary to his land and a fence was erected along this boundary during the 1980s. Therefore it is his contention access could not have been as of right since this time because the public would have needed to climb over this fence. Secondly he would say because there is no defined path between points C and D, the claimants can not show one route. Mr David suggests because of this and that it is open ground, it is inevitable the public would have wandered over an area between point C and a point somewhere at or near to point D.
- 10.3 Whilst two of the claimants do not own any plots on Balaclava Row, of those who were interviewed, seven do.
- 10.4 A Mr Lloyd said he took groups of scouts this way and a Mr Newman stated he knew of other people who have used this path, but many have moved out of the area. However, no names and addresses were forwarded.
- 10.5 The landowner Mr Zwart of the initial section of the path at point B was interviewed on the 3rd May 2000 who stated he bought the land concerned in 1995 although he has lived in the area for a considerable period.

- 10.6 When he purchased the land he said he had to hire machinery to clear the bramble and knotweed, which had made the route virtually impassable in 1995. He indicated it may have been possible to walk through but not via a defined and single route.
- 10.7 He acknowledges certain individuals have a private right of way to Balaclava Row, but questions whether a public right of way exists via this route.

CONCLUSION

- 11.1 On the information obtained one may conclude the claimed period is 1965-1985 because the owner of the land at point C (Mr David) first challenged the existence of the possible public right of way by erecting the fence. However the first challenge acknowledged by the claimants was when their access via B-C was denied in 1995. It is alleged by the claimants the gate was initially locked, although this is denied by Mr Zwart.
- 11.2 Of the nine who were interviewed seven have a specific interest in the plots of land at "Balaclava Row", the two who do not, being Mr & Mrs Maddox.
- 11.3 Mr Lloyd said he used the paths regularly while leading scouts via the path. He was of the view that it was accepted to be a public footpath. Mr Newman stated he knows of others who have not lived in Balaclava Row and who have used the path. However, it was only when access to the former Balaclava Row was blocked at point B, that the application was made even though access was challenged at point C in about 1985.
- 11.4 The route concerned has according to the claimants, been available for the relevant period, their use of it has been "without force or stealth" but whether their association with the land suggests that the majority of claimants were enjoying a private right is possible.
- 11.5 The provisions of Section 53 of the Wildlife and Countryside Act 1981 require that the Council be satisfied either a public right of way subsists to make an Order or that it is reasonable to allege one exists. In this example there is some doubt as to whether a public path subsists.

COMMENT

- 11.6 This distinction was highlighted in Regina v Secretary of State for Wales ex parte Emery (1996). The claimants have to show that it is reasonable to allege one does. It clearly spelt out that in the two tests for inclusion (subsists or reasonably alleged to subsist) were different. It ensured that Councils did not set themselves the exacting task in concluding that an order could properly be made. Second and even more important in relation to cases based on user evidence, there was

a recognition that in the event of a conflict of evidence as between owner and public which might reasonably, following cross examination at public inquiry, be resolved in favour of the public, the Council would be acting correctly in regarding the public's allegation of a public right of way as reasonable and hence make the order.

As a result of the above if there is no irrefutable evidence forwarded to show a public right of way does not exist then this Council is obliged to make the Order.

11.7 Any order made would primarily be based the following:-

- (a) That Mr & Mrs Maddox have no interest in land at Balaclava Row.
- (b) Use by Scouts under the direction of Mr Lloyd, was not on account of his wife having a legal interest in the land.
- (c) That there are other persons, who according to Mr Newman, were making use of the paths but who did not own or have any legal interest in the land.
- (d) That whilst undefined, a single route has been used between points C and D.

11.8 The question therefore, is whether it can be said to be reasonable to allege such a public right exists.

- (i) At present there are only three people who can provide the requisite evidence prior to 1985. It should be borne in mind that this path does not serve an isolated settlement in a sparsely populated area, but a residential area on the edge of Port Talbot.
- (ii) There is no defined path between C and D.
- (iii) No claim was made when the fence was first erected at point C in 1985 (or thereabouts), which one would have expected if the claimants alleged it is a public right of way.
- (iv) Therefore one would be entitled to conclude the user evidence is insufficient as a matter of fact and degree to demonstrate that it is reasonable to allege a public footpath exists.

RECOMMENDED:- that no Modification Order be made.

**SPECIFIC EVIDENCE REGARDING THE ALLEGED PUBLIC FOOTPATH
VIA ROUTE A-G-F POST 1964**

- 12.0 Of those that attended the site meeting, and who assisted in attempting to identify the former route, only Mr Lloyd, Mr Mainwaring and Mr Newman stated they have used this path.
- 12.1 Their individual periods of use are 1977-1995, 1964-1995 and 1973-1995.
- 12.2 Mr Newman stated a high timber type fence was positioned across the "route" underneath the motorway at the end of Caradog street, which he believes had been there for some time, but not removed until 1981.
- 12.3 Two fences exist across the route one at point G running approximately parallel to the motorway and a second downslope. At this second fence, Mr Newman located the point at which he believes a stile was located.
- 12.4 The owner of the land containing the route G-F has objected. The basis of the objection is that the area has been overgrown for many years and he cannot accept that the public could have used a path route via the one currently claimed.

Secondly, that there has been a fence across the route at point G and he does not recall the stile referred to.

CONCLUSION

- 12.5 There is some doubt as to the precise alignment of this route by field evidence, although the Ordnance Survey Plans show a route.
- 12.6 There are only three people who are able to support the contention that such a public right exists.
- 12.7 There is the suggestion that the way was barred by a wooden fence for some time, notwithstanding the existence of two other fences which it is alleged, contained stiles. However, there are none there at the present and there is no information as to when they were removed.
- 12.8 It is also clear that there is no information as to when the "way" was brought into question by the erection of the wooden fence and even if access was available after 1981. There is also the unresolved question as to when the stiles in the other two fences were replaced by fences. As such it is difficult to calculate the relevant 20 year period.
- 12.9 The question therefore is whether it is reasonable to allege a public right of way exists.
- 12.10 Given the relevant period can not be calculated from the information provided, that there is some doubt as to what route was available and there are only three persons who can support the claim it must be concluded that the allegation has not been made.

RECOMMENDED:- that no modification order be made.

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