

**ENVIRONMENT AND HIGHWAYS
CABINET BOARD
29TH JANUARY 2015**

REPORT OF HEAD OF LEGAL SERVICES – D. MICHAEL

SECTION A – MATTER FOR DECISION

WARD AFFECTED: MARGAM

**APPLICATION TO UPGRADE FOOTPATH NO. 73 (MARGAM) TO A
BYWAY OPEN TO ALL TRAFFIC AND FOOTPATH NO. 25
(LLANGYNYDD MIDDLE)**

Purpose of Report

To consider an application to upgrade footpath no. 73 in the Community of Margam to a byway open to all traffic and footpath no. 25 in the Community of Llangynydd Middle

Background

1.1 The two contiguous routes are shown on the attached Plan.

Footpath No. 25 commences on the County Highway (point A) within the County Borough of Bridgend and proceeds via a stile at a field boundary before passing over a fence which also marks the boundary between Bridgend and Neath Port Talbot Borough (point B). However there is no stile or any means of passing through the fence at this location. Public footpath No. 73 is recorded as commencing at point B although it cannot be walked from this point west north westwards, as it is obstructed by the Forestry Commission plantation. Even though the trees had been felled at the time of the site inspection in October 2010, the remains of branches and stumps show that even before their removal, it would not have been possible to walk the section of path between points B and C. The public footpath is also obstructed by another fence at point C, before it passes over moorland. Nonetheless it is still not defined on the ground until “the path” merges with a vehicular width track at point D. The path continues as Footpath No. 73 until it joins Footpath No. 36 and 58 in the Community of Margam at point G.

- 1.2. The obligation to consider the application and the tests to be applied are contained within Section 53(2) and 53(3)(c) of the Wildlife and Countryside Act 1981 (Appendix 1).
- 1.3 This Council had offered to determine the claim to include Footpath No. 25 but no delegated authority has been granted to this Council by Bridgend County Borough Council.

1.4. **User Evidence**

The only evidence submitted is from the applicant who states that he has made use of the route which runs parallel to Footpath Nos. 73 and 25 via B-E-F for four years, commencing in 1990. However this has been identified as the Ogwr Ridgeway Walk on the National Gazetteer. Moreover the applicant has stated he has been able to ride as far as the stile at point E from either direction and so has not been able to ride the entire length of this other route without interruption. Therefore there is no evidence that this alternative path nor footpath No. 73 has been ridden on horseback.

Consequently it is evident that there can be no presumption of dedication from long term use either to satisfy section 31 of the Highways Act 1980 or from a lesser period of use under common law.

- 1.5. As the application is solely based on documentary evidence it is necessary to determine whether at the relevant date of the Definitive Map and Statement, being 1954, there was a public byway open to all traffic via these two registered public footpaths. Appendix 2 sets out the basis for making such an order under these conditions.
- 1.6. In addition the Natural Environmental Rural and Communities Act 2006, provided all routes that were in use by vehicles but have not been recorded on the list of adopted streets as a maintainable highway, nor shown in the Definitive Map and Statement, are automatically extinguished by the commencement date, being the 16th November 2006 in Wales.

There are five exceptions to this provision, contained in Appendix 3, but none of these apply to this claim.

- 1.7. This Council is however obliged to consider any other evidence that may establish the route has a higher status than its current designation, but less than that alleged. Consequently the question to consider is whether the route should be recorded as a public bridleway or restricted byway, the latter being a way for use by non mechanically propelled vehicles.

DOCUMENTARY EVIDENCE

- 2.1 The applicant has provided an extract from the Yates Map of 1799 at a scale of 1" to 1 mile (that is 1: 63,360) which purports to identify this route and who therefore takes the view this would have been regarded as a public road. Due to the scale and accuracy of this plan it is not certain it is aligned precisely along the same route as the present registered path. There is a significant difference between a map at a scale of 1:63,360 compared to the 1:2500 scale used for surveying and producing modification orders which all use ordnance survey plans. Nevertheless, assuming that it is one and the same route, the publication "Rights of Way, a Guide to Law and Practice" comments on these earlier privately commissioned maps. In particular the author quotes from case law (Merstham Manor Ltd. -v- Coulson and Purley Urban District Council 1936) whose view is that these earlier maps do not show whether the cartographer was intending to represent the roads on his maps as public highways. In the case quoted, the Judge concluded by saying that he does not find they give him any assistance. All that can be said, is the depiction of a road on such a map, is a belief by the cartographer that a road existed and therefore is of itself in law, no evidence that a public highway existed at that time.

The Yates Map in question depicts a road crossing another road also being claimed as a byway in the report, and entitled "Application to Upgrade Footpath Nos. 36, 53, 76 and 97 in the Community of Margam to a Byway Open to All Traffic". At the junction of these two roads the map is annotated with the words "Crofs o th Hand", which the applicant states is a reference to "Cross Road" and should be interpreted as meaning "public road".

The applicant makes reference to the Planning Inspectorate Guidelines and identified their reference to Hollins -v- Oldham in 1995, where the Judge had interpreted a cross road as a public road. The guidelines go on to consider that judgement, and conclude that all the documents have to be examined and assessed to see how reliable each would be in coming to a conclusion. The Inspectorate advise that the recording of a cross road

may not be proof of a public highway or that it enjoyed a particular status at that time.

2.2 **Tithe Plan and Apportionment**

These documents did not form part of the applicant's case but were considered as a matter of course. The Tithe Plan for this area was produced in 1842 and the explanation of its significance is contained in Appendix 4 . This shows a path or track on the north eastern side of the County Boundary running approximately parallel to but not coinciding with Footpath No. 73.

2.3 It is not possible to draw any conclusions from this document, firstly because it does not coincide with the footpath. Secondly, whilst the document can sometimes assist in inferring highway status especially when taken together with other documents, in itself the Tithe Survey was not undertaken primarily to record nor classify highways. A limited number of first class Tithe plans identify what were considered to be public highways by colouring those routes in blue, but no first class maps were produced for this area.

2.4 **The Ordnance Survey Plans - 1st Edition 1876 and 3rd Edition 1918**

Both these earlier editions show this path and on the 1918 Edition, it is marked FP. It is worth recalling the Planning Inspectorate's Consistency Guidelines which suggest the notation FP, for example, was to inform the public that it would not mistake them for roads which would be used for horses or wheeled traffic. So their view would be, that in this example since at least 1914, the Ordnance Survey were in fact providing evidence that the way was not suitable for vehicles, or indeed horses. In addition, it is also established that the Ordnance Survey were not tasked with identifying public highways and so any routes shown would not necessarily be used by the general public. Consequently it is not possible to assume routes shown on the Ordnance Survey Maps provide clear evidence of the status of the way.

2.5 **The Royal Commission on Ancient and Historical Monuments in Wales and Medieval Non-Defensive Secular Monuments**

The applicant has stated this section of path is known to be Roman and continues as Heol-y-Moch ("the Pigs Way") in a north westerly direction. The relevant extract from the volume on Ancient Monuments only refers to the route where it commences at point X, proceeding north to point Y

toward the Roman Encampments. There is no plan attached to the text to indicate the precise alignment other than a series of grid references. Consequently it is difficult to interpret Footpath No. 73 as being part of Heol-y-Moch. However even if it were, it says nothing about the claimed higher status of this footpath as this publication in itself was not intended to identify public highways.

The applicant wishes to make the point that if it is agreed the route called Heol-y-Moch was intended to have been represented by Footpath No. 73, then because the route is named, that is evidence it is a highway. In addition, it should be considered a public road and therefore is a public carriageway.

This view is based on the Planning Inspectorate's Guidelines that "one of the requirements of Section 69 of the Highways Act 1773 was that all common highways had to be named before indictment for obstruction or disrepair could take place. This requirement continued in the Highways Act 1835. As private roads were not liable in this way, they did not need to be named. It therefore follows that a named way is probably a public highway".

However, the advice continues, "Inspectors may have some difficulty with this argument. Although the statutory element is probably correct (supporting evidence would be needed), it is a matter of fact that nowadays many public highways are not named and some private roads are. Furthermore, road names, like place names, can be corrupted over time or even disappear completely and new names appear through local usage".

The Inspectorate concludes, "the argument that a named highway is probably a public highway or at least that its naming carries some inference of public status should be thoroughly tested. Of themselves they are not persuasive evidence".

Conclusion

- 2.6 The Tithe Map of 1842 does not establish that Public Footpath No. 73 was a highway at this time. The Ordnance Survey Plans identify these two paths as tracks, although the 1918 Edition suggests it was only suitable as a footpath.

2.7 The reference to Heol-y-Moch in the Royal Commission's volume on Ancient Monuments does not identify Footpath No. 73 and therefore does not assist.

2.8 There is no user evidence to show Footpath No. 73 was incorrectly described as a public footpath.

Appendices

Plan and Appendices 1-4

Recommendation

That no Modification Order be made.

Reason for Proposed Decision

There is insufficient evidence to support the claim to upgrade Footpath No. 73 to any higher status than that currently ascribed to it.

List of Background Papers

None

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COMPLIANCE STATEMENT

APPLICATION TO UPGRADE FOOTPATH NO. 73 (MARGAM) TO A BYWAY OPEN TO ALL TRAFFIC AND FOOTPATH NO. 25 (LLANGYNYDD MIDDLE)

(a) Implementation of Decision

The decision is proposed for implementation after the three day call-in period.

(b) Sustainability Appraisal

Community Plan Impacts

| | | |
|-------------------------------|----|-----------|
| Economic Prosperity | .. | No Impact |
| Education & Lifelong Learning | .. | No Impact |
| Better Health & Wellbeing | .. | No Impact |
| Environment & Transport | .. | No Impact |
| Crime & Disorder | .. | No Impact |

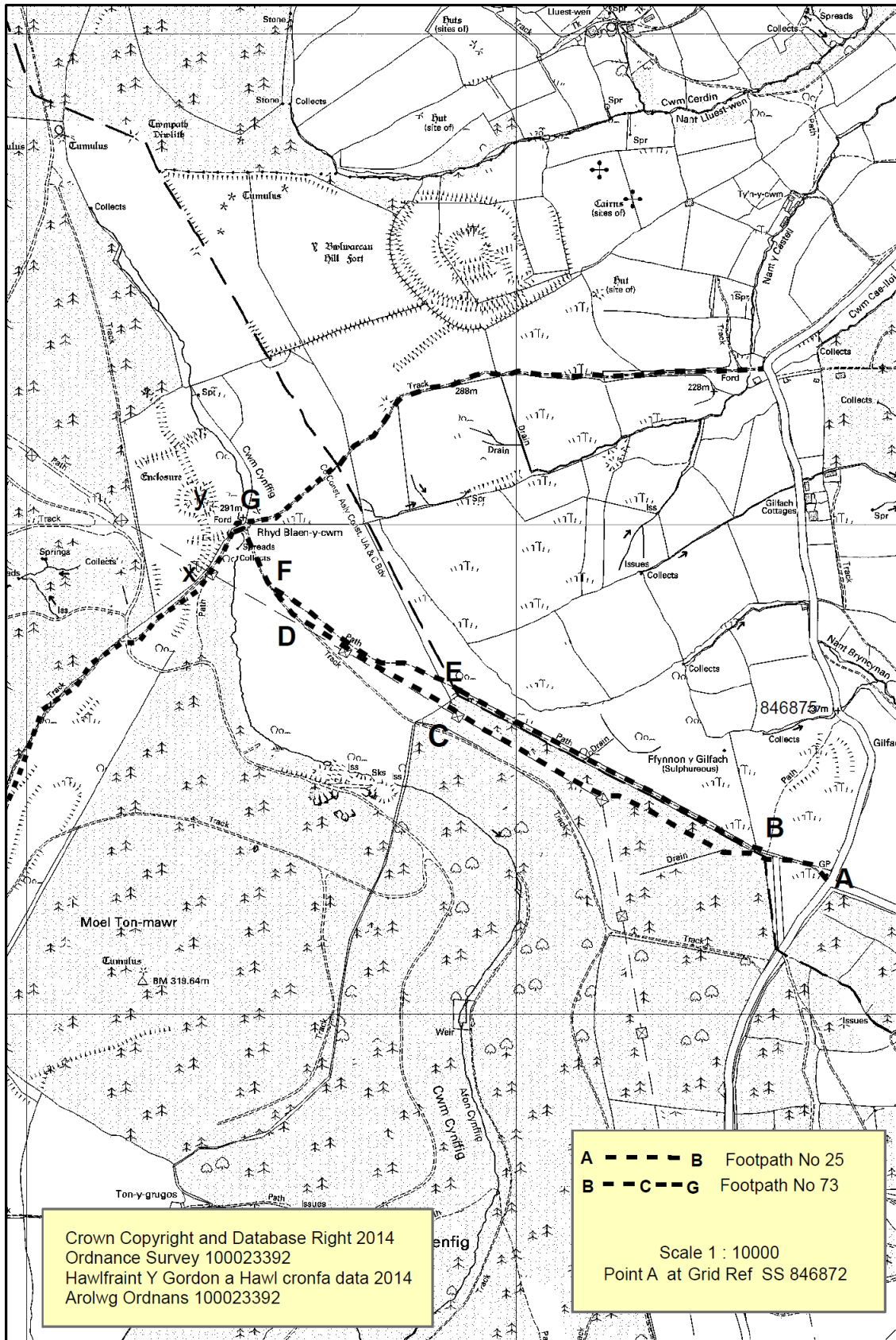
Other Impacts

| | | |
|-------------------------|----|-----------|
| Welsh Language | .. | No Impact |
| Sustainable Development | .. | No Impact |
| Equalities | .. | No Impact |
| Social Inclusion | .. | No Impact |

(c) Consultation

This item has been subject to external consultation

Plan referred to in paragraph 1.1.



APPENDIX 1

WILDLIFE AND COUNTRYSIDE ACT, 1981

Section 53 Duty to keep the Definitive Map and Statement under continuous review.

- (2) As regards every Definitive Map and Statement, the Surveying Authority shall:
 - (a) as soon as reasonably practical after commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in Sub-Section 3; and
 - (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of those events, 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:
 - (b) the expiration, in relation to anyway in the area to which the map relates of any period such that the enjoyment by the public of the way during that period rises a presumption that the way has been dedicated as a public path or restricted byway;
 - (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 such that the land over which the right subsists is a public path, a restricted byway or, subject to Section 54A a byway open to all traffic;
 - (ii) 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;

- (iii) that there is no public right of way over land shown in the map and statement as a highway of any description or any other particulars contained in the map and statement require modification.

THE BASIS UPON WHICH A MODIFICATION ORDER MAY BE MADE TO MODIFY OR DELETE A PUBLIC RIGHT OF WAY

1. This Council must be satisfied that the existing entry in the Definitive Map and Statement is incorrect. This means that the evidence should show a mistake was made at the relevant date of the First Definitive Map, which in this case is 14th September 1954.
2. The provisions of Section 32(4)(b) to the National Parks and Access to the Countryside Act 1949 required the Authority to produce a Definitive Map and Statement. Section 56(1)(b) and (d) of the Wildlife and Countryside Act 1981 provides that, “the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein to the following extent, where the map shows a footpath the map should be conclusive evidence that there was at the relevant date a highway as shown on the map...”. So if a challenge is being made to an entry to the Map and Statement the evidence must show a mistake was made at the earliest relevant date which is the first date the path was recognised as having legal status.
3. The question therefore is what is considered sufficient evidence to show that such a mistake had been made. The 1981 Act permits a correction to be made when evidence is discovered and considered with all other relevant evidence and so a decision has to be made on the balance of probabilities that an error had been made.
4. The real difficulty lies when the evidence upon which the entries were made into the Definitive Map have been lost or that record is incomplete. This is a common predicament that this and other Authorities face, as once the procedure for finally showing a public right of way has been completed the conclusivity of the Map and Statement would have led many Authorities to be less concerned on retaining the reasons for its final inclusion. Nonetheless as a result of previous case concerning R -v- S for Environment ex parte Simms and Burrows (1990), such deletions, or downgrading and other amendments are deemed possible.
5. The issue therefore is what weight is to be given to the entry into the original map especially when the evidence which led to its inclusion is absent. It was a document prepared pursuant to an Act of Parliament and which was to be an authoritative record, it required various stages leading up to its preparation to be satisfied and gave landowners several

opportunities to challenge any proposed entry. It should also be borne in mind that the map was prepared at a time when one could find local people whose memories went back very much further than today's residents.

6. This issue was addressed at the Court of Appeal concerning the case of *Trevelyan -v- Secretary of State for the Environment* (2000). It concluded there must be an initial presumption in favour of the existence of that public right of way and unless there is evidence to the contrary, it should be assumed the proper procedures were followed and that evidence did exist which made it seriously arguable that the right subsisted at the relevant date, even if no trace of that evidence survives.
7. Welsh Office Circular 45/90 on 'Modifications to the Definitive Map', advises that: 'in making an application for an order to delete...a right of way, it will be for those who contend that there is no right of way..., to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded. ...it is not for the authority to demonstrate that the map is correct, but for the applicant to show that an error was made.'
8. Welsh Office Circular 5/93 on 'Public Rights of Way' states that: 'Surveying authorities, whenever they discover or are presented with evidence which suggests that a definitive map and statement should be modified, are required to take into consideration all other relevant evidence available to them concerning the status of the right of way involved. Moreover, before making an order they must be satisfied that the evidence shows on the balance of probability that a right of way shown on the map is not in fact a public right of way. The mere assertion, without supporting evidence, that a right of way does not exist would be insufficient to satisfy that test.'

APPENDIX 3

Summary of the Seven Exceptions under Sub-Section 67(2) under the provisions of the NERC Act 2006

Sub-section 67.2 (a) excepts ways that have been lawfully used more by motor vehicles than by other users, for example, walkers, cyclists horse riders and horse drawn vehicles in the five years proceeding commencement date (commencement date being November, 2006 in Wales). The intention here is to accept highways that are part of the ordinary roads network.

Sub-section 67.2 (b) excepts ways that are both recorded on the list of streets as being maintainable at public expense and are not recorded on the Definitive Map and Statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification, but are generally regarded as being part of the ordinary roads network.

Sub-section 67.2 (c) excepts ways that have been expressly created or constructed for motor vehicles.

Sub-section 67.2 (d) excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.

Sub-section 67.2 (e) excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930 when it first became an offence to drive off road.

Sub-section 67.3 (a) excepts from extinguishment ways that were the subject of an application prior to the relevant period (19th May 2005 in Wales), and 67.3 (b) either the Council had determined the claim or that a person who made the application needed to drive along the route to access land in which they had an interest.

Sub-section 67 (5) excepts from extinguishment ways where immediately before November 2006 the exercise of an existing byway was needed to enable a person to access land who had an interest in that land then the way becomes a private right of way.

TITHE APPORTIONMENT AND PLANS

Until the nineteenth century most land was subject to a church tithe which was one tenth of the annual produce of the land which had to be given to the church. The Tithe Commutation Act of 1836 provided that all tithes were converted into a fixed money rent. All land was assessed for the value of its average produce and each field to be accurately measured and recorded in an apportionment book along with the tithe plans. It was prepared under statutory authority by the Tithe Commissioners to show all cultivated land arable and pasture because tithe was payable on land which produced crops. It also had to show waste land and definitive roads which did not produce crops because tithe was not payable on these. If a road or public way passed through the land, a landowner may well require it to be shown so as not to pay tithe on it. As far back as 1989, the Department of Environment Guidance Notes stated: “*although solely concerned with identifying titheable lands, the maps do mark roads quite clearly as untitheable, thus can provide useful supporting evidence when taken in conjunction with appropriate schedules*”.