

**ENVIRONMENT AND HIGHWAYS  
CABINET BOARD  
9<sup>TH</sup> JUNE 2015**

**REPORT OF HEAD OF LEGAL SERVICES – DAVID MICHAEL**

**SECTION A – MATTER FOR DECISION**

**WARD AFFECTED: TONNA**

**ALLEGED PUBLIC FOOTPATH - FROM THE PADDOCKS TO QUARRY ROAD**

**1.1. Purpose of report**

To determine the application to register a public path from the Paddocks to Quarry Road.

**1.2. Introduction**

- 1.2.1 An application was received on 2<sup>nd</sup> December 2009 to register the path shown A-B-C-D on Plan No. 1 as a public right of way on foot.
- 1.2.2 The claim was supported by ten people who by that date were alleging an average of 12 years continuous use, seven of whom said they have used the path for 13 years and three who claim eleven years' use.
- 1.2.3 After the claim was submitted a further four people came forward, one of whom stated he had used the path for twenty years. Two were not specific as to when they commenced walking the path but both quoted from the mid 1990s and the fourth stated she had not crossed the fields since 1955.
- 1.2.4 At the time of the application Bellway Homes, who developed the housing estate, were the sole owners of the land containing the path that is situated between house numbers 51 and 53, points A-B and the adjacent woodland that separates the houses from Quarry Road, points B-C-D.

- 1.2.5 Part of the land between points B and C was sold in June 2011 to a resident who has objected to the application. Bellway Homes have not made any representations on the matter. As well as the path between the houses, Bellway Homes still retain ownership of the stream running along the rear of the properties and a narrow strip of land alongside Quarry Road.
- 1.2.6 The basis of the claim is that there has been a minimum period of twenty years' uninterrupted use and that there has been a presumption under Section 31 of the Highways Act 1980, that the path has been dedicated as a public right of way on foot. It is also possible that a lesser period of twenty years' use could have given rise to such a presumption, but that would be under common law. The relevant tests for both are listed in Appendices 1 and 2. The obligation on this Council to consider this application is based on the provisions of the Wildlife and Countryside Act 1981. The relevant sections have been included in Appendix 3.
- 1.2.7 Quarry Road is not an adopted vehicular highway but is recorded as a public bridleway. The Paddocks forms part of the adopted estate road after the housing estate was completed.
- 1.2.8 All the usual organisations individuals and landowners have been consulted including the Local Member and the Community Council.

### **1.3. Background**

- 1.3.1 Outline consent was granted to develop the fields as shown by a bold black line on Plan No. 2 which now contains the housing development. This planning permission was granted on appeal in 1989. The area containing Heol Davies and Davies Andrew Road was developed first, the boundary of the estate being distinguished from the subsequent Paddocks by a broken line on Plan No. 2.
- 1.3.2 Bellway Homes started building The Paddocks in 1995 and the development was thought to have been completed by 1996, although one of the residents stated a site office was still in being in 1998. Consequently, it is evident that until 1995 the area now containing The Paddocks comprised three fields. Therefore the path that has been claimed from points A-D did not link one highway to another until The Paddocks was added to the list of streets in 2004 although there is no record of precisely when it was adopted. So prior to 1995, point A would have been in the field.

1.3.3 An issue that arose concerned the woodland between points B and C which had been referred to as an amenity space by the Inspector at the time of the appeal in 1989. The 1994 Approved Details provided a condition that a path should be set out between house numbers 51 and 53 leading to the amenity space. The amenity space is that portion of land containing the three paths shown on plan no.1 This led to the public perception that a route would be provided from The Paddocks to Quarry Road. The application was submitted in 2009 to ensure a route was recognised in case the woodland was developed. However when the woodland was sold in 2011 the new owner closed the path at point B as shown on plan no.1 in June of that year.

**1.4. The basis of the claim and the tests to be applied to establish that the landowner has dedicated a way**

1.4.1 Under Section 31 of the Highways Act 1980, it is necessary for the applicant to show there has been a minimum period of 20 years continuous uninterrupted use via the same route. In addition, that unless the path leads to a viewpoint or place of interest, the points of termini of the path should connect to an existing public highway.

1.4.2 In order to calculate the twenty year period, known as the relevant period, it is necessary to establish when the existence of the alleged public path was called into question. This will either be as a result of the path having been physically closed or as a result of posting notices on site denying the existence of the right of way. Alternatively and as a result of the Natural Environment Rural and Communities Act 2006, the date of the application can count as the date the existence of the public path is called in question, but whichever date is earlier will count as that date.

1.4.3 The path was closed in June 2011, by a boarded fence across the path at point B. However, as the application was submitted in December 2009, the earlier date will call into question the existence of the public way. Therefore, counting retrospectively from this date the relevant twenty year period is 1989-2009. Consequently, the applicant has to show the one and the same path has been in use by the general public for the entire twenty year period.

## **1.5. The Evidence**

- 1.5.1 The path as identified by the applicant commences at point A, but that length of path has only been in existence since the housing development commenced and the path set out between the building plots now containing house numbers 51 to 53. Building Control recorded the development commenced in 1995. Therefore, the public could not have used the path as originally claimed for the requisite twenty year period.
- 1.5.2 Nonetheless, if there is evidence there was a path in existence prior to 1995 such that the current path was set out along a pre-existing one then that should be taken into account. Section 1.6 deals with this possibility.
- 1.5.3 Plan No. 2 shows Davies Andrew Road and that the road only extended onto the field as far as point X. There is one person who indicated he moved into this road in either 1988 or 1989 and walked from the end of that road to Quarry Road through the fields. In his view that earlier route more or less coincided with the existing estate road now called The Paddocks. It continued into the woodland (at point B on Plan No. 1) via a set of sleepers over the brook where the path entered the woodland. This person said it was no more than the “width of a house” distant from the current path.
- 1.5.4 Consequently this is the only evidence of a pre-existing path from 1989-1995 which appears to have coincided with the now adopted estate road. However, the possible variation of the path to that in existence today where it passes between these two houses, suggests the original was moved but to more than to a minimal extent. That is to say the variation in its position was more than the width of the path, and evidently done to accommodate the housing development at about point B.
- 1.5.5 In theory one person’s evidence could be sufficient to show dedication of a path, although in the circumstances this would be inadequate. Assuming there was an earlier path coinciding with the present path and that it had been available for the minimum twenty year period then there are issues regarding:
- (a) access through what became a building site;
  - (b) the maintenance or otherwise of fences enclosing the woodland;
  - (c) that there was in any event more than one path through the woodland;

- (d) whether the use made by the claimants can be said to represent the public at large, given use from 1989 derives from those who moved into Andrew Davies Road and the Paddocks, and their visitors, who wished to avail themselves of a short cut to Quarry Road. Consequently, there is the question as to whether those residents would fall into the category of a special user group.

Appendix 4 provides an explanation of this concept.

- (i) Regarding point (a) above, all the six claimants who were interviewed were clear that there was no enclosed or secured building site and so they were able to make their way to Quarry Road at all times.
- (ii) In respect of (b), the current owner of the woodland said he has lived in close proximity to this site since 1974 but that his family are from Tonna. He and his neighbours of Henfaes Terrace started experiencing problems with vandals and youths loitering in Quarry Road only after The Paddocks was developed due to people making their way from that direction. As a result they had to close access to Henfaes Terrace from Quarry Road in approximately 2000 - 2001 shown on Plan No. 1.

In addition Bellway Homes still had an office on the site in 1998 and were asked by some of the residents of Henfaes Terrace to secure their land, which according to the landowner they did from 1998. He indicated they installed a barbed wire fence alongside Quarry Road and another plain wire fence running parallel, but set back a few metres. These two fence lines can be seen on plan no.1 one running directly alongside the bridleway D-E and the other along the line F-C.

#### Comment

*Consequently the owner would contend the claimants could not have enjoyed uninterrupted access as fences had been erected, damaged but repaired on various occasions by Bellway Homes. The owner of the woodland said the last time they did so was throughout a period between 2001 and 2003.*

*None of the claimants interviewed concede fences were evident and so do not recall any problem in accessing Quarry Road. Bellway Homes were unable to state what maintenance work was done throughout this period.*

*Furthermore the applicant has stated that she was born in 1969 and as a child and youth lived close to the junction of Quarry Road and Henfaes Road. Until the present time, she does not recall there ever having been a fence alongside the woodland. Consequently she would dispute that there has been an obstruction to those who wanted to access Quarry Road from the fields and subsequently those walking from The Paddocks.*

- (d) Three exit points at Quarry Road were identified by the applicant on site as shown on plan no 1. According to the applicant the route B-F was used by school children who lived toward the south western side of The Paddocks, particularly as there is a bus stop where Quarry Road meets Henfaes Road. The upper path B-E would be used should people be heading to the Rugby Club, or wishing to go on a longer walk to Ivy Tower. This was confirmed by those interviewed and the location of the rugby club being shown on Plan No. 2. Ivy Tower can not be shown on that plan, but lies to the south east some 600 metres distant.

The middle exit B-C-D according to the applicant ceased being used when access through Henfaes Terrace was blocked by the residents of that road in or around 2000/2001, shown on Plan No. 1. Access via A to E is the only one now evident and according to the owner, remains so as he himself uses it regularly with his wheelbarrow. It is barred by a wooden barrier, wrapped with barbed wire and supported by a number of posts close to point E.

#### Comment

*The issue is whether the variation in the routes used undermines the claim if each particular route was not used for the full twenty year period. For example the middle route evidently ceased to be used when Henfaes Terrace was closed in or around 2000/2001.*

1.5.6 Appendix 3 sets out the basis upon which an Order could be made, the lower test being whether it is reasonable to allege a public path exists. Secondly, if it is, has the landowner who says there was no intention to dedicate a public path produced any incontrovertible evidence that establishes he or his predecessors did not dedicate a public path.

1.5.7 In the current example, the allegation that a way was dedicated initially rests with the applicant and that can only be satisfied:

- (a) if the evidence of one witness is sufficient to show the path that he used prior to the housing development in 1995 coincided with the current alignment of the estate road;
- (b) secondly, that this earlier path also coincided with the path that is now positioned between house numbers 51 and 53.
- (c) thirdly that use is by the public at large and not a limited group of persons who live in close proximity to the path.

Comment

*It is likely the path or route used by this witness was in close proximity to what became The Paddocks and the path which now lies between points A and B. There is no evidence of any defined route across the field prior to the housing development. The witness stated the path A-B was no more than the width of a house from its present position and so was close to the same route as that claimed. .*

1.5.8 The Order would in effect be based on the evidence of one witness who is the only person who could show the path (if it was one and the same) was in use for the minimum period of twenty years. The person lives in the Estate which is in close proximity to the path and being only the one person, cannot be said to represent the public at large.

**1.6. Use of a pre-existing route prior to any of the housing development at Heol Davies, Davies Andrews Road and the owners of Gelli Deg Farm on The Paddocks**

1.6.1 It was suggested that some people had been walking through the fields before any housing development took place. Three witnesses came forward who said they had used two routes shown very approximately on Plan No. 3. One person said there was a gap between what is now house numbers 44 and 46 as shown as point G on Plan No. 3. According to one

witnesses this provided access into the fields via a gate where it joins Neath Road. He used this access from 1947-1955 from the age of 15 and recalls there were gaps in the field boundaries between Neath Road and the woodland, before joining Quarry Road somewhere in the vicinity of point H .

- 1.6.2 The other two persons' use spanned the periods 1945-1955 and 1945-1960s but joined Quarry Road via the field at about point I rather than the woodland. Their entry into the fields was via a gate at point J also shown on Plan No. 3. They also said there were gaps in the field boundaries which they suggested were somewhere in the vicinity of points M and N.
- 1.6.3 None could be precise as to the position of the route they used, but two had assisted the owner of Gelli Deg Farm on various occasions and so were known to the family.
- 1.6.4 One of the original ten witness said during the period 1949-1952 from the age of 13 he worked for the owner of Cefn-y-Don Farm. He lived in Tonna at this time and so walked from Quarry Road into the fields via a point at about point K before reaching that farm. His recollection is of a gate positioned approximately at point M but close to the corner of the field as would the other gate near point N.
- 1.6.5 The owner of the woodland has indicated that he has lived at Henfaes Terrace from 1979 but that his wife and her family have lived in the area prior to this time. That as a young man he helped the owner and farmer of Cefn y Don and his recollection was that the owner of this farm was vigilant in keeping people he did not know out of his land. He also stated that the field now in part occupied by The Paddocks was periodically waterlogged.

## **1.7. Conclusion**

- 1.7.1 Given the above, it is not possible to justify making an Order on the current evidence.
- 1.7.2 Even if the twenty years use by the one person is accepted to have coincided with the claimed public path where it passes between the two houses, there is also the issue as to whether that access was periodically interrupted when, according to the current owner of the woodland, Bellway Homes installed two fences alongside Quarry Road in 1998. Furthermore, that the subsequent repairs to those fences periodically interrupted use until 2003, and thereby called into question the



existence of the alleged public path. The applicant denies that such fences existed.

1.7.3 It is clear the only reason the application was made is due to the housing development at The Paddocks and these residents once having moved into their properties were trying to secure an additional means of access to and from the estate. As such that use was by a particular group of people rather than the public at large who for example may have been continuing to use a long pre-existing path

1.7.4 Whilst much earlier access had evidently been enjoyed by three persons from Neath Road to Quarry Road, no defined route can be established and, in any event, only one stated he walked through the woodland which is where it is claimed the public path exists. This person however could not be any more precise as to which route he took through the woodland. There is no minimum twenty year period of such an earlier use. Furthermore, any association between users and the landowners could be seen as those users having been given permission to access the land. Consequently, this earlier use through the fields does not add any weight to the application as made, nor does it identify a pre-existing public path had been dedicated prior to the housing development.

## **1.8 List of Background papers**

Footpaths file

## **1.9 Appendices**

Plans numbered 1, 2 and 3 and appendices 1 – 4

## **1.10 Recommendation**

That the application be refused.

## **1.11 Reasons for proposed Decision**

There is insufficient evidence to establish the one and the same path has been used for a minimum period of twenty years by the public at large.

## **Officer Contact**

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## COMPLIANCE STATEMENT

### ALLEGED PUBLIC FOOTPATH - FROM THE PADDOCKS TO QUARRY ROAD

#### (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

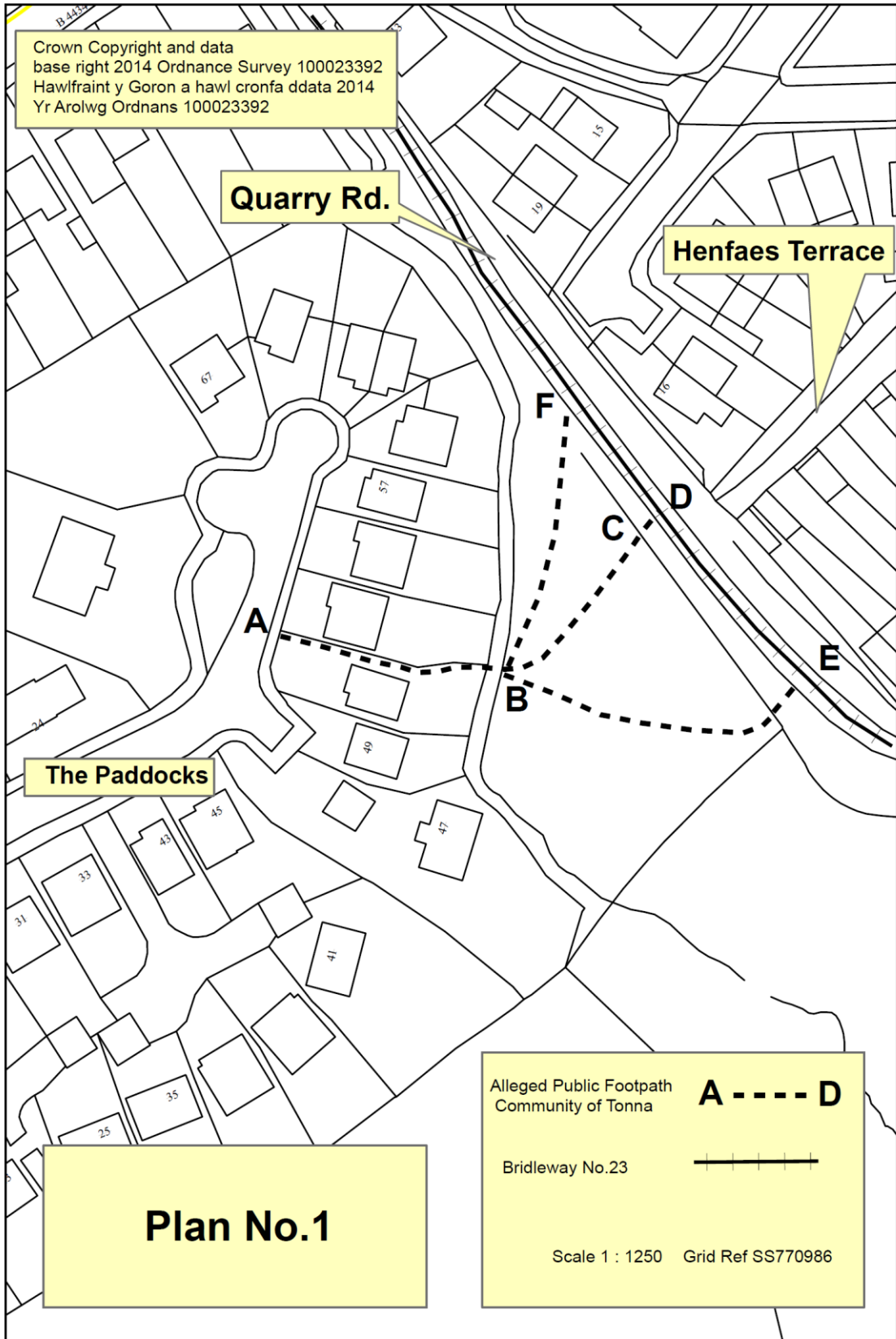
##### Other Impacts

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

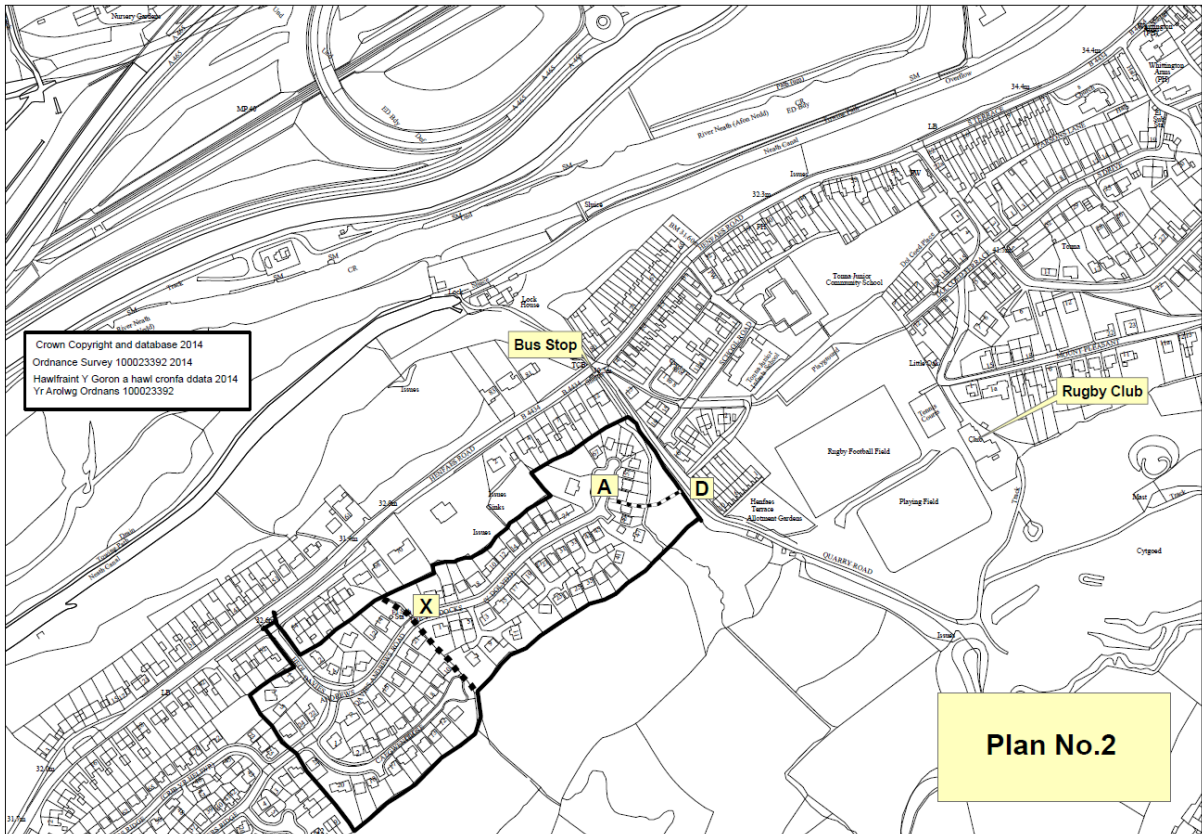
#### (c) Consultation

This item has been subject to external consultation

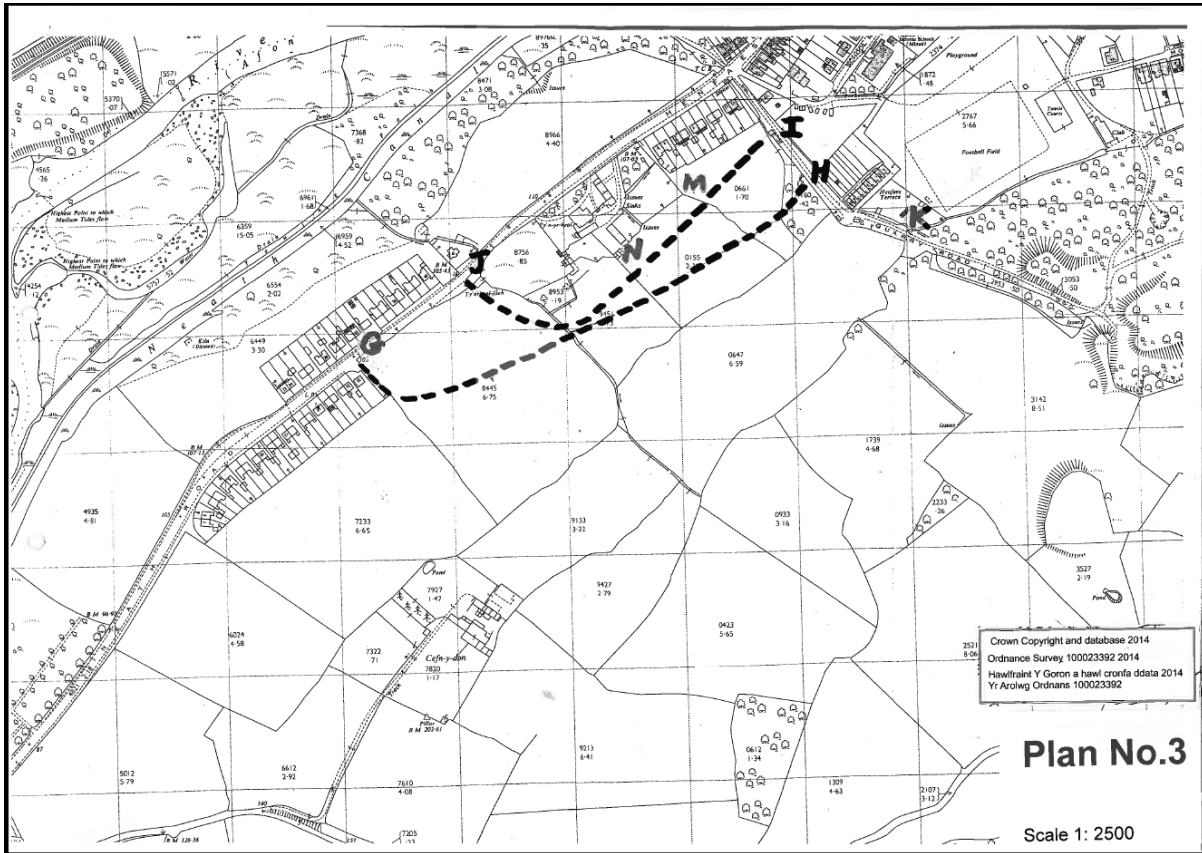
**PLAN 1**



# PLAN 2



# PLAN 3



## APPENDIX 1

### HIGHWAYS ACT, 1980

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

Where a public way over 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 of 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.

For Section 31(1) Highways Act, 1981 to operate and give rise to a presumption of dedication the following criteria must be satisfied:

- the physical nature of the path must be such as is capable of being a public right of way
- the use must be 'brought into question', i.e. challenged or disputed in some way
- use must have taken place without interruption over the period of twenty years before the date on which the right is brought into question
- use must be *as of right* i.e. without force, without stealth or without permission and in the belief that the route was public
- there must be insufficient evidence that the landowner did not intend to dedicate a right of type being claimed
- use must be by the public at large

## APPENDIX 2

### DEDICATION UNDER COMMON LAW

No minimum period of use is required, but the claimants must show that it can be inferred by the landowners conduct, that he or she had actually dedicated the route. User of right, is not of itself necessarily sufficient. Under statute, twenty years, if proved to have been uninterrupted will be sufficient to show presumed dedication.

Under common law it is still possible that use was due to the landowners tolerance rather than because that landowner had intended to dedicate. Consequently there needs to be evidence that the landowner (or owners) for whatever period is being considered, acquiesced to that use and took measures to facilitate public use.

Obviously this means the landowners have to be identified and evidence that they wished to have the route dedicated to the public.

No minimum period of use is required, but the claimants must show that it can be inferred by the landowners conduct, that he or she had actually dedicated the route. Use is not of itself necessarily sufficient as opposed to section 31 of the Highways Act 1980 where after twenty years, if proved to have been uninterrupted will be sufficient to show presumed dedication.

**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 the 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 raises 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.

**SPECIAL USER GROUP**

- (a) The Planning Inspectorate has produced advice on this matter in that they say there is no strict legal interpretation of the term ‘public’. The dictionary definition being ‘the people as a whole’ or ‘the community in general’. Arguably and sensibly that use should be by a number of people who together may be taken to represent the people as a whole/the community.

However, Coleridge L J in R -v- Residents of Southampton 1887 said that “‘use by the public’ must not be taken in its widest sense - for it is a common knowledge that in many cases only the local residents ever use a particular road or bridge. Consequently, use wholly or largely by local people may be use by the public as depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community”.

- (b) In contrast to this view was the decision made by Lord Parke in Poole -v- Huskinson 1834 who concluded: “there may be dedication to the public for a limited purpose...but there cannot be dedication to a limited part of the public”. This case was quoted by an Inspector in 1997 appointed to consider an application to add a public bridleway to the Definitive Map for North Yorkshire County Council. Here the route had also been in use for 40 to 50 years. That Inspector concluded: “In the case before Lord Parke, residents of the same parish were held to constitute a limited part of the public and I therefore believe the inhabitants of the Parish of Cliffs should also be held to constitute a limited part”. The Inspector refused to confirm the Order.