

# ENVIRONMENT AND HIGHWAYS CABINET BOARD

17<sup>TH</sup> September 2015

## REPORT OF THE HEAD OF LEGAL SERVICES – D.MICHAEL

### SECTION A – MATTER FOR DECISION

**WARD AFFECTED: GLYNNEATH**

### **ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC FROM MAIN ROAD TO NANT HIR**

#### **Purpose of report**

To consider the application to register a public byway open to all traffic and therefore add the path to the Definitive Map and Statement.

#### **Background**

An application has been made to this Council to recognise the route shown on Plan no. 1 between points A- F as a public byway open to all traffic. That is, a route which the public claim to have the right to use in motorised vehicles, on horseback, on bicycles and as pedestrians. If this application is accepted, it would require this Council to make a Modification Order to add a public byway open to all traffic to the Definitive Map and Statement.

The application was made by on the 7<sup>th</sup> April 2002 and twenty-six evidence forms were submitted in support of the claim. Sixteen showed an average of 24.2 years use as a byway. The remaining ten showed an average of 30.6 years use on foot.

In 2008, a further fifteen evidence forms were submitted. Of those fifteen, eight alleged an average of 35.3 years use as a byway, and the remaining seven alleged an average of 27.5 years use as a footpath.

The claimed route begins at Main road (B4242) at point A, before proceeding for approximately 18 metres before passing over a canal bridge and along a rough tarmac path to point B. The path then passes over a small stone bridge

just before reaching St Cadoc's Church at point C. The path continues as a rough tarmac track to reach a locked barrier at point D before terminating at Nant Hir at point E.

All the usual organisations and consultees were contacted including the Community Council, St Cadoc's Church and the Aberpergwm Estate. In the case of the Estate, they indicated they would have no objection if the track was registered as a public footpath. Two residents of Manor Drive object to the registration of a public byway. The church agrees that the track has been in use, but made no specific objection to the application.

The majority of the claimed route is owned by the Aberpergwm Estate (B-D), the rest is owned by this Council. Ownership of the bridge at point B however, is unknown.

### **THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT, 2006**

The Natural Environment and Rural Communities Act 2006 automatically extinguished any byway rights that were not recorded in the Definitive Map and Statement on the commencement date of the Act, which for Wales was 16<sup>th</sup> November 2006. There are several exemptions to the automatic extinguishment of vehicular rights, which are summarised in Appendix 1.

The exemptions that are relevant to this claim being:-

Section 67(3)(a), when an existing public right of way could be recorded if, before the relevant date (19<sup>th</sup> May 2005 in Wales), an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the Definitive Map and Statement so as to show the way as a byway open to all traffic

Secondly, s67(3)(c) before 19<sup>th</sup> May 2005, a person with an interest in the land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles –

- (i) was reasonably necessary to enable that person to obtain access to that land, in which case the way becomes a private right of access for that person/s.

The application was made in April 2002, before the relevant date and so the first exemption above applies.

The principal means of vehicular access to Nant Hir, Llygad Yr Haul and Maes Y Ffynnon from the vicinity of point A is via what is known as “Wimpy Road” shown G --- E. It is not clear why vehicular access via the claimed route is “reasonably necessary” given “Wimpy Road” runs virtually parallel and in close proximity to the claimed public byway. Whilst “Wimpey Road” is prone to flooding, it is a two lane road whereas the claimed byway can only accommodate one vehicle at a time with no passing places.

## **EVIDENCE**

### **Byway Open to All Traffic**

Of the 35 claimants who have submitted user evidence forms, 15 allege a minimum of twenty years use as a byway open to all traffic, one of the requirements of Section 31 of the Highways Act 1980 (Appendix 2).

A barrier was erected at point D in 2002, and locked in August 2003. This would act as bringing the way into question (Appendix 2), therefore the twenty year relevant period is from 1983-2003.

It is alleged there were large wooden notices secured to the pillars either side of the entrance from the B4242 at point A stating “MANOR HOUSE, PRIVATE ROAD, NO ADMITTANCE”. It has been suggested these were not maintained and removed in approximately 1993 some 10 years into the relevant period.

None of the claimants interviewed can recall these notices nor is there any reference to them to the question on notices in the user evidence forms.

In responses to consultations, one resident of Manor Drive (point D) stated that those living in Nat Hir used “Wimpey Road” to access the estate until roughly 1988 another resident quoted 1998. It was from this date that the road’s inadequate drainage resulted in it becoming periodically flooded, which is when residents started to use the alleged route as a short cut. If that is correct then there would not be a full period of twenty years use counting back from 2003. However this is contradicted by the six claimants who were interviewed, who gave much earlier dates for when they first started driving along this road.

Of the six claimants that responded to requests to be interviewed, four claim use both on foot and by vehicle. Only one claims to have been challenged in their use, by a resident of Manor Drive in 2001.

Prior to the building of the properties on Nant Hir, the only access to the Farm Cottages and Dan-y-Dderwen was via the claimed route.

The Title Deeds show both numbers 1 and 2, Farm Cottages, have a private right via the claimed route to access their properties. This private right also extends to the lane leading off Nant Hir towards Farm Cottages. (These cottages are shown on Plan No.2 )The private right states they can “pass and repass with or without...vehicles”. Therefore, evidence submitted by the owners of both 1 and 2, Farm Cottages must be discounted, as their use was “by right”, in other words they already have a pre-existing private right . For a claimed right of way to succeed, use must be trespassory in its nature in order to be “as of right.”

According to Official Copies of the Land Register no other properties in the vicinity of the Farm Cottages or Nant Hir have a registered private right along the claimed route.

### **Special User Group**

If any of the exemptions under the Natural Environment and Rural Communities Act 2006 are to apply, the claimant must show a public byway was in existence by 19<sup>th</sup> May 2005, therefore, use would have to be “by the public”, and not by a special user group. A special user group is defined in more detail in Appendix 3 but it means a group of people who live in close proximity to the path or reside in a limited area and therefore could not represent the public at large.

The majority of claimants live at Nant Hir, Morfa Glas and Llygad-yr-Haul, which all form part of the same housing estate. It would only be those living in this area who would have any reason to use the road. Only one claimant who is able to show over 20 years use in a motor vehicle lives outside the area (Addoldy Road), but has not responded to interview requests.

The Glynneath Community Council would say that the meaning of close proximity is “nearness” or “closeness” and it is only those living at the southern end of Nant Hir would fall into this category. That Morfa Glas, for example, is a street of 90 houses, several hundred metres away from the path. They would argue that the term “the people as a whole” or “the community in general “as set out in Appendix 3 should apply.

Plan No.2 shows the distribution of where the claimants reside and who alleged vehicular use. Only two live in Morfa Glas and one in Min Y Coed. The majority do live in Nant Hir.

Given those alleging such rights reside in a limited area, then it cannot be said they represent the general public.

The other condition is whether it is reasonably necessary for those users to access the route. This use allegedly commenced in 1988 due to the periodic flooding of "Wimpey Road". This is due to the lack of improvement works being undertaken which in the normal course of events would have been implemented had the road been adopted. So should such works be undertaken by whoever has that responsibility and that given "Wimpey Road " is a two lane access road, it would render the claimed public byway unnecessary.

There is some doubt that the way would have been used prior to 1988, it being only wide enough to accommodate one vehicle, as opposed to the route known as "Wimpey Road" which can carry permit two vehicles to pass alongside each other

It is also difficult to accept that the limited numbers pf people all living in the same estate can be said to represent the public at large.

Recommendation: - That the application to recognise the claimed path as a public byway be refused.

## **EVIDENCE**

### **Lesser Rights**

Even though the route has been claimed as a public byway, this Council is under an obligation to consider any other evidence that shows the path may have a lower status than that claimed (Appendix 4).

All 35 claimants have stated they also walk along the path.

### **Special User Group**

Plan No.2 shows the distribution of all those who only claim use on foot as well as those, who whilst claiming vehicular use, also claim use as pedestrians. The

same issue therefore arises as to whether even this greater number of users still fall into the Special User category.

Again it is evident that it is only those living in the Estate are making use of the path and so the same conclusion could be reached that they only represent a limited group of people and do not represent the public at large.

### **Conclusion**

The claimants supporting the application can be said to represent a special user group and therefore, no Modification Order can be made.

### **Recommendation**

It is recommended that: -

No Modification Order be made to add the route to the Definitive Map and Statement as a public footpath

### **Reason for proposed Decision**

There is insufficient evidence to justify making a modification order to add a byway to the Definitive map and Statement

### **List of Background papers**

Footpaths file

### **Appendices**

Plans numbered 1 and 2 and Appendices 1 – 4

### **Officer Contact**

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## COMPLIANCE STATEMENT

### ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC FROM MAIN ROAD TO NANT HIR

#### (a) Implementation of Decision

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

#### (b) Sustainability Appraisal

##### Community Plan Impacts

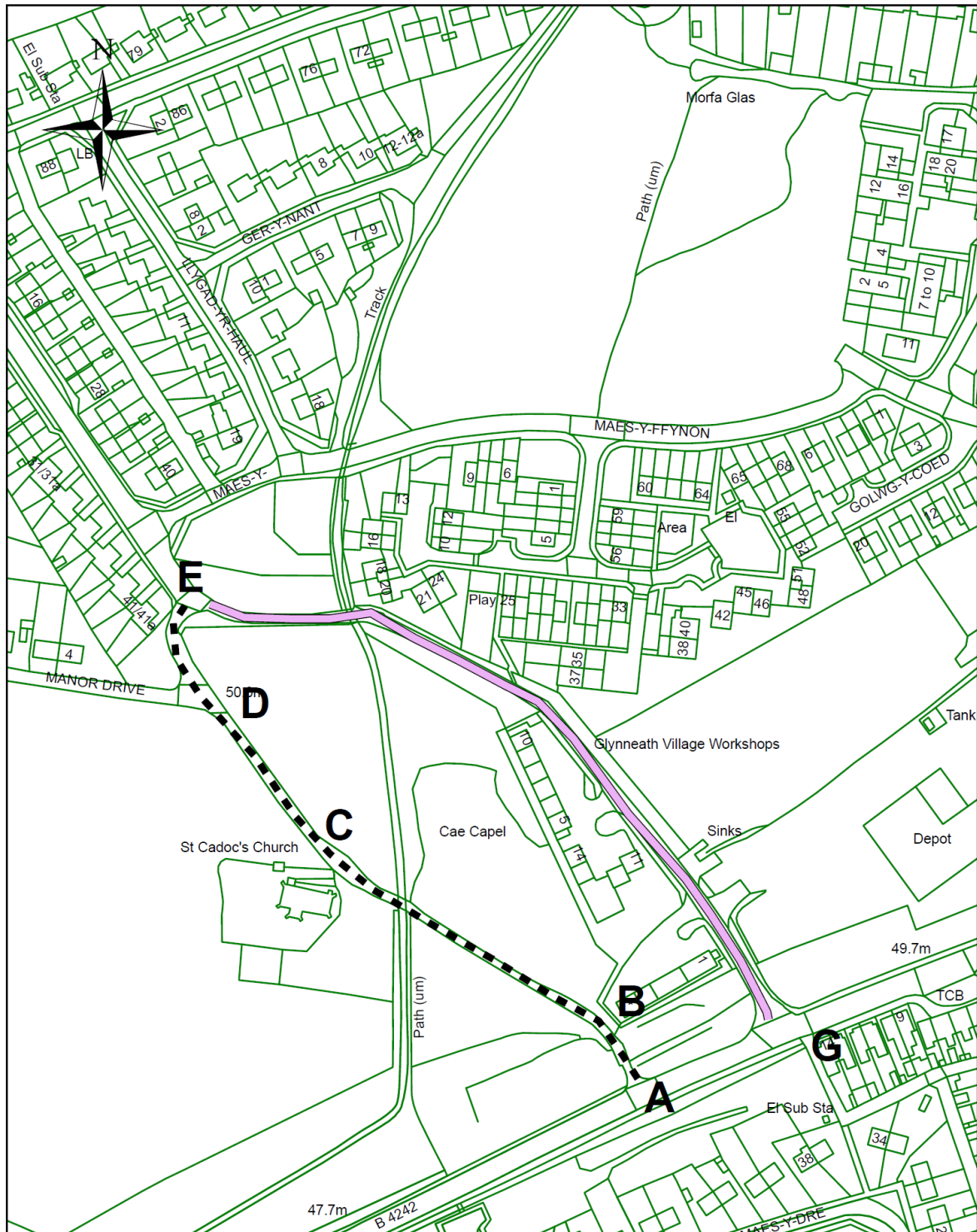
Economic Prosperity	..	No impact
Education & Lifelong Learning	..	No Impact
Better Health & Wellbeing	..	No Impact
Environment & Transport	..	No Impact
Crime & Disorder	..	No Impact

##### Other Impacts

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

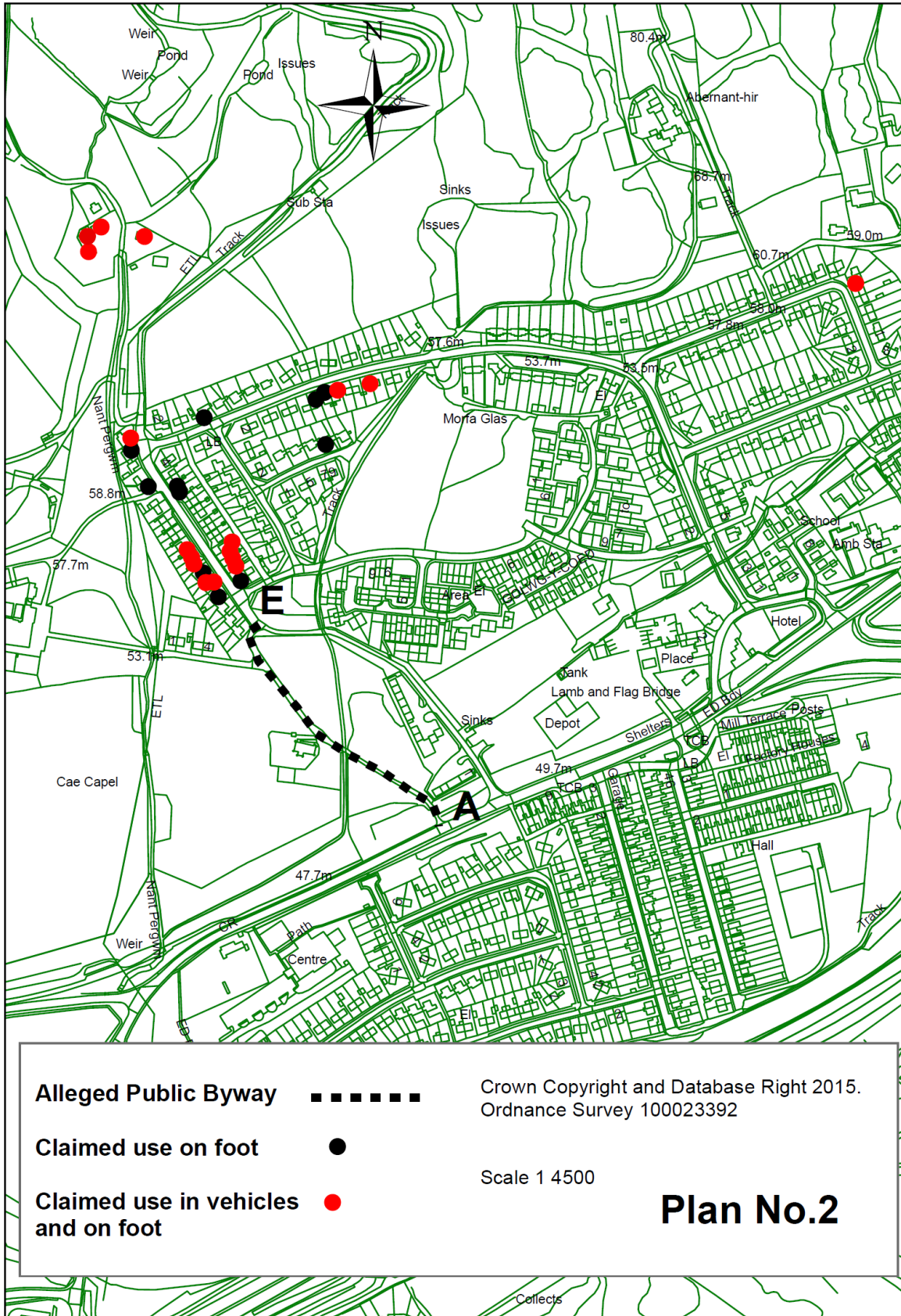
#### (c) Consultation

This item has been the subject to external consultation



<b>Alleged Public Byway</b>	<b>A</b> - - - - - <b>E</b>	Crown Copyright and Database Right 2015. Ordnance Survey 100023392
<b>"Wimpy Road "</b>	<b>G</b> ————— <b>E</b>	
<b>Grid Ref SN 871060</b>	<b>Scale 1 2000</b>	<b>Plan No.1</b>





**NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006**

**Summary of the Five 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 November 2006, and (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. In such circumstances the way becomes a private right of way.

**SECTION 31, 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

**SPECIAL USER GROUPS**

- (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 can not 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.

**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 keep the map and statement under continuous review and as soon as possible after the occurrence of any of [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:-
  - (b) the expiration, in relation to any way 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.