

NEATH PORT TALBOT COUNTY BOROUGH COUNCIL

ENVIRONMENT AND HIGHWAYS CABINET BOARD

29 October 2015

REPORT OF HEAD OF LEGAL SERVICES – DAVID MICHAEL

SECTION A – MATTER FOR DECISION

WARD AFFECTED: GODRE'R GRAIG

ALLEGED PUBLIC FOOTPATH FROM HODGSONS ROAD TO THE "WEIR", COMMUNITY OF YSTALYFERA

Purpose of the Report

To consider the evidence submitted which alleges a public footpath shown from points A to X on Plan No.1

Background

Twelve user evidence forms were forwarded to this Council in October 2003 in support of an application to register a route shown on the plan from point A to point X as a public footpath and therefore added to the Definitive Map and Statement.

The application route commences on Hodgsons Road but terminates on the path alongside the river at point X overlooking a weir. This point alongside the river marks the northern extent of the path that was dedicated by this Council, although that path terminates at point C and so does not connect to another public highway. Whilst it is possible for a public path to terminate at a view point or place of interest, only two persons gave this as the reason for walking to this point as the remainder continued further.

This route crosses land under the ownership of the Trustees of the Carreg-yr-Afon Park (points A-J), the Ynyscedwyn Estate (J-K) and this Council (K-X). Initially no one objected, the Trustees and

Estate having agreed to dedicate the path as a public right of way where it passed over their land.

The path passes through a metal gate at point A and alongside the children's playground. At point H the path leaves the field and passes up a small slope before entering another field between points H and K. The circular path shown on the plan represents a gravel track constructed by persons unknown for use by ponies. The alleged public path does not follow any part of this track but crosses the field before proceeding uphill from point K through overgrown vegetation until it reaches the riverside path at point X. The path has been found to be impenetrable between points K and X since 2008.

This path connects to the path which commences at point F. The sections between points X and F is under the ownership of the Tawe and Tributaries Angling Club, who had agreed in principle to dedicate the path as a public right of way. Such an agreement by them and the three owners concerning the route the subject of this report A-X would have secured a public path from one highway to another A - F.

In the event it was not possible to obtain an agreement from the landowner concerning X-F nor A-J.

The route the subject of this report could have been dedicated as a public path. In 2007 the owners of the land between points A and J had agreed in principle in 2007 to do so, but by July 2011 after two meetings stated they were no longer prepared to enter into such an agreement. Their reason being, that they may wish to develop a viewing stand for the football club where the path currently exists between Points A and H. They indicated that stand may be placed on the path and therefore potentially interfere with their desire to develop the site. Consequently, this application must be determined on its own merits.

The obligation of this Council to determine such an application derives from the provisions of the Wildlife and Countryside Act 1981, the relevant tests being set out in Appendix 1. Any applications based on user evidence should be able to satisfy the test under Section 31 of the Highways Act 1980. This requires the applicant to be able to show the public at large have been able to enjoy a minimum period of twenty years uninterrupted use of the way. That Section is included in Appendix 2, but the relevant

twenty year period is calculated by determining when the alleged right of the public to walk the path was called into question. This is usually identified by the landowner blocking the route with for example, a locked gate or by erecting notices alongside the path to inform the public that no such right exists. The other means by which dedication could be presumed is under common law and an explanation of which is contained in Appendix 3.

The Evidence

Fourteen persons have stated they have been making use of this path for an average of thirty three years. The reasons given include: five who have stated they have taken their children or grandchildren this way, two to walk their dog, two to access the Weir and another stated he walked as far as the bridge positioned at Point E.

Six of these Claimants have also stated they have walked to Glan-yr-Afon Road in support of the claimed paths F-X. There are also another three who have supported the claimed public path from X-F which gives a total of nine who allege on average of thirty nine years, from one highway to another that is A-F.

Where the path passes upslope from point K-F it can no longer be used due to overgrown vegetation which includes bushes and small trees. It appears the path was becoming difficult to use by 2003 which coincides with the time the application was made. The first site visit undertaken found the path impassable in 2008. Prior to that date there is no evidence the landowners made any efforts to prevent access. As such the public were not challenged nor was the alleged existence of the path brought into question. Consequently the date of the application would normally be taken to mark the end of the twenty year relevant period (as provided under the provisions of the Natural Environment and Rural Communities Act 2006) being 2003.

Only two of the three landowners were served notice at the application stage and so in accordance with case law, that application was not compliant with the provisions of the Act 1981. Consequently the date of the application cannot be taken to mark the date that the existence of the public path was called into question. This means that Section 31 of the Highways Act 1980 would not apply and therefore the usual 20 year rule for presumed

dedication cannot be considered. Therefore the possibility that the path has been dedicated under common law should be evaluated.

Under common law the issue to determine is whether the landowners took positive measures to facilitate such public use, such as maintaining and keeping the path clear, and possibly the provision of stiles or gates for use by the public. It is evident that whilst no objection was initially made by any of the landowners, the owners of the land between points A and H do not wish the path to be recognised as a public one. The path between points K and X became impassable sometime after 2003 and this Council who own this portion of land appear not to have ever kept this clear for the public. Therefore there is little evidence that any of the landowners took positive measures to keep the path open for the public.

Special User Group

All fourteen Claimants reside in Hodgsons Road and so the other issue to be addressed is whether it can be concluded the path in being used by the public at large.

There are two examples from case law where a different interpretation was placed on how much requirement there is to show use from people who do not live in one area. Appendix 4 highlights the two cases, but it can be seen in these cases that on the one hand, use by local people (undefined) could arguable be sufficient to establish use by the public but on the other hand use by the inhabitants of a Parish would not. Therefore can evidence of use by twelve living in one street be sufficient to reflect use by the public at large? Plan No. 3 shows the distribution of where the claimants reside who have alleged use of this path. It is evident all reside in a limited area in Hodgsons Road, which comprises eight different households. Given the path's close proximity to Godregraig and Ystalyfera one would expect some evidence of use from those who live in other streets.

Consultation

This item has been subject to external consultation

Appendices

Plan No. 1

Plan No. 3

Appendix 1

Appendix 2

Appendix 3

Recommendations

That no Modification Order should be made and therefore the application be refused.

Reasons for the Proposed Decision

Whilst there is sufficient evidence of use, that use is limited to persons residing in one street and confined to a small area within that street. As Appendix 3 makes clear there can be a presumed dedication to the public for a limited purpose but there can not be a presumed dedication to a limited part of the public.

Secondly use by the public alone is not sufficient to show that there has been a presumed dedication under common law. Whilst two of the landowners, other than this Council, had originally agreed to enter into a dedication agreement, one has now declined to do so. In addition, the path between points K-X was never kept open and so it is difficult to conclude this Council showed any intention to dedicate the path.

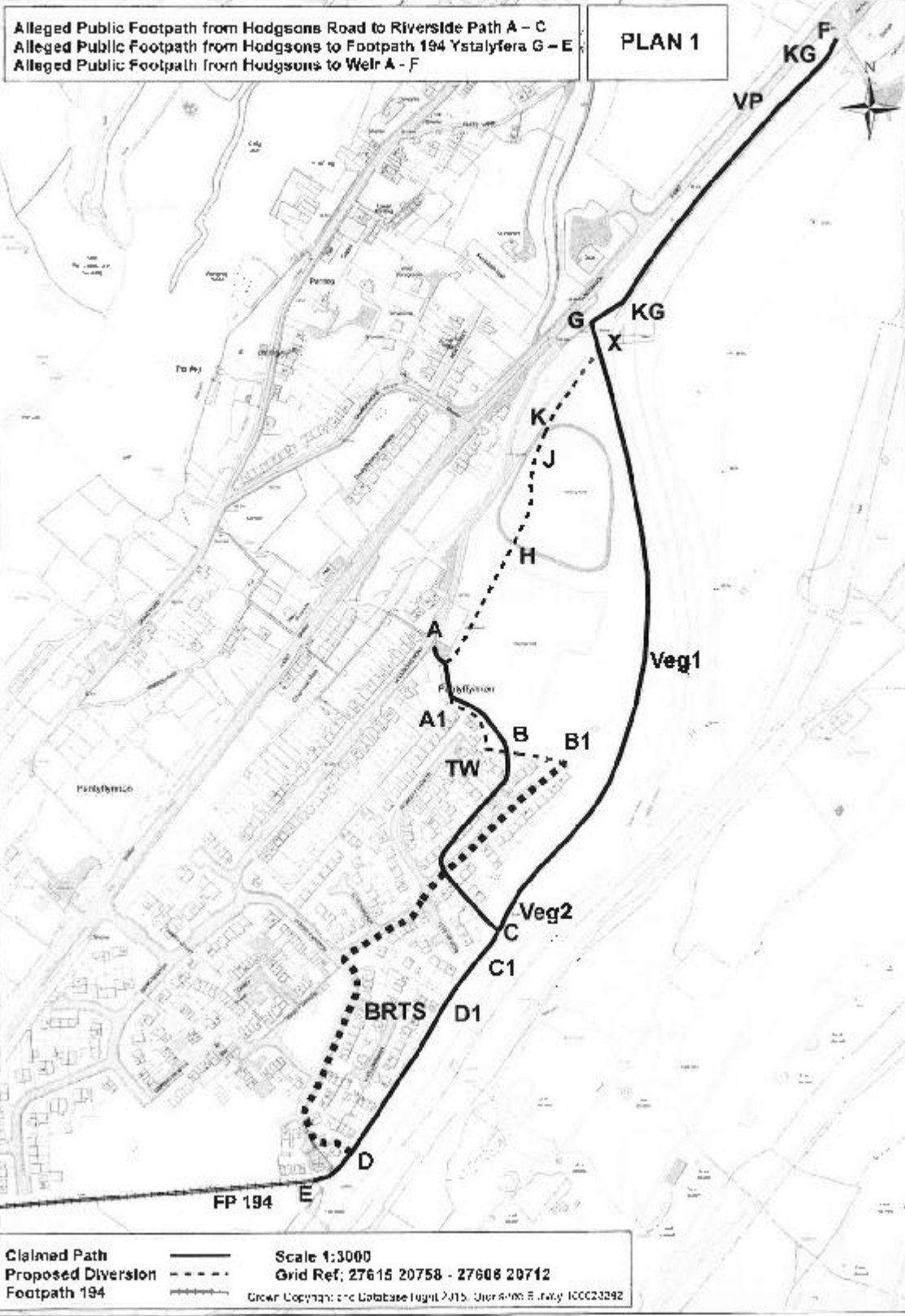
For the two reasons given, it is recommended the application should be refused.

List of Background papers

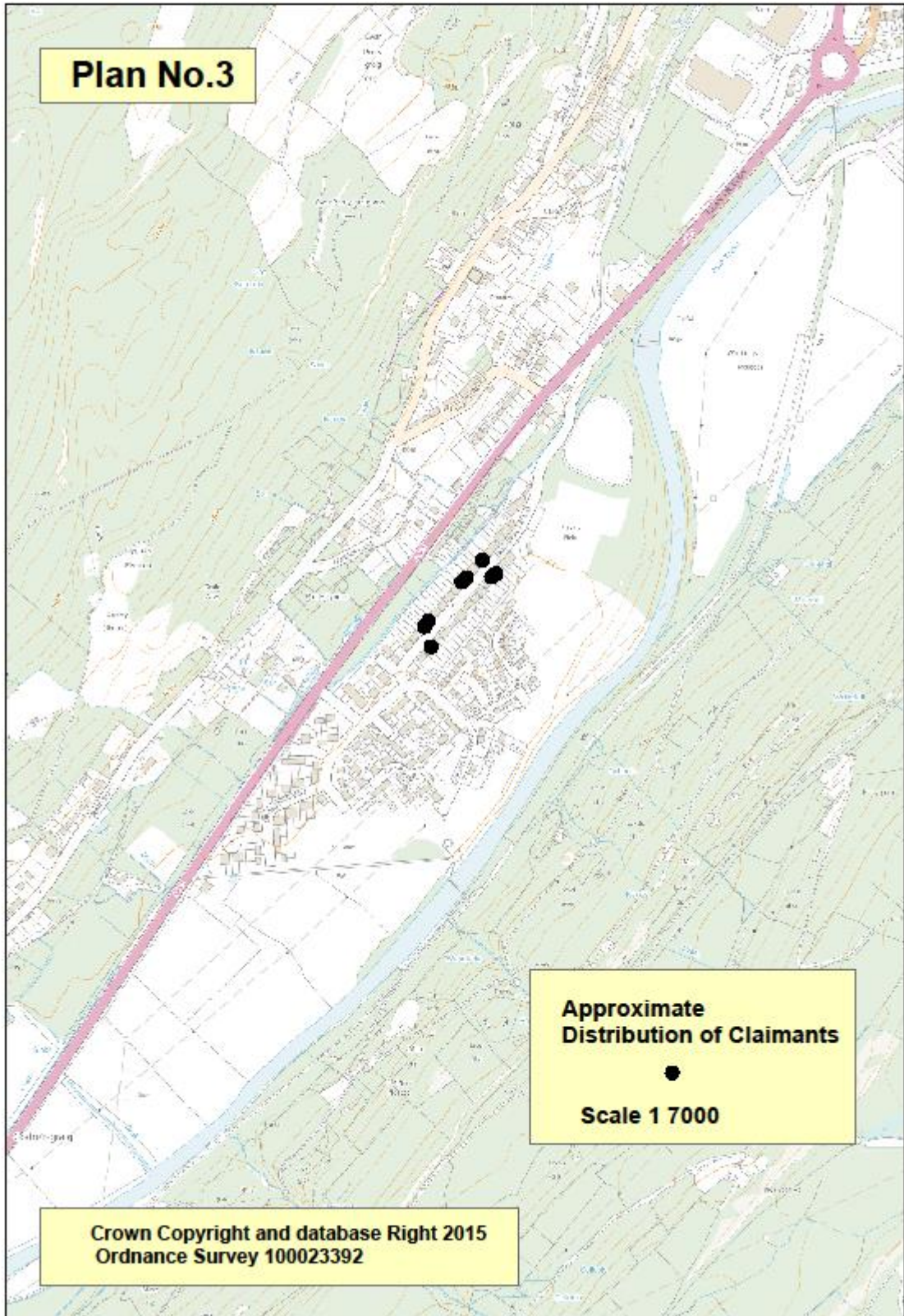
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Officer Contact

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Plan No.3



**Approximate
Distribution of Claimants**



Scale 1 7000

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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.

APPENDIX 2

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 3

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.

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.

This means the landowners have to be identified and that there is evidence to show they wished to have the route dedicated to the public.