

NEATH PORT TALBOT COUNTY BOROUGH COUNCIL

ENVIROMENT AND HIGHWAYS CABINET BOARD

1st September 2016

REPORT OF HEAD OF LEGAL SERVICES – DAVID MICHAEL

SECTION A – MATTER FOR DECISION

WARDS AFFECTED: PONTARDAWE

**ALLEGED PUBLIC FOOTPATH FROM LLOYD STREET TO
FOOTPATH NO.3 COMMUNITY OF PONTARDAWE.**

Purpose of the report

To consider the evidence submitted which alleges a public path from points A-C-D-G and the discovery of further evidence which suggests the existence of a public footpath from points E-E1.

This requires consideration of the paths:-

- (i) A-C-D-G under a minimum of 20 years use
- (ii) A-C-D-G under common law
- (iii) B-C under a minimum of 20 years
- (iv) B-C under common law
- (v) C1-D-G under a minimum of 20 years use
- (vi) E-E2-E1 under a minimum of 20 years use
- (vii) E-E2-E1 under common law

Background

- 1.1 The application was made in 2001 to recognise the paths A-C-D and B-C shown on the plan (Appendix 1) as public footpaths.
- 1.2 The area was subject to a land reclamation scheme in 2003 which re-profiled the site due to the earlier closing of the Darren Colliery in 1966.

- 1.3 The route A-C-D was unaffected by this work as it lay just outside the site. The land containing the path B-C comprises a gravel/soil slope with small standard size trees but which could be walked if required.
- 1.4. The path E-E₁ was not the subject of this claim and Lloyd Street G-D is an unadopted road. However, any evidence that is brought to this Council's attention that shows a public way exists has to be considered.
- 1.5 The currently registered paths are shown as red lines.

Description of the Paths

- 2.1 The route A-C-D is an earth based path, passing mostly through woodland, on average being half a metre wide, and relatively level apart from either end where it slopes downhill from about point E to Lloyd Street at point D, and from point A1 downslope to Graig Road at point A.
- 2.2 E-E₁ is a well-defined path some 2 metres wide, its surface now comprising loose stone chippings and containing a metal footbridge at point E₂.

Requirement to consider all the evidence

- 2.3 The relevant provisions of the Wildlife and Countryside Act 1981 which obliges the Council to determine the application are contained in Appendix 2 section 53 (3)(b)
- 2.4 The relevant provision which requires the Council to consider evidence discovered even though the evidence does not relate to a claim made by a member of the public is also found in Appendix 2 section 53 (3)(c). This relates to the path E-E₂-E₁ and the unadopted length of Lloyd Street from D-G.

Consultations

- 3.1 All the usual organisations were informed, including the local Member, the Community Council, this Council's Estates Section and the other known owner. This Council owns the land between points A-C₁, and the objector who has stated he intends to seek consent to build a house between points D – E and who owns the

lengths D-C1, and D-E1. Ownership of the length of path between points E2-E1 is unknown although it is possible it forms a remnant of the land formerly under the ownership of the then Coal Authority.

The Evidence

- 4.1 Two batches of supporting user evidence forms were submitted, one received from the applicant in 2001 and another from the local Member in 2015.
- 4.2 Of the earlier set, only three people continue to reside at the addresses given in 2001 and are still in support of this application. The later set of forms comprises 10 witnesses, one of whom is now deceased. After further clarification as to what paths have been used the total currently in support is 6, five of whom have been interviewed on the telephone and one in person.
- 4.3 One of the means by which a path can be registered as a public one, is to determine whether there has been a minimum 20 year period of uninterrupted use. This test derives from Section 31 of the Highways Act 1980 (Appendix 3), whereby there is a presumption in law that the landowner/s have acquiesced to the existence of the public path. The 20 year period is calculated by counting retrospectively from either the first occasion the public's alleged right was called into question or from the date of the application, whichever is the earlier.
- 4.4 Whilst barriers were placed across the path between points D and E in 2005 by the owner referred to above, the application was submitted in 2001. However, the applicant did not comply with the requirement to serve notice on all the known landowners until 2002. There is case law which established if this is not done the application is not properly made. Therefore based on the date of the application the relevant 20 year period would be from 1982 – 2002.

The Path A-C-D-G (under a minimum of 20 years)

- 5.1 There are 6 people who allege an average of 22 years use of this path, all of whom have said they have each walked the path through the whole of this relevant period.

- 5.2 Reasons given include 5 who said they used the path for recreational purposes and 3 to walk dogs.
- 5.3 The current objector purchased the land from the Trebanos Rugby Club in 2005 who themselves bought the land from the former Coal Authority in 1968.
- 5.4 The Trebanos Rugby Club had indicated they were prepared to dedicate the path, but by March 2005 ceased to correspond with the Council and so this option had to be abandoned.
- 5.5 The objector has provided a witness from the rugby club who has stated that the path as claimed was obstructed by a barbed wire fence from 1995 to 2005 when the land was sold to the current owner. This fence was positioned some 20 yards upslope from the beginning of the path at point D. If this is correct then the first occasion use was interrupted would have been in 1995. In order to consider whether there has been a presumed dedication to the public those in support of the application would have to establish that there had been 20 years uninterrupted use counting retrospectively from 1995. Of the six in support of this application there are four persons who themselves would each claim to have walked the path throughout this entire period and one who has said he commenced using the path in 1978. The sixth person started using the path in 1993.
- 5.6 Of the six people in support, five denied a fence ever existed across the path and another three residents also said no such fence was ever in place.

Common Land

- 6.1 Between points A and C1 the path passes over the registered common CL24, for which a revocable deed of access was granted to the public for air and exercise on the 27th March 1975. Consequently, the public have been given permission to walk over the whole area of common land and so have been using the path “by right” rather than “as of right” since 1975. There has been case law on these two definitions and whether such a deed is sufficient to call into question the existence of a public highway (Appendix 4). This case concluded the formal exercise of the deed and the depositing of that deed with the appropriate government department (as was the case here for this common CL 24, would

be a sufficient act to indicate the landowners intention was not to dedicate the path .

6.2 The relevant period so far established, 1982- 2002 shows the use of the path A-C1 could not be as “as of right”. Therefore to determine whether the whole length A-C-D-G is a public way, the relevant period will be 1955-1975. However none of the six people alleges use throughout this earlier period, the longest use is by two who commenced using the path in 1956 and 1972. All the remainder did not start using the path until or after 1975. Consequently this should be considered insufficient to show any presumed dedication under the 20 year rule as specified by the Highways Act 1980.

6.3 Recommendation

That no modification order be made for the whole of the path from A-C-D-G under the Highways Act 1980.

Reasons for the Decision

Insufficient user evidence to show a minimum period of twenty years uninterrupted use.

The path A-C-D-G under common law

7.1 The only other means by which such a dedication could be shown to have been made is under common law where a lesser or greater period than 20 years could be sufficient, but where mere acquiescence is insufficient. There would have to be evidence from the landowners conduct he or she had dedicated the path as a public right of way. Appendix 5 explains in more detail the principal to be applied in drawing such a conclusion.

7.2 The 1947 edition of the ordnance survey (revised in 1941-1942) shows a tramway from point D to point A2 which appears to coincide in part with the line of the path as claimed. The 1962 edition as surveyed in 1960 shows a tramway extending as far as point A1 from point D. Use as a tramway would be incompatible for use by pedestrians. For there to be a presumption that the landowner had dedicated the way to the public, the character and

nature of the route is relevant. There is case law which has established that such dedication can not occur if such public use would interfere with the purposes for which the land was held. Therefore it would not be possible to infer such a dedication until after the tramway had been dismantled and that would be the case even under a statutory claim.

7.3 The 1968 edition and surveyed in 1967, some 7 years later is only available for the southern section of path D – C1 where this is marked as a track, with the mineral railway absent. However there is only one person who can show use from when the line was dismantled and after the colliery buildings were demolished (those buildings being absent from this edition) before the rest of the path C1-C-A was made the subject of the deed of access. This is insufficient user evidence to warrant making a modification order after the mine operations ceased but prior to the Deed of Access being made in 1975.

7.4 Recommendation

That no modification order be made.

Reasons for the proposed decision

The length of path A-C-C1 cannot be shown to have public status under common law due to insufficient user evidence and any evidence the landowners at the time took measures to dedicate the route as a public one.

The Route B-C

8.1 This section of path passes in its entirety over the same common, and so the same principle applies as that which affects the length A-C-C1 in that there has been a pre-existing right of access for the public since the 1975 deed of access was made.

8.2 Recommendation

That no modification order be made for the length B-C

Reasons for the Proposed Decision

Those in support of the claim have been using the path by permission since 1975 and none can show a minimum period of 20 years prior to 1975.

The Route C1-D-G (under a minimum of 20 years use)

- 9.1 This length is unaffected by the deed of access of 1975. It provides access between a public highway at points G (Pheasant Road) and D (Footpath no.35) to a place of popular resort at point C1 being at the edge of the common referred to above.
- 9.2 Whilst the application identified a longer route, A-C-C₁-D-G, the Council is obliged to consider all evidence that may show a public path exists as highlighted in Appendix 3.
- 9.3 In addition there are examples of other public paths terminating at the boundary of common land where rights to air and exercise exist over that common. For example, Footpath No's 30, 53 and 97, in the Community of Cwmllynfell, and Footpath No. 173, in the Community of Pontardawe.
- 9.4 As this path is unaffected by the deed of access the relevant period will either be 1982-2002 or 1975 – 1995 depending on whether the statement that a fence was erected across the path in 1995 can be validated. None of the 8 people concede such a fence existed but even if one did then there are 4 who claim 20 years uninterrupted use prior to 1995 and another from 1978-1995. If no such fence can be established, then all 6 people can show 20 years throughout the later relevant period. The reasons for using the path remain the same as before, recreational and walking the dog.
- 9.5 The Community Council have stated they have arranged to have overgrowing vegetation cut back since 1999.

9.6 Recommendation

That a modification order be made to show the path C1-D-G as a public footpath only and if no objections are made to confirm the same as an unopposed order.

Reasons for the Proposed Decision

The tests as set out in Appendix 2 are twofold. Whether it can be concluded on the balance of probabilities a public path exists and or whether it is reasonable to allege such a public path exists. In the case of the latter test, the landowner would have to provide credible evidence that the path was not subject to a dedication to prevent this Council from making a modification order. The existence of a fence in 1995 is disputed and therefore it can not be concluded at this stage one was positioned to prevent passage, nor that if one did obstruct the path, that in itself would have negated the presumption that the path had been dedicated by 1995.

The Path E-E2-E1 (a minimum of 20 years use)

- 10.1 No application has been made to recognise this path as a public right of way. However those people supporting the application also volunteered evidence of their use of this shorter section of path. According to those seven persons interviewed they, as did the landowner, assumed this path is a public footpath.
- 10.2 As well as the six people who gave evidence in support of the application route (A-C-C₁-D-G) a seventh person also interviewed provided evidence of their long term use of this path E-E2-E1. Of the seven people concerned the reasons for their use varied. One indicated they used the path to access the post office and shops in Trebanos, another to attend the Trebanos Rugby Club (formerly located on Lloyd Street). Four said they would walk their dogs this way, one to visit friends and three said it formed part of a recreational walk.
- 10.3 As no application was made, then the only means by which the relevant period could be calculated is if the alleged public path has been called into question. Whilst barriers were installed near Point D, these did not affect the length E-E₂-E₁. For example, one person stated she would continue walking from Lloyd Street at point D via Footpath No. 2 to point E before joining this unregistered path.
- 10.4 Given the possible public status of the path has never been called into question, no minimum 20 year period can be calculated, then

the statutory period under Section 31 of the Highways Act 1980 cannot apply.

10.5 Recommendation

That no modification order be made for that length of path E-E2-E1

Reasons for the Decision

The path has never been called into question

The path E-E2-E1 (under commonlaw)

- 11.1 The other test would be to consider if the path has been dedicated under common law (Appendix 5). As indicated above, no minimum 20 year period need be established but a greater or lesser period could be sufficient if it can be established the owner took positive measures to enable the public to enjoy access. Consequently, mere acquiescence to such use would not be sufficient.
- 11.2 Those seven who were interviewed allege an average of 39 years up until 2015. However, the path was according to those interviewed a dram road which served the Darren Colliery until the mine closed in 1966. That is it was often used by the employees of those working in the mine.
- 11.3 The path is shown as a tramway on the 1947 edition of the ordnance survey and surveyed in 1941- 1942 but shown as a disused tramway on the 1962 edition surveyed in 1960.
- 11.4 However to access this section would have required the public to pass through the operational area of the mine situated at point D., Therefore the relevant period could not commence until the mine buildings had been removed by 1967.
- 11.5 Therefore the use of the path E-E2-E1 could only be subject to such a dedication from either 1967 or when the land was sold in 1968. There is still a period of 47 years from 1968, throughout which use of this path could give rise to a dedication. Only one person has claimed to have walked this path prior to 1968 and so the average length of use claimed is 37 years until 2015. Consequently, there is sufficient evidence of use.

11.6 The Community Council stated they have cut overgrowing vegetation along this path from 1999-2015. Consequently, the maintenance of a path by a public body is good evidence that the landowner has not only accepted the path was in use by the public but was content to have that path kept open by the Community Council on behalf of the public.

11.7 The path contains a metal footbridge at point E₂ which according to one person replaced an earlier bridge. The present one according to another was installed at the time the land reclamation work was undertaken on the Darren Colliery site in 2003. Again evidence that the landowner was prepared to allow such a structure to enable the public to continue to pass and re pass

11.8 The above suggests that the landowner had indirectly facilitated its use by allowing such work to be undertaken on the land

11.9 **Recommendation**

That a modification order be made to show the path E1-E2-E as a public footpath and if no objections are made to confirm the same as unopposed.

Reasons for the Proposed Decision

The path has never been called into question and as no application was made, there has been no date when the path has been called into question. As a result no minimum period of 20 years can be considered counting retrospectively from any one identifiable date.

Since the land was sold and the mine ceased to operate there has nonetheless been sufficient use of the way for a significantly long period which has remained uninterrupted.

The work undertaken by the Community Council, the replacement footbridge as well as the more recent re surfacing work implies the then landowners had accepted the path was being maintained for the benefit of the public. The consequential acceptance of that dedication by the long continued use by the public, provides the third element in showing the dedication was accepted by the public under common law.

Consultation

This item has been subject to external consultation

Recommendation

That the recommendations contained in paragraphs 6.3, 7.4, 8.2,9.6,10.5 and 11.9 above be approved.

Reasons for the Proposed Decision

As contained within the circulated report

Appendices

Appendix 1 - Plan

Appendix 2 – Wildlife and Countryside Act, 1981

Appendix3 – Highways Act, 1980

Appendix4

Appendix 5 – Dedication Under Common Law

List of Background Papers

Case File Reference M08/9

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