

**NEATH PORT TALBOT COUNTY BOROUGH COUNCIL
REGENERATION AND SUSTAINABLE DEVELOPMENT CABINET
BOARD**

21 July 2017

REPORT OF HEAD OF LEGAL SERVICES

MATTER FOR DECISION

WARD AFFECTED: ALLTWEN AND RHOS

ALLEGED PUBLIC FOOTPATHS FROM:-

- (a) PEN YR ALLTWEN TO FOOTPATH NO.39.**
- (b) BRYN LLEWELLYN ALONGSIDE PEN YR ALLTWEN TO FOOTPATH NO. 36**
- (c) FOOTPATH 39 TO FOOTPATH NO.36 COMMUNITY OF CILYBEBYLL**

Purpose of the Report

- 1.1 To determine an outstanding application that alleges three public paths as public rights of way on foot.

Background

- 2.1 An application was submitted under the provisions of the Wildlife and Countryside Act 1981 in 2000 to recognise three paths as public rights of way as shown on the attached plan. The relevant extract from this Act is included in Appendix 1.
- 2.2 The path (a) above commences at the eastern end of Penyralltwn Park proceeds in a south westerly direction across an open field before joining footpath No. 39 via a broken fence. It is a worn grassy path

some 180 metres in length crossing footpath No. 36 at point B. This path is shown on the attached plan as a dotted line from point A to point D.

2.3 To second path (b) above comprises a route which commences on Bryn Llewellyn at point F before passing to the west of the ruins named Pen-Yr-Alltwen to join Footpath No. 36 at point H The path is overgrown and impenetrable.

2.4 The third path (c) above commences on footpath No. 39 at point D and proceeds north to join footpath no 36 at point E.

2.5 The registered public paths are also shown on the attached plan.

The Twenty Year Relevant Period

3.1 In 2000, twenty seven user evidence forms were forwarded in support of the applicant by individuals who also claimed to have walked these paths. Twenty one each stated they had been using these paths in excess of twenty years, the average being twenty six years.

3.2 Given the application has been based on user evidence, the principal claimant has to establish there has been a minimum period of twenty years uninterrupted use sufficient to show that these paths have been dedicated by the owners of the land. Section 31 of the Highways Act 1980 prescribes the principle of a presumed dedication by a landowner/s to the public. The relevant section being included in Appendix 2.

3.3 In order to assess which period of twenty years should be considered, it is necessary to establish when the existence of the alleged public path was called into question.

3.4 This can be identified by the action of a landowner whether by:

- a) the posting of notices on site specifically denying the existence of such a public path.
- b) the blocking of the way by placing a fence or locking or securing a gate across a path.
- c) making a statutory declaration under Section 31 to the Highways Act 1980 to this Council that no additional rights are recognised by

the landowner, other than any which are recorded in the Definitive Map and Statement.

- d) In addition the date of the application can count as the date of the calling into question

Land Ownership

- 4.1 The path between Points A and F passes over two registered titles and that between G and F under one of the above titles. An objection has been made by the two persons who hold the registered titles for most of the path A-F and who own all the path G-H.

User Evidence

- 5.1 Whilst twenty seven people originally supported this application only 12 currently reside at the addresses previously given in 2000. As part of the investigative process in 2002 all claimants were asked to provide additional information, and 15 responded. The evidence currently falls into three categories:
 - a) Those who are still resident at the addresses given in 2002. These comprise 12 persons, all of whom were interviewed in 2002
 - b) Those also interviewed in 2002 but are no longer resident, comprising 3 persons
 - c) Those who whilst providing user evidence forms were not interviewed in 2002, comprising 12 persons and no longer resident at the addresses provided in 2000
- 5.2 Given the time that has elapsed since the application was made, those still at the addresses given in 2000 were asked to contact this office to provide some additional information which would also establish if they wished to continue to support this application. Three letters were sent to each in August, October and December 2016, with only two people responding. In order to bring this matter to a conclusion the letter of December 2016 made it clear that unless a response was received within 28 days, it would be presumed those individuals no longer wished to support the application. Two responded with another two additional people who were not party to the original application, although in the

event, these last two persons had not made use of the two paths that were the subject of the original application.

- 5.3 The issue therefore is to decide whether a modification order can be made as set out in Appendix 1 under section 53(b) or Section 53(c). In the case of section 53(b) the Council has to concluded a public path does exists on the balance of probability. In the case of the Section 53(c) the test is less onerous, in that an order could be made upon the discovery of evidence which shows “(1) that a right of way which is not shown on the map and statement subsists on is reasonably alleged to subsist....”
- 5.4 In the case of “reasonably alleged to subsist” there evidently needs to be a reasonable amount of evidence of long term use by a good representation of the public. However for the landowner to persuade the Council not to make an order that landowner would have to provide sufficient evidence of a lack of intention to dedicate and to provide credible evidence that he or she had taken measures to inform the public that there was no intention to dedicate the path as a public right of way.
- 5.5 Whilst the initial application was well supported, and even though there are still 12 “claimants” living in the area, there are only two who can now be relied on to provide evidence. Whilst there is no statutory minimum number of witnesses required to justify making a modification order that number should realistically reflect the wider public use and demand for the path. The number should be sufficient to shift the burden of proof on to the landowner to have to demonstrate a lack of intention, as is being advocated by the landowner in this case. Two people can not realistically represent the wider public, particularly if required to attend a public inquiry where their evidence would be tested. Therefore it is difficult to justify making an order.
- 5.6 A summary of the evidence for each of the paths can be found in Appendix 3.

Recommendation

That no modification order be made for the three claimed public paths

Reasons for the Proposed Decision

In respect of path

- (a) The written evidence provides grounds for making a modification order under the test that it is “reasonable to allege a public path subsists” as set out in appendix 2. However only two people have stated that they wish to continue to support this application which is insufficient to justify making a modification order.
- (b) In addition to the lack of support set out above, it is also possible this path was called into question in either 1993 or 1996 which if correct would only leave one person who would claim to have used the path for the full 20 year period.
- (c) Only one person has said they are prepared to continue to support this alleged public path should this earlier period be found to represent the relevant period which again is insufficient to justify making a modification order.

Consultation

The item has been subject to extensive consultation

Appendices

Plan and appendices 1-3

List of Background Papers

M08/21

Officer Contact

Mr Iwan Davies:-Principal Solicitor – Litigation Tel No.01639 763151 E mail:i.g.davies@npt.gov.uk

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

(a) Pen yr Alltwen to Footpath No.39

The path A-B-C-D

- 1.1 This is a field path, still in evidence from a site visit in August 2016. Taking into account those who were interviewed and in conjunction with their plans submitted with the user evidence forms, eleven said they have been making use of this path.
- 1.2 A site visit in 2002 highlighted the position of 2 barbed wire fences which had been placed at Point C. In addition it was seen that a ditch had been excavated along the southern field boundary both fence and ditch were created to prevent horses from escaping (Prior to the double fence it is alleged a stile had been in place at Point C). The exact date this work was done is unknown but a site survey undertaken in December 2000 identified a barbed wire fence at Point C. The application was made in October 2000, consequently it could be concluded the path's status was called into question in 2000 resulting in a relevant 20 year period of 1980 – 2000.
- 1.3 Of the eleven interviewed in 2002 two also agreed to meet in 2016. Eight of those originally interviewed have each said they have made use of this path throughout the entire relevant period, one of the claimants commenced later in 1986 the other in 1988 and the third person was not living in the United Kingdom between 1991 and 1996. Consequently there was good evidence this path has been in constant use for the minimum period required.
- 1.5 Five indicated it was a means of either their children or their children's friends walking to Alltwen to catch a bus to attend school in Pontardawe. Three said they also used this path to catch a bus from Alltwen to reach their place of works and four to walk their dogs. Four also specified it formed part of a longer walk, taken on weekends and evening for pleasure

Evidence against the Application

- 1.6 The land has been under different owners since the current agent has been managing the field from 1968. Statements have been submitted by that agent and the tenant who was occupying the land for 11 months of each year within the relevant period until 1998. Additionally, a local resident on also submitted a statement on behalf of that agent. Both the tenant and the local resident have stated they have turned people away if they were not walking along the registered public paths. If this is substantiated it would be evidence of the owners lack of intention to dedicate these paths by the tenant for 18 of the 20 year period. However none of those interviewed have said they were approached by the tenant, nor by the resident whose house overlooks the field. Thus there is no clear and unambiguous evidence to establish if people were turned away and so there is a conflict in the account between the two parties.
- 1.7 Secondly the agent has stated notices were installed at four separate locations, shown at points W, X, Y and Z on the plan. A photograph of the one positioned at Z reads "Private No Right of Way". It is not known when these were placed on site, although none were found during the site visit in December 2000. However the agent stated these four signs read "Private Land No Trespassing".
- 1.8 The notice which was in place at Point Y is at the beginning of footpath No. 36 where it joins Pen Yr Alltwen Park. So it would be a misleading notice given the public have the right to enter the land at this location. Secondly case law has established that a notice which reads "Private No Trespassing" has no effect on an alleged public footpath. A person who enters or remains on land without lawful authority commits trespass against the holder of the land. Lawful authority can be achieved in two basic ways, one of which is that the landowner provides permission to users to enter the land. There is no evidence the landowner ever gave that permission nor do any of the claimants say they have received permission. Secondly, lawful authority can be obtained to enter premises from long uninterrupted use whether that be under common law or

statutory law by applying the provisions of section 31 of the Highways Act 1980. It is under the latter that the application was made.

Conclusion

- 2.1 In terms of the evidence presented to the Council nothing has been provided by the landowners (past or present) which is irrefutable. No user concedes they were ever turned away and the reason the application was submitted appears to derive from the path being obstructed at Point C by the barbed wire fence, presumed to be in 2000. In other words until that point in time and according to the current evidence available, there is no clear and unambiguous evidence that the landowner/s had made it clear to the public that no such rights existed via the route A-B-C-D-E.
- 2.2 However whilst there are grounds for making an order under the test “reasonable to allege a path subsists” as set out in Appendix 2, there is virtually no continued support for this claim. One of the eleven has contacted this Council to say he is no longer interested, 4 are no longer at their previous addresses, and 4 have withdrawn their support by not responding, leaving only 2 persons upon whom this Council could rely. It is probable that the landowner would sustain their objection to this application should a modification order be made. It is likely that a public inquiry would have to be held to resolve the matter and therefore the user evidence tested at that inquiry. As explained in paragraph 5.5 above, two persons would not be considered adequate to reflect widespread public use of this path.

(2) Bryn Llewellyn to Footpath No.36 F - H

- 3.1 The 2000 application also identified this path linking Bryn Llewellyn Road to Footpath No. 36 passing to the western side of the ruin of Pen-Yr-Alltwen Farm.

The Relevant Period

3.2 Four persons who were interviewed in 2002 have all stated they have used this path for the whole of the relevant 20 year period ending in 2000. Another 3 persons quoted their use from 1986, 1988 and 1978 the latter whose use ceased in 1993 or 1996. Six gave no specific reason why they would use this path, but two said they would wish to walk this way when coming from an easterly direction as it enabled them to reach footpath No. 25 without having to walk uphill along Bryn Llewellyn from where footpath No. 36 meets that road at point W. Footpath No.25 is positioned virtually opposite the point the claimed path meets Bryn Llewellyn at point F. Both recalled a stile at point F1, which was removed and replaced by a mound of earth and barbed wire fence. One considered this occurred in between 1993 and 1996, the other was not specific. Both said this is the reason they stopped walking this path.

So basing the evidence on the two who are still in support of this claim it is possible that the relevant period ended in either 1993 or 1996.

In 2016 the path was inaccessible due to it being overgrown.(Point G marks the point at which another path passes to the east of the ruin which whilst referred to by some claimants was not part of the original application).

Evidence against the Application

3.3 As indicated previously in paragraph 6.7 the agent who acts for the owners of this land stated notices had been installed which read “Private Land No Trespassing” at Points W and X on the attached plan. The wording itself as previously mentioned has no effect on the alleged existence of this public path, it was not located at point F and in fact both notices were placed at the points of termini of the two currently registered public paths, numbered 36 and 49. The landowners objected to the application in 2000 but there is no evidence that they took any specific measures to inform the public that they did not wish to dedicate this path as a public right of way within the period 1980 – 2000. If a fence and mound of earth was placed across the path in either 1993 or

1996 this would set back the relevant period to possibly as early as 1973 – 1993.

- 3.4 Two of those in support indicated they stopped using this route when the gate and stile they identified as being at point F1 was removed and replaced by a barbed wire fence and mound of earth barring their way. Both stated this is the reasons they stopped using this path. One witness said this was either in 1993 or 1996, the other person did not respond to requests for further information. If this is correct the relevant period would be either 1973-1993 or 1976-1996. Only one person said they started using the path as early as 1976.

Conclusion

- 4.1 In the absence of further clarification from those 5 still resident at their previous addresses, it is not possible to establish the relevant period. Secondly whilst the notice referred to earlier would not count as a challenge to the existence of this alleged public path, the lack of continued support cannot justify making a modification order.

Recommendation

No modification order be made

(3) Footpath No.39 to Footpath No.36

E-C-D

- 5.1 This route was identified on the plans attached to the application form and supported by 10 people, 6 of whom were interviewed in 2002 and two again in 2016.
- 5.2 The path passes along the western side of the field and forms another route connecting footpath No. 39 to Footpath No. 36. Principal reasons for using this path was given by five people was to walk their dogs.
- 5.3 None of those 6 said they recall being approached by anyone and none of the notices referred to previously had been located close to point C or D .

5.4 There are four people who still reside at their addresses as provided in 2002 but only one responded to the three requests for further information. As already in this report one person upon whom this Council could rely is insufficient to make the modification order requested.

Conclusion

5.5 Given the lack of continued support no modification order can be justified.

A-B-C-D-F

#Mrs. S. Jones	1980-1991	1996-2000
#Mrs. Anne Jones	1978-2000	
#Mr. Vivian Jones	1978-2000	
#Mrs. J. Mapstone	1978-2000	
#Mr. J. Morris	1977-2000	
Mr. R. Daniel	1970-2000	
Mrs. R.H. Rees	1988-2000	
Mrs. Y. Griffiths	1986-2000	
#Mrs. E. Davies	1978-2000 rarely	
#Mr. Walsh	1980-2000	
#Mr. Llewellyn	1953-2000 (No longer supporting claim)	

6 Throughout 1980 to 2000

4 Less than 20 years

All the above interviewed

Still Resident

F-H

#Mrs. E. Davies	1978 – 1993/96 (ceased in 93/96 due to Wire Fence 1993/1996	
#Mr. V. Jones plan)	1978 – 2000	(only according to
#Mrs. Mapstone	1978 – 2000	
#Mrs. S.G. Vaughan	1975/76 – 2000	
Mr R. Daniel	1970 – 2000	
Mrs. R. Rees	1988 – 2000	
Mrs. J. Wheel	1986 – 2000	

Still resident and all the above were interviewed

E-C-D

Whilst Mr. Walsh had identified this FP on his original UEF on being interviewed in 2016 he was asked about any other routes and said he did not use this one.

#Mrs. E. Davies	1978-2006)	(Also Interviewed
2016)			
#Mrs. Vaughan	1975/6–2000)	
#Mrs. C.E. Thomas	1955–2000)	
#Mrs. G. Jones	1960–1964)	
	1967–1991)	
	1996-2000)	
Mr. G.W. Thomas	1970-2000)	

All the above 6 were interviewed in 2002 with Mrs Davies and Mr Walsh in 2016.

Mrs. M. Allen	1970-2000
Mr. R.P. Price	1973-2000
Mr. J.N. John	1975-2000
Mr. A. Davies	1930's-2000

Still resident

Reasons for use

To walk dogs – Vaughan, Jones, Mrs. Davies, Mr. G.W. Thomas and Mr. J.N. John