

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

21 July 2017

**REPORT OF THE HEAD OF LEGAL SERVICES – DAVID MICHAEL
MATTER FOR DECISION**

**Application to upgrade the public footpath off Martyn's Avenue to a
Byway Open to all Traffic Community of Seven Sisters**

Purpose of the Report

To determine the application regarding the length of path between points A-B-C

Background

- 1.1 In February 2009 an application was submitted under the provisions of the Wildlife and Countryside Act 1981 (Appendix 1) to upgrade the path shown on the attached plan to a Byway Open to All Traffic. The basis of the claim is that there has been a continuous and minimum period of 20 years use to reflect a presumption that the way has been dedicated to the public (Appendix 2).

The definition of a Byway Open to All Traffic (BOAT) is a carriageway, being a right of way for mechanically propelled vehicles, but one which is used primarily as either a footpath and or bridleway, that is by walkers and horse riders. Consequently such ways would be regarded as rural or semi-rural in nature given they would be recorded in the Definitive Map and Statement rather than on the list of adopted streets and roads.

- 1.2 The application identified a route which was diverted in August 2003 and subsequently confirmed by the Welsh Ministers, via A1-B. Consequently, the route A-B has been altered and so the application in effect would upgrade the unaltered length between points B and C but add a new public highway where the previous footpath was positioned between points A-B
- 1.3 The application was supported by 12 persons all of whom live either in Church Road or Martyn's Avenue and allege an average of 36 years use.

- 1.4 Under the Natural Environment and Rural Communities Act 2006 no public byway can be created after the 16th November 2006. If any do exist, but have not been recorded immediately before this date, they are automatically extinguished. There are certain exemptions to this provision which have been listed in Appendix 3.
- 1.5 Irrespective of whether vehicular rights are shown to exist, this Council is also under an obligation to consider any evidence which shows the path to be of a lower status such as a bridleway or restricted byway. However no evidence has been submitted in this regard.

Validity of the Application

- 1.6 The applicant did not serve notice on all the landowners and accordingly did not comply with Schedule 14 of the Wildlife and Countryside Act 1981. Appendix 5 relates to non-compliance with the Act in respect of an application for a BOAT.
- 1.7 In addition the applicant would still have to identify which exemption to the automatic extinguishment of a BOAT applies as this Council cannot provide that advice. In the event, nothing has been forwarded in this regard.
- 1.8 The third issue is that all the supporters to this application live in the immediate locality, eight of whom live adjacent to this path. As such they cannot be considered to represent the public at large. They form a group for whom this route provides a useful route rather than a highway which would be used by people living further afield. This type of limited use may be said to be by a special user groups referred to in Appendix 4.
- 1.9 Whilst Sections 67(3)(a) and 67(5) of the 2006 Act concern the need of certain individuals to access their properties, in the case of the former, this application was made after the relevant date of 19th May 2005, and in the case of the latter, no public byway can be said to have been in existence prior to the commencement date of the 2006 Act being 16th November 2006.

Recommendation

No modification order be made for the route A-B-C

Reasons for the Decision

Primarily, that because none of the exemptions set out in Appendix 3 apply, then under the terms of Natural Environmental and Communities

Act 2006, no public byways can be created after the 16th November 2016.

In addition even if such an exemption could be found the application did not comply with the terms of the Wildlife and Countryside Act 1981.

Lastly that those in support of the application cannot be said to represent the public at large.

Consultation

This item has been subject to external consultation

Appendices

Plan and appendices 1- 5

List of Background Papers

M08/20

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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 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 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

SUMMARY OF THE SEVEN 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 preceding 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 the relevant period (19th May 2005 in Wales), and 67.3 (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 then the way becomes a private right of way.

APPENDIX 4

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.

APPENDIX 5

In the case concerning the Trail Riders Fellowship and SSEFRA and Dorset County Council (2016) EWHC 2083 (Admin) an application was considered where reliance was being made on an exemption to the automatic extinguishment of a BOAT given that application had been made before the commencement date of the Natural Environment and Rural Communities Act 2006. However the Court found that the application was not compliant with Schedule 14 of the Wildlife and Countryside Act 1981 and rejected the application.