

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

7 DECEMBER 2018

REPORT OF THE HEAD OF LEGAL SERVICES – C GRIFFITHS

MATTER FOR DECISION
WARD AFFECTED: YSTALYFERA

Alleged Public Footpath from Clare Road to Alltygrug Road
Community of Ystalyfera

Purpose of the Report

To determine the application that alleges the existence of public footpaths as shown on Plan no.1, between Clare Road and the lane to its rear to Alltygrug Road.

Background

- 1.1 The application was received in 2013 to recognise a public path commencing between house No's 25 and 27 Clare Road, Ystalyfera. The path is shown on the plan no.1. The path initially proceeds along a grassy rough track from point E – A1 before passing along the lane from A1-B which provides vehicular access to the rear of some of the properties on Clare Road

The claimed paths continue from points A and B which both pass over what is now an overgrown field, to merge at a field boundary at point D. The route continues through another overgrown field to emerge on Alltygrug Farm Road at point C.

- 1.2 The provisions of the Wildlife & Countryside Act 1981 place an obligation on the Council to investigate such application. Those provisions are reproduced at appendix 1. The current application is based on the presumption that the long term uninterrupted use has given rise to the paths having been dedicated to the public by the previous landowner.

The relevant provisions of section 31 of the Highways Act 1980 is set out in appendix 2.

The Twenty Year Relevant Period

- 2.1 When an application is based on user evidence it is necessary to calculate the relevant minimum 20 year period which is the time over which the claimants alleges they have enjoyed such uninterrupted use. This requires identifying a date when the alleged right of the public to use the way was called into question and then count 20 years back from this date.
- 2.2 Whilst the application was made in 2013 there is general consensus that it was when the current owner purchased the land in 2010 that the issue over whether the public had the right to walk these paths arose. However two people have said they continued to use the path after 2010 until it became too overgrown. The current owner contends that in 2010 the field was already overgrown.
- 2.3 Thirty five people completed user evidence forms, five of whom are now deceased. One other is no longer at her previous address and cannot be contacted. Thirteen people have been interviewed and apart from five of those interviewed, all have claimed to have walked across the fields, either from points A and B, or only via point B, for a total of twenty years counting retrospectively from 2010. One of the joint current owners has also been interviewed and objects to this application.
- 2.4 Those interviewed have confirmed their access was first blocked in 2010, with one person saying he had been confronted by the current owner after 2010 when continuing to use the paths. Consequently the relevant period can be taken to be 1990 – 2010.

The various sections of path between E-A₁-A-D-C and E-A₁-B-D-C, E-A₁-B₁-D-C

- 3.1 Given some people have used different points of access and this Council's obligation to consider all available evidence, the three different routes A-D-C, B-D-C and B₁-D-C are considered. The lengths E-A and D-C are common to all three lengths of path.

The Path E-A₁-A

3.2 All thirty five people have stated they have used this length of path as shown on the plan attached to their user evidence forms. Four people said that there used to be a metal footpath sign positioned at point E which is alongside a telephone kiosk. None can recall when it was removed.

The Path A-D

3.3 Twenty six people have claimed this length of path as shown on their user evidence forms. The same four people stated that there used to be a metal footpath sign on Allt Y Grug Farm Road at point C.

Of those interviewed three people said there used to be a gate at point A, one said there was a stile alongside this gate which he thought fell into disrepair in about 1979, yet two others said there was only a stile at point A. Two people said they believed the stile remained in position until sometime in the 1990's.

Five people were unable to comment on whether the stile was still in place during the relevant period and the sixth considered it was in position in 1979 contrary to the above. Three said the fence was occasionally repaired when sections had deteriorated and so there would have been periods when the land was accessible without any stile or gate. However, no one could be specific as to when and for how long this fence would have remained in situ to enclose the field completely. Three people did not recall any gate or stile at point A when interviewed, yet two of whom said one did exist when completing their user evidence forms.

3.4 Reasons given for use by two were to walk or be taken to the Infants School referred to earlier, (shown on plan No. 1) although these two people are referring to a period prior to 1990. Four others mentioned the path was used by children who lived north of point D and attended the Infants School or Junior School. Alternatively to walk further than these schools either to attend Ysgol Gyfun located in the centre of Ystalyfera or to catch a bus to attend Cwm Tawe Comprehensive School. Other reasons for use included one who said he used to deliver mail in the area, one said to pick blackberries or nuts, and another said to walk the dog.

3.5 Five aerial photographs of the two fields have been obtained and dated 2000, 2004, 2009, 2012 and 2013. None show any obvious and worn path commencing at point A and proceeding in a northerly direction to

point D as claimed. There are some shorter lengths of track in the field but their points of termini start and end within the field, as opposed to starting and ending at points A or D. The 2009 photograph shows two paths commencing on the rear lane but not at point A, neither of which proceed to point D.

- 3.6 One of the previous tenants of the field between points A-D grazed horses during the period 1958-1968. She considered the lease required she and her husband to secure the land with a fence and to keep the culvert clear; they also installed a gate at point A in order to be able to bring their horses in and out of the field. This former tenant also said that the agents required them to keep access open through the field.
- 3.7 The applicant stated that the lease required all previous tenants of the field, of which he thought there were at least three, to provide stiles at both points A and B so that the public could pass through. However the agents for the previous landowner prior to its sale in 2010 stated in 2016 that there was no provision in the lease for public access.

B-D

- 4.1 The second entry point identified in the application is positioned to the north east of where a small stream joins the lane. Nineteen people identified this access point on their user evidence forms. Of those interviewed two said there used to be a stile at this location, one could not recall when it disappeared, the other said it remained in place into the 1990's.
- 4.2 The reasons for using this path duplicate the reasons given for walking A-D. However, if the stream referred to, was in full spate walking from point B would avoid the need to cross over the stream if walking from point D.
- 4.3 The five aerial photographs mentioned in paragraph 3.5 above, all show a worn area of ground at about point B. It is possible to make out a path extending to point D in those photographs of 2004, 2009 and 2012, two of which being within the relevant period. Vegetation does partially obscure the path where it lies close to point D.
- 4.4 Seven of those interviewed said there was a stile at this point but none were clear as to when it disappeared.

The Path D-C

All thirty five claimants have identified this route. Six people said there was a stile at point C, and two said it was a kissing gate. The precise line of this claimed public footpath is particularly well shown to its full extent in the 2004 aerial photograph. This line has been used to show its alignment on the plan attached to this report. There is no discernible variation to that alignment by superimposing the path depicted in the other four aerial photographs. The thirteen who were interviewed stated the path varied little over the time they used the path.

Points B₁-D

- 5.1 A third access point from the rear lane at B₁ has been identified by nine people on their user evidence forms. Four said there was a stile positioned just south west of the point the stream meets the lane. One said it remained here throughout the 1990's, another stated it lasted into the 1990's, but was no more specific.
- 5.2 Two of those people made use of this access point either from the rear of their properties and two did so in the context of visiting their relatives whose houses also enjoyed rear access onto the lane. For the remaining five it was their preferred access point. According to two, it was the only access point into and out of this field as they did not recall seeing any gate or stile at point B.
- 5.3 The applicant stated that this stile was installed prior to 1985 by a resident of Clare Road so that he could access the field to burn his garden rubbish. He also thought this stile fell into disrepair by about 2010. However the applicant does not consider this to be the correct starting point for either of the two public paths.
- 5.4 No worn line or path appears at point B₁ on any of the aerial photographs.

Summary

- 6.1 Five people when interviewed said they only used the access at point A and that there was no other access available. Three conversely did not recognise any access at point A, but only used the access at B₁.
- 6.2 Twenty six have supported the path commencing at point A, nineteen support access via point B and nine via point B₁.

Evidence against the Application

- 7.1 Of those thirty six who originally supported this application, six can no longer continue to support this claim (five are deceased and one no longer at her former address) leaving thirty claimants. Of these, nine can access the paths, whether it be via A, B or B₁ from the rear of their properties on Clare Road.
- 7.2 The agent acting for the landowner has indicated that when her client purchased the land to include this rear lane, the residents of Clare Road were informed they had permission to access their properties from this lane.
- 7.3 One supporter of this claim but who does not live in the area, also makes use of the rear access from a property on Clare Road when visiting his relative. Another four people can access the first field (A/B-D) directly from the rear of their properties on Allt Y Grug Road. This means there is no reason or need for these fourteen to commence walking the path from a public highway. As such their use cannot be regarded as representing the public at large as other members of the public could not access the path from those properties. Their use is more akin to the enjoyment of a private right. Therefore in terms of providing user evidence, their contribution would have to be discounted. Nonetheless, their evidence of the existence, condition and position of the path, location of stiles, gates, fencing and the history of the site would be relevant.
- 7.4 The second issue is to consider whether the remaining sixteen who have supported the claim can also be said to represent the public at large. The question being whether they would constitute a special user group as defined in more detail in Appendix 3. That is a number of people who whilst they may not access the path directly from their houses, still live in close proximity to the path which is the reason why they would use the path rather than some who live further away.
- 7.5 There are some three persons who fall into this category, this leaves thirteen although there is another person as part of this thirteen who uses the path to visit relatives but it is not known whether he also accesses the path from the rear of one of the houses on Clare Road.

- 7.6 Of the thirteen, four were interviewed, (six were also asked several times but did not respond). However, only two of those interviewed claim to have accessed the path via points A and B as specified in the application, the other two said they had walked via point B₁ and were unaware of any other access point into the field from the lane to the rear of Clare Road.
- 7.7 So out of the thirty six people originally supporting this application, only two people who could be said to represent the general public in their user evidence and who after being interviewed can provide first hand evidence of their use of the two paths that have been made the subject of this claim.
- 7.8 The current landowner stated that when she purchased the land it was overgrown and she replaced the dilapidated fence by the one that is present today. She understood from the agent for the previous owners that no horses had been grazed on the land since 1997 which is why the vegetation grew to the extent stated and the land became inaccessible.
- 7.9 She also noted that on her purchase of the land someone cleared the lane between points E and A to take their 4 wheel drive vehicle this way, so that even this length of path was inaccessible in 2010.

Other Evidence

- 8.1 One witness said her daughter used the paths to gain access to the two schools at the end of Clare Road as well as to catch a bus to travel to one of the Secondary Schools. This daughter also provided that evidence from 1997 – 2003. Another recalled doing so when he was young but before the relevant period and three others said it was used by pupils for this purpose.
- 8.2 Four people stated that there were metal footpath signs both at point E and C although no one can recall when they were either moved or fell into disrepair, nor for how long they existed. This does not in itself establish whether a public right exists but suggests that whoever was responsible for installing these signs assumed such a right did exist. Alternatively it is also possible that the signs were removed by the previous landowner on the basis that no such right did exist.
- 8.3 The applicant and one other long term resident wished to point out that the claimed public path forms a continuation of public footpath No. 161 which connects Allt Y Grug Road to Clare Road. Footpath 161 itself

also provides a further extension from footpath 161 to Millborough Road. These two paths are shown on plan No. 1. It has been suggested therefore that it is only logical that the claimed path be considered.

- 8.4 The Local Member has also confirmed that he assumed the path E-A1 was an extension of footpath no 161 and given he lives adjacent to the field A-D has used the section of path E- A1 regularly since 1997 to access his house. However he has not used any of the paths claimed A-D-C nor B1-D-C and B-D-C. He is also not aware of the public using the gate at point A but also wished to add that he recalls a metal footpath sign at about point E.

Conclusion

Route E-A-B-D-C

- 9.1 Whilst thirty six people originally supported this application seventeen have to be eliminated as witnesses who can provide user evidence, leaving twelve or thirteen who could represent the public at large.
- 9.2 Only two of those who would be interviewed out of the four who responded could show sufficient long term use of the paths as claimed during the relevant period (i.e. A/B-D-C and A-D-C).
- 9.3 In addition there are nine other potential witnesses who could be said to represented of the public at large but have not responded to requests for further information.
- 9.4 There is some further evidence that these paths were used by school children (one witness could testify to her use as a pupil from 1997-2003).
- 9.5 Metal footpath signs at points E and C, the location of stiles at point C and the paths continuation from footpath No. 161 provide some supporting evidence.
- 9.6 Further evidence of the use made by those living close to the paths said the paths were easy to access until 2010, confirmed the evidence of others including school children using the path also gives some weight to the validity of this application. Also confirmation of the existence of stiles at points D and C.
- 9.7 The landowner's contention that the fields and the lane (E – A) were overgrown is evidently disputed by the claimants; particularly all those

interviewed. The aerial photograph taken in 2012 does show a route along most of the line of path as claimed via B-D. The photograph cannot reveal information as to what existed under the canopy of trees nearer point D. A route is clearly seen from the 2009 photograph, suggesting people were making their way via this path even if as suggested, the vegetation had not been grazed or trampled by horses since 1997.

9.8 The test to be applied in considering whether to agree to the application is to consider whether it is either:

- a) “Reasonable to allege a public path exists” as highlighted in subsection to the 1981 Act (Appendix 1). This is less onerous than having to decide if;
- b) A public path exists on the balance of probability.

The evidence of the additional nine people would be required if the matter was to be tested at any subsequent tribunal, but it is difficult to avoid the conclusion that uninterrupted access has been enjoyed throughout the period claimed via this route. Therefore it is recommended that a modification order should be made to show the path E-A-B-D-C on the Definitive Map and Statement.

Route A-D-C

There is less consistency with the evidence particularly as three have stated they do not recall any gate or stile at this location. One of the two interviewed who would represent the public at large said the gate was positioned opposite the lane (or at A₁) rather than a point A. There is no indication from the aerial photographs of a clear defined line. Given a path is shown for the route B-D-C, it appears inconsistent that nothing similar is shown for A-D.

Whilst it is evident use has been made of a route from A-D it is unclear if the same line has been in use or whether there has been some variation to the route used between points A and D.

Therefore on the basis the evidence is less consistent and that no single route can be seen from the aerial photographs, it is recommended that no modification order be made to include the length of path A-D in the Definitive Map and Statement.

The Path B₁-D-C

This path (effectively B₁-D) was not the subject of this application. Three people who were interviewed said they had used this access and six others had identified this on the plan attached to their user evidence forms. According to the applicant, one resident placed a stile in the fence so that he could take his garden waste into the field. One of those claimants is deceased but only two users could be considered as representing the public at large in total and one of whom was interviewed. Consequently there is insufficient evidence to show this was used by the public, given the better established access point a matter of 3-4 metres away at point B on the other side of the stream. Therefore no modification order be made for this section for the reasons given

Recommendation

That a modification order be made to recognise a public footpath between E-B-D-A-C and if no objections are made to confirm the same as an unopposed order.

Reasons for the Proposed Decision

A modification order should be made for the length E-A-B-D-C on the basis that it is reasonable to allege such a public path exists;-

- (a) There are sufficient numbers of witnesses who could represent the public at large.
- (b) Evidence that it is a route used by pupils attending the former Infants school and Ysgol Gyfun and Cwm Tawe schools
- (c) The aerial photographs supporting the existence of the claimed public path.
- (d) The previous existence of a metal footpath sign at either end of the path, at points E and C.
- (e) The lack of any evidence that establishes that access was not possible during the relevant period nor that measures were taken prior to 2010 to inform the public that no such right of access existed.

No modification order should be made for the route A-D as there is less consistency with the evidence on what structure existed at point A, no evidence from the aerial photographs of a path linking the two points (even though there is clear evidence of the route from B-D,) and that it is unclear if the same line was used between these two points.

Similarly no modification order should be made for the path B1-D, given the applicant does not consider this is the correct starting point for the path, no worn line appears on the aerial photographs. It is unclear whether the stile remained in place during the 1990's but in any event was absent by 2000

Consultation

The item has been subject to extensive consultation.

Appendices

Plan No.1
Appendices 1-3

List of Background papers

M08/10

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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

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.