

# **NEATH PORT TALBOT COUNTY BOROUGH COUNCIL**

## **REGENERATION AND SUSTAINABLE DEVELOPMENT CABINET BOARD**

**Date: 12<sup>th</sup> April 2019**

### **REPORT OF THE HEAD OF LEGAL SERVICES – C.GRIFFITHS**

#### **MATTER FOR DECISION**

#### **WARD AFFECTED: SANDFIELDS EAST**

#### **ALLEGED PUBLIC FOOTPATH FROM DARWIN ROAD TO NEWBRIDGE ROAD COMMUNITY OF SANDFIELDS.**

#### **Purpose of the Report**

- 1.1 To determine an application which alleges a public footpath exists alongside part of the estuary, commencing on Newbridge Road at the point it meets the pedestrian bridge which is currently closed, before turning into the land occupied by the Greenstar rugby club. Shown on plan no.1 by a broken line A-B-B1-C.

#### **The law**

- 1.2 The application has been made under the provisions of the Wildlife and Countryside Act 1981 and a copy of the relevant provisions are reproduced at appendix 1.
- 1.3 There are sixteen people who support the application, ten of whom each claim to have walked this path for at least 20 years and that there has been no interruption during that period of use.
- 1.4 For the purposes of this report, it should also be noted that under Section 31 of the Highways Act 1980 (reproduced at Appendix 2) any minimum period of uninterrupted use of 20 years could give rise to the

presumption that the owner of the land has dedicated the way to the public.

- 1.5 In addition to the statutory provisions referred to above, there are provisions under the common law where any period of use whether it be more or less than 20 years could be deemed sufficient to establish that there has been a dedication of a public right of way. However there needs to be evidence of positive action by the landowner that shows there was an intention to dedicate and that the public have used the route which is consistent with an acceptance of that dedication (for the common law provisions please see Appendix 3).

### **The application**

- 2.1 Turning to the application, one point of termini is at the entrance to the Green Stars Rugby Club and its playing fields on Darwin Road (shown as point A on the plan no.1). This is accessed via a large vehicular gate and an adjacent small pedestrian gate. The route follows the tarmacked access road and adjacent footway to pass between the rugby clubhouse and the 11<sup>th</sup> Port Talbot Scouts Group clubhouse before passing through another pedestrian gate (point B). The path continues via the tarmacked joint cycleway and footpath before terminating at the junction of Newbridge Road and Darwin Road (point s B-B1C). The section of path B-C forms part of the Wales coast path even though it is not registered as a public right of way.
- 2.2 An objection has been made to this application by one of the local Ward Members who also represents the Greenstars rugby club. A letter setting out the club's grounds for objecting was sent by another member of that club and this is shown in Appendix 4.

### **3.1 Tests to be applied are as follows**

- 3.2
- (a) Whether there has been a minimum period of twenty years uninterrupted use prior to the first occasion the public's alleged right to use the path was called into question. This is known as the relevant period and is calculated counting retrospectively from this date. If there is no evidence of such an occasion, then the

date of the application itself will count as the end date for the twenty years;

- (b) Whether as outlined in paragraph 1.5, there is evidence of common law dedication.

3.3 Issues such as the convenience of a path, or whether it would provide a useful amenity or be of recreational value to the public are not grounds for recognising the path as a public one. Conversely, if the registration of this path were to prove an inconvenience or problematic to the owners of the land, this would also not be a relevant consideration. It is a question as to whether the applicant can show a right of way exists: the letter submitted by the Greenstars Rugby Club list their concerns associated with the possible recognition of this path as a public right of way. Nonetheless that letter does not provide any evidence as to why the public have not been making use of this path for the requisite period. The relevant tests are as follows:-

Whether a public right of way can be shown to exist;

- (a) on the balance of probability; or
- (b) that it is reasonable to allege one exists.

In the case of (b) this means the Council has to conclude there is sufficient evidence to justify making a modification order, rather than conclude such a public path does exist. It is therefore a less onerous test to satisfy.

If a modification order were to be made this would be subject to a period in which objections could be raised in respect of it. If objections are made to an order, the matter would have to be referred to the Planning Inspectorate for determination. If the Planning Inspectorate determines in favour of making the order, the order would then be confirmed and subsequently registered as a public path.

### **Land Ownership**

4.2 This Council owns all the land affected by the application and leases the land containing the length A-B to the Trustees of the Aberavon Green Stars Rugby Football Club. At point A there is a notice stating

“Little Warren Playing Fields”. At point C there are footpath and cycling notices with the 2 metre wide path divided by a white painted line. This length C-B is still managed as well as owned by this Council.

### **The Evidence**

- 5.1 The application was made in 2016 due to the pedestrian gate at point B having been locked at this time, according to two of the supporters of the application, and one of the Local Members. This coincided with the time the Green Stars Rugby Club took on the lease. However three supporters have said they have not found it locked much, at most only 2-3 times per year.
- 5.2 According to the six supporters to this claim who have been interviewed, the smaller pedestrian gate at point A has never been locked. According to four people the larger vehicular gate alongside has been locked with two suggesting more recently. Two other people have said that this larger gate has been locked periodically to prevent some local residents from using the club car park. One of the Local Members stated it has been locked every evening since September 2016 as a result of a request by the Police in order to deter acts of vandalism.
- 5.3 If the date of 2016 is the first occasion the public’s alleged right to use the path was challenged by the locking of the gate at point B then the relevant period would be 1996-2016. If so, ten people have each claimed to have used the route A-B for at least twenty years counting retrospectively from 2016.

### **Possible Relevant Period 1996 – 2016**

- 5.4 No exact date has yet been found from this Council’s records as to when the path B-C was set out, although according to one officer and also one resident it was 2005. The aerial photograph establishes it would have been after 2004 but before 2009.
- 5.5 Prior to the construction of the joint cycleway/footpath there were two paths running alongside the estuary in approximately the same location. One was positioned via a slightly different alignment as can be seen on plan no. 2 and shown as a bold black line, B-B3-B2-B4-C1-C .6 The aerial photographs of 2000 and 2004 show this earlier path more clearly but also a path at a higher level running alongside the playing fields via

B3- C1. This is why the connection to the access at point B, was via a number of short routes from the lower path situated slightly south west of point B1 passing up a steeper gradient than the current cycleway/pedestrian paths. These four routes are also shown on plan no.2 again as bold black lines, a fifth is highlighted as B2-B3.

- 5.7 In order to satisfy the provisions of S.31 of the Highways Act 1980, it is necessary to consider that length of path that was available to the public for the full twenty year period. Whilst the position of the path between A-B was unchanged throughout 1996-2016, it did vary from point B as its alignment between 1996 and 2005 proceeded to this earlier path from B-B2 or via the other four routes as mentioned. However the change in the alignment of the path in 2005 to the newer cycleway did not call into question the existence of the earlier path as it was not obstructed or removed. The result was to offer the public a newer path constructed to a higher standard which has since been used.
- 5.8 The position under common law is different to the test under s31 of the Highways Act 1980, in that whilst the path used after 2005 (B-B1-C via the broken line) was not subject to a minimum of 20 years use, it was specifically constructed for use by the public, whereby the notice at point C with its clear demarcation for dual cycling and walking and its more gradual gradient to the gate from B1 – B, was a clear invitation to the public to make use of this path. Since its construction the public accepted and have made use of the path until the present day. Consequently this provides good evidence of an express dedication by this Council under common law for the length B-C shown on plan no.1. The result was to provide better access into what was known as the Little Warren Playing Fields, in 2005 still managed by this Council until it leased the land to the Green Stars Rugby Club in 2016.
- 5.9 There is further evidence from three supporters, two of whom indicated the surface of the length of path A3-B, was tarmacked as a result of the intervention of a previous Local Member. This has been estimated to have been around 2009. This action enabled a less abled person to use the path in a wheelchair, given it was often muddy. This provides further evidence that this Council was also improving access for the public to pass in and out of what was the “Little Warren Playing Fields”.

- 5.10 Paragraph 3.2 refers to the basis upon which a modification order can be justified, that is:
- (a) whether it can be concluded a public path exists on the balance of probabilities; or
  - (b) whether it is reasonable to allege one exists.
- 5.11 The evidence shows the Council improved access alongside the estuary via B-B1-C, shown as a broken line in plan no.1
- 5.12 Within the grounds of the rugby club the Council also improved the surface of the shorter length of path A3-B and previously provision was made for a pedestrian gate at point A. Evidently this allowed the public to pass through the site when the main gate at point A was locked. This establishes access has been available throughout the period 1996 – 2016.
- 5.13 Consequently to satisfy the provisions of section 31 that there has been a route that was in continuous use between 1996 and 2016 would require recognition of the length A-B-via the broken line and thereafter via B-B3-B2-B4-C1-C via the bold line as shown on plan no.2.
- 5.14 Regarding the more recent path via B-B1- C via the broken line, this route can be shown to have been dedicated under common law for the lesser period from 2005 – 2016.
- 5.15 In conclusion there is sufficient evidence that the path as claimed A-B-C (plan no.1 ) has been dedicated to the public by the Council and accordingly a modification order should be made at the very least on the basis that it is reasonable to allege such a public path exists. That order would recognise access commencing at the pedestrian gate at point A and following the accommodation road and footway alongside and up to point A3, (plans no 1 or 2) thereafter via the single narrower path between point A3 and B before following the joint footpath and cycle path between points B and C shown on plan no.1, (or via the broken line between points B –B1-B4 and thereafter via the bold line from B4-C. as shown on plan no.2)

**Relevant Period**  
**1985 – 2005**

- 6.0. When the newer path B-C was set out in 2005 according to three supporters this coincided with the occasion the perimeter fence enclosing the playing fields was installed, which obstructed access into and out of the site at point B. Four stated the access was obstructed by this fence but two said a gap appeared shortly afterwards, with a section of the fence having been removed. One person thought this was done by members of the public. Two people however estimate this fence was installed closer to the year 2000.
- 6.1 It is possible these two possible earlier dates could be taken as the first occasion the existence of the alleged public path was called into question which would move the relevant period further back to either 1985 – 2005 or 1980 - 2000. There are six people who could each claim to have made use of this path throughout the whole of this period, 1985 – 2005, three of whom have been interviewed to include the earlier path running north from B3 – B2 –B4 – C. If the earlier date for when the fence was installed was 2000 then there are 5 persons who would claim to have been walking this path for the whole of this period, 3 of whom have been interviewed.
- 6.2 It is evident that throughout this earlier relevant period whether 1980 – 2000 or of 1985 – 2005, the public have enjoyed uninterrupted access via the route A-B-B3-B2-B4-C, shown on plan no.2, whilst part of this path is no longer in existence; the route has nonetheless acquired legal status.
- 6.3 It is also the case that when this perimeter fence appeared two persons stated that a section of this fence was removed (by persons unknown) to enable public access and that accordingly the public re asserted its right to continue to use the path. If this was the case, the appearance of this fence would not therefore have called the existence of the right of way into question.

## **Conclusion**

- 7.0 The two paths B-C and B-B3-B2-B4-C1 (apart from where they merge north of point B4) are shown as being approximately 5 metres apart. The length B-B3 was at its maximum 28 metres distant from the current path. A 5 metre variation to the alignment of these paths is more than what would be considered di minimus and so it cannot be said that the paths are one and the same.

## **Recommended**

- 7.1 Given the newer path B-C (plan no 1 ) is now the preferred and used route, it is recommended that this length be made the subject of a modification order as specified in 5.11 above and if no objections are made to confirm the same.
- 7.2 Secondly for the sake of completeness the earlier route B-B3-B2-B4 (plan no 2) via the bold line, has to be given legal recognition but be the subject of an extinguishment order on the grounds it is no longer needed for use.
- 7.3 The Welsh Office Circular 3/93 ( still in force ) advises that where it is agreed between the users of a path, the landowner and the Council that a path is not the most suitable, it does not have to be entered into the Definitive map before it is diverted.
- 7.4 In this case it is recommended that both paths should be accorded legal status and so whilst there are grounds to add the length B3-B2-B4 via the bold line to the Definitive map, it is suggested that it be made the subject of an extinguishment order, rather than first being included into the Definitive map before being extinguished. It is not possible to divert a path on to an existing public path and so it would be necessary to extinguish the path B-B3-B2-B4-C as it is no longer needed for public use.

## **Proposed Extinguishment of the Path B - B<sub>3</sub> - B<sub>2</sub> - B<sub>4</sub>**

- 1.1 Under the provisions of Section 118 to the Highways Act 1980, a public path may be extinguished provided:
- (a) the path is not needed for public use.
  - (b) consideration is given to the extent the path is likely to be used by the public, taking into account the land that is served by the path even if the Order is unopposed.

It is a two stage test so that even if it is agreed the path is not needed before this Council decides it could confirm an unopposed order, it should give due regard to the (b) above.

- 1.2 Since 2005 the public have made use of the path set out by this Council. Secondly the earlier path as shown by the bold line has been abandoned and no longer in existence. Therefore condition (a) above can be satisfied.
- 1.3 There is no reason to assume this earlier path will ever be used in the future, particularly as part of the path was in close proximity to the current one.

### **Recommendation**

- 1.4 It is therefore recommended that an extinguishment order be made under Section 118 of the Highways Act 1980 for the length of path B-B2-B4 shown on plan No. 2 and if no objections are made to confirm the same as an opposed order.

## 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**

### **COMMON LAW DEDICATION**

Consideration must also be given to the possibility of the path having been dedicated under common law. In these circumstances there are two elements:

Firstly there must be evidence of positive action on behalf of the owner that clearly shows an intention to dedicate. Secondly the public must use the land in a manner consistent with the intended use of the land in a manner consistent with the intended use of the dedication. Such a dedication is not reliant on statute and therefore a greater or lesser period of 20 years can be sufficient.

Evidence therefore of the owner setting aside land for the use of the public and of such a character that the public could not but believe that there was an intention to vest that route in the public, so that use by the public and maintenance by the owner is a strong indication of such a dedication.

The current path was set out as a dual cycleway footpath, tarmacked, in effect replacing the earlier earth path from approximately 2005. As indicated the public were already making use of the earlier path on Council owned land and so inevitably the public having been being invited to use this newer improved path did so, from at least September 2005.

The addition of notices situated at points B1 and C promoting the route is consistent with the presumption that the path was being given over to the public.

This therefore provides good evidence of an express dedication by this Council particularly in the absence of any notices clearly stating that there was no intention to dedicate the path nor has there been any clear indication given to the public that their use was by consent.

## APPENDIX 4

We are a community club that's run by volunteers with very little income. Part of the lease conditions are that we maintain the building and surrounding grounds which includes the maintenance of perimeter fence, gates, car park and everything inside that perimeter.

Ninety percent of the time the gates are left open to the public and we endeavour to control some of the daily issues that we encounter.

By making this a public right of way we would lose the ability to sometimes control the right of access.

We have a huge litter problem with people disposing of their litter and dog waste indiscriminately.

We have a huge problem with dog mess on the grounds where children play daily.

We have to deal with 'joy riders' who race around the car park, we have to deal with youths who use the grounds for drug abuse.

We have to deal with vandalism of the premises and surrounding area.

As stated previously, we are also responsible for the maintenance of the perimeter fence which has already been damaged by some residents to allow themselves access to the playing fields.

In the coming months we must spend more than £4000 to repair and maintain the playing surfaces.

We will need to control access to these areas for a period of 10 weeks, without the ability to lock the gates this would become impossible.

We strongly object to the proposal of making this a public right of way but will always endeavour to make access available to the public whenever possible.

If this proposal was to go ahead we feel that we would no longer be held responsible and liable for the full maintenance of the facility.