

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

Date: 22 June 2018

REPORT OF THE HEAD OF LEGAL SERVICES – C.GRIFFITHS

MATTER FOR DECISION

WARD AFFECTED: GLYNNEATH

**ALLEGED PUBLIC FOOTPATH ALONG THE PATH TO THE REAR
OF HOUSE NO'S 11 TO 22 PARK AVENUE AND NO. 8 EARLSFIELD
CLOSE - COMMUNITY OF GLYNNEATH**

Purpose of the Report

- 1.1 To determine an application which alleges a public footpath to the rear of Park Avenue as shown on the plan between points A-B-C.

Background

- 2.1 On the 15th February 2016 an application was made under the provisions of the Wildlife & Countryside Act 1981 (Appendix 1) to recognise the path shown A-B-C as referred to above.
- 2.2 The application was supported by 11 people. Subsequently of these one of these people withdrew their support. Interviews were conducted with the other supporters but only 6 were able to give their periods of use.
- 2.3 Subsequently, a further 4 people came forward and were interviewed, but only 2 of these were able to specify their periods of use.
- 2.4 The other 3 people were asked to provide further information but did not respond. In total therefore, of the 10 people interviewed, 8 allege an average of 27 years use of the path.
- 2.4 The path is situated to the rear of house numbers 11-21 Park Avenue, shown at points C-B and the remaining section A-B lies between the two houses of 8 Earlsfield Close and 22 Park Avenue and the perimeter

fence of the tennis court. The path is obstructed by a shed and fence at point B and a double gate at point A, the length A-B having been incorporated as a garden into No. 8 Earlsfield Close. Point A joins the adopted Earlsfield Close and point C connects to a public footpath which was the subject of modification order 1/15 and confirmed in 2015.

The Twenty Year Relevant Period

- 3.1 The burden of proof is on the applicant to establish such a right exists and in this particular claim, that there has been a minimum period of 20 years uninterrupted use enjoyed by the public at large. This is calculated by counting retrospectively from the point in time the path's alleged public status was brought into question. There is evidence the path was closed by the installation of gates and fences. Section 31 of the Highways Act 1980 (Appendix 2) deals with this aspect of the law.
- 3.2 Accounts as to when the path was first obstructed vary between those asserting the right of way as well as the date given by the objector and a different date given by another independent witness.
- 3.3 The applicant initially said the path first became blocked in the late 1990's by a fence at point B, but subsequently revised that estimate to 1992 after having spoken to other residents.
- 3.4 One supporter considered the path first became blocked in the early 1980's. Another stated 2007, but said prior to that date it had become increasingly difficult to use. The local Member stated the path has been inaccessible for around 30 years.
- 3.5 Another supporter first became aware the path was blocked in 1984 when he returned to the U.K. from living abroad, but his last regular use appears to have been closer to 1974.

All of the people referred to above were part of the 8 people interviewed

The Objector

- 4.1 The sole objector who lives at 8 Earlsfield Close has been granted possessory title of the path A-B, although she purchased No.8 Earlsfield in 1976 before moving into that house in 1977. It is not known who owned the land A-B prior to this date as no proof of title has been produced. (Paragraph 8.2 refers to a document produced by the

applicant, which asserts the land has been under the ownership of the Welfare Trust since 1927).

- 4.2 The objector has stated there was a locked gate at point B on her arrival in 1976 and the path overgrown. There is an undated photograph of the lane purported to be of 1979 showing the clearance work and what appears to be a timber boarded fence at point B.
- 4.3 A set of gates is shown on a photograph at the western end of the path at point A taken in 1984 which it is said were in situ by 1980. In the photograph the path is shown as tarmacked and fenced.
- 4.4 By 1996 the tarmac is said to have been removed and replaced with red bricks set into the ground with a new set of gates at point A.
- 4.5 A photograph which is said to be taken in 2001 shows a private social gathering taking place in what has become a small area of garden. Further extensive planting of shrubs, flowers with hanging baskets and a brushwood fence attached to the tennis court fence is shown in a photograph presumed to have been taken after 2001.
- 4.6 In summary the objector contends this path was already obstructed in 1976 and has maintained and developed a private garden area ever since.

Evidence from an Independent Witness

- 5.1 A resident of Earlsfield Close has provided an account of her use of the path when it was first closed in 1972. According to this witness a chain and lock had been placed across a kissing gate which was in position at point A. This was done by the previous owners and occupiers of 8 Earlsfield Close, as this witness attempted to confront one of the owners. The date is considered accurate by this person as that summer she was no longer able to take her children to school on account of a job offer. Her relatives continued to take the children via a different route until 1978, thus corroborating the account of the present owner's contention that the path was already closed by 1976.
- 5.2 The applicant contends the kissing gate was at point B, as the then occupier of 8 Earlsfield Close had consent from the Welfare Trustees to drive their car along the claimed path to access the garage, which according to the applicant was positioned at point B. (A site visit has revealed the remains of an old metal railings at this point.) When this

lock and chain was placed on the kissing gate, the occupier of No. 8 at that time, was told by a member of the Committee of the Welfare Trust to remove the padlock. This contradicts the account in paragraph 5.1 above that there was no access via the path after 1972. It also does not explain why, if the Welfare Trust were the owners at that time, no claim to record their title has been made to the Land Registry.

- 5.3 Even if use of the path had resumed by the early 1980's as suggested by two supporters, it is the first occasion the public use of the path is brought into question is what determines the relevant period for the purposes of calculating whether there has been a statutory dedication. Therefore the relevant period is 1952-1972 and it is within this span, that continuous uninterrupted use would have to be established in order to justify recognising the path as a public one. The periods of use given by those who were interviewed is set out in Appendix 3. There are only two people who claim to have started walking this path by 1952. (Person B and E).

The Earlsfield Housing Development (Western End of the Path point A).

- 6.1 Accounts provided by 3 people would suggest the land containing houses 1-8 Earlsfield Close was cleared in or around 1962, with house numbers 5-8 first being built in 1963 (according to two people) and the last to be built being number 2 which was allegedly completed and occupied by May 1964. This account given by the independent witness has also said that when the houses were under construction for a period of 18 months, it would not have been possible to walk from point A to Park Avenue. Two claimants however disagree when asked if this would have been the case.
- 6.2 A public path must reflect a single and clearly identifiable route. It should therefore not vary and should remain the same throughout the 20 year period, given there is no right to wander over land.
- 6.3 The claimed public path did not link to another public highway at point A until Earlsfield Close was not only built, but adopted. However it is clear that the basis of claiming the path A-B-C is based on continuing to Park Avenue. Until Earlsfield Close was built by the mid-1960's, access would have been via a different route. Three people have stated access from point A to Park Avenue before Earlsfield Close was built was, different, one said via a more diagonal line.

- 6.4 On the 1962 edition of the Ordnance Survey Map the current houses at Earlsfield Close are absent. The Map shows a path following the southern boundary of the tennis court and bowling green before joining Park Avenue at point F. This path is shown on the attached plan F-A by a bold line.
- 6.5 According to two people the area immediately adjacent and to the south of this path F-A was grass and bounded by a hedge where it was adjacent to Addoldy Road and Park Avenue. However another person considers the hedge may have been a wall although all agree there was a gate at point F. The applicant stated there was a grass tennis court on this area of ground bounded by a 1'6" wall on the park side and the wall topped by a Hawthorne hedge alongside Park Avenue.
- 6.6 So the path in use within the relevant period 1952 – 1972 did alter and possibly was even inaccessible for some of the 18 month period the houses were being built. The path available to the public was from point D-F from 1952 until approximately 1963 and thereafter via Earlsfield Close to point A and then on to Park Avenue. Therefore there was no uninterrupted access of one single route.

Access east of the path from point C- G, C- H, C- I, C- J

- 7.1 In 1962 the path leading from Park Avenue north to Gelliceibryn (G-H) was not registered as a public right of way. The evidence that was considered which lead to its recognition, resulted in the confirmation of a modification order in 2015.
- 7.2 The relevant date for the determination of this modification order in 2015 was 1984-2004. So under the statutory presumption that there was a dedication of the path G-H to the public, the evidence did not show such a public path existed prior to 1984. There was evidence of some 43-44 years average use of the path counting retrospectively from 2004, which would take their commencement date back to 1964. Also a few people did indicate they had used the path as earlier. Nonetheless it is not clear whether that evidence would have been sufficient to show the path was dedicated under common law nor how many of those earlier users could now be relied upon. Common law dedication is the alternative means by which it is possible to presume a landowner could dedicate such a right to the public. Appendix 4 summarises the criteria which would have to be satisfied in order to draw such a conclusion.

- 7.3 It is also clear that those who are still in support of the present application in the period 1952-1972 were using the path A-B-C as a means of accessing the former Welfare Hall and the football ground neither of which are on public highways. In addition use was also claimed as continuing from point C to reach the schools either via Robert Street C-J or via a path C- I, also shown on the attached plan.
- 7.4 It is therefore not known whether point C was joining a public highway during 1952-1972. Whilst the applicant contents the track/road G-C-H has been a road wide enough for two vehicles, it was not adopted as a carriageway during the relevant period nor is it adopted at the present time. So this track or road was not recorded as a public highway by 1952. Given there is no evidence it was a public highway at this earlier time the route/s taken by the claimants would have to specify points other of termination. This would be necessary to consider if one single route east of point C would satisfy one of the conditions that the claimed public path should terminate on another public highway. In the case that would be to either of the points G, H, (that is Gelliceibryn), I or J.
- 7.5 It is possible for a public path to terminate at a point at a place of public resort but there is no clear evidence as to where that place was by 1972. Accounts vary as to whether people were making their way to the former Welfare Hall, the football ground, the park or to the schools further east. Secondly none of these places were specified in the application.
- 7.6 Appendix 3 shows that there are only 6 people who can show some use within this relevant period 1952-1972, although one of these used the path to visit his grandfather in Park Avenue and also to access the football ground. One of the 5 did not start using the path until 1970. Also there is only one person who can show use throughout the full period of 20 years. As such this is a very low number of people to reflect use by the public at large.

Other Evidence Submitted by the Applicant

- 8.1 The applicant has suggested that the notation F.P. written alongside the claimed public path on the 1962 edition of the ordnance survey implies the way is public. The ordnance survey were tasked with recording all topographic features including buildings, but were not authorised nor did they attempt to establish the status of the tracks. The only plan that is authorised to identify the known position of public highways is the Definitive Map and a Council's adoption records known as the list of streets. Consequently this ordnance survey from 1962 is simply

recording the position of a footpath and should only be interpreted as confirming a path was in existence by that date.

- 8.2 It is also contended by the applicant that the objector and owner of No. 8 Earlsfield has no title to the land containing the length of path A-B as it is under the ownership of the Aberpergwm Estate and therefore cannot obstruct or prevent the use of the path. However the objector has possessory title to this strip of land and the Aberpergwm Estate have stated in their letter dated the 4th April 2018 that they are unaffected by this application. In addition, case law has established it is not necessary for the owner to call into question the existence of an alleged public path.

Consequently the current and previous occupiers of 8 Earlsfield Close were entitled to close the path and challenge those wishing to assert their rights of passage.

- 8.3 The applicant contends the installation of gates and fences is a breach of a covenant set out in a conveyance of the 28th February 1927 to the Glynneath and District Miner's Welfare Association. A headed sheet produced by the applicant suggest the land was subsequently conveyed to the Neath Higher Parish Council in 1952 although there are no plans or copies of the deed. Also submitted is a schedule listing the history of the exchange of some of the land in this vicinity, showing the conveyance to that Council was for the purpose of building the swimming baths, which was situated to the east of the path near point I on the plan, (but no longer in existence).

According to the plan attached to the restrictive covenant the land includes the path A-B-C and provides "no building or erection of any kind shall without the previous consent of the vendor or his successors in title be set up upon the land hereby conveyed." The Aberpergwm Estate have confirmed that the land in question does form part of a restrictive covenant.

- 8.4 It is unclear whether the burden of this restrictive covenant falls to the current owner nor who has the benefit of this restrictive covenant. Nonetheless there is no obligation on this Council to enforce this covenant. There is case law which has established adverse possession of land cannot succeed by enclosing a public highway. However the path A-B-C is not registered as a public highway and its status is evidently in dispute.

Recommendation

That no modification order be made for this claimed public path.

Reasons for the Proposed Decision

That the current application be refused given:-

- (a) The path between point A and point F (Park Avenue) during the relevant period varied and so the same route was not in use to satisfy the minimum period of 20 years uninterrupted use.
- (b) There is no evidence that point C joined a public highway throughout the relevant period and so the claimed public path did not terminate on a public highway during the relevant period.
- (c) Also the application does not specify any other point east of point C as a place of public resort nor is there any consensus as to whether that point may have been during the relevant period.
- (d) The amount of people supporting this application within the relevant period is too low to be able to conclude that this can represent the public at large.

Consultation

The item has been subject to extensive consultation.

Appendices

Plan and Appendix 1-4

List of Background Papers

M08/64

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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 the 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 raises 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

Person	Period	Length of Use
A	1956 – 1974	18
B	Late 1940's – 1958	10
C	1953 – 1968	15 (D-E-A)
D	1970 – 1975	5
E	1945 – 1992	47
F	Early 1960's – 1974	3
G	1974 – 1983	9
H	1983 – 2007	34

APPENDIX 4
DEDICATION UNDER COMMON LAW

No minimum period of use is required, but the claimants must show that it can be inferred by the landowners conduct, that he or she had dedicated the route. User of right is not of itself necessarily sufficient, nor mere acquiescence by the owner. Under statute, twenty years, if proved to have been uninterrupted will be sufficient to show presumed dedication.

Under common law it is still possible that use was due to the landowners tolerance rather than because that landowner had intended to dedicate. Consequently there needs to be evidence that the landowner (or owners) for whatever period is being considered, not only acquiesced to that use but either directly or indirectly took measures to facilitate public use.

Obviously this means the landowners have to be identified and evidence that they wished to have the route dedicated to the public. For the right of way to be established, it needs to be shown that it has been used openly as of right and for so long a time that it must have come to the knowledge of the owners that the public were so using it as of right. Public user is no more than evidence which has to be considered in the light of all available evidence.

As a matter of proof at common law, the greater the length of user that can be demonstrated the stronger the inference of dedication will usually be.

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