

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

12th April 2019

REPORT OF THE HEAD OF LEGAL SERVICES –C GRIFFITHS

MATTER FOR DECISION

WARDS AFFECTED: BRYNCOCH NORTH

Application to upgrade footpaths no's 1 and 2 to a public bridleway, Community of Blaenhonddan

Purpose of the Report

To determine the application that has been made to upgrade the public footpaths shown on Plan No. 1 to a public bridleway.

Background

- 1.1 The application being considered in this report is to upgrade footpath No's 1 and 2 to a public bridleway. This application submitted by a local resident was made in 2017 is supported by 11 people who claim to have ridden this route for an average of 30 years. These supporters are therefore referred to as "claimants" in the report. It is the second time such an application has been made, the first having been reported to this Council's predecessor Council, West Glamorgan County Council on the 26th October 1995.
- 1.2 The earlier application was rejected but the applicant successfully appealed against that Council's decision, which resulted in this Council being directed to make a Modification Order. As required, notice of that order was published and as a consequence, thirteen objections were made, which resulted in a public inquiry being held on 24th August 1999. On the 21st September 1999 the Inquiry's Inspector refused to confirm the order, thus agreeing with that Council's original conclusion.

- 1.3 There remains however, a continual duty on this Council under the Wildlife & Countryside Act 1981, to review the entries in the Definitive Map and Statement and to take account of any new evidence together with any considered previously. The relevant provisions of the Act are contained in Appendix 1. Therefore, this second application must be assessed in the light of the previous information submitted in respect of the first application and the reasons for the previous Inspector's decision in 1999.

The Twenty Year Relevant Period

- 2.1 As the evidence in support of this application is based on long term use, the provisions of Section 31 of the Highways Act 1980 also apply in determining the application and these can be found in Appendix 2. Consequently, the applicant must either establish (a) there has been a minimum period of 20 years uninterrupted use counting retrospectively from the date the alleged existence of the public bridleway was called into question or (b) 20 years use retrospectively from the date of the application, but in either case whichever is the earlier.
- 2.2 In addition such a presumed dedication can only be inferred in the absence of any evidence that refutes the existence of such a right.
- 2.3 The date of the application is 2017, but the evidence from the previous conclusions reached by the Inspector was that the existence of the alleged public bridleway was challenged by a former occupier of one of the nearby properties, No. 3 Cwm Cottage in 1993, some 25 years previously.
- 2.4 The public inquiry was held in 1999 and so this earlier challenge and objection was sustained throughout this 6 year period (1993 – 1999). Consequently any use between these dates could not count toward the previous nor current application.
- 2.5 No statutory declaration denying the existence of a public bridleway has been received since 1999 from any of the owners or occupiers of the land containing footpath No's 1 and 2. Nonetheless the current five objectors who have a legal interest in the path would contend that no one has been able to ride along this path "uninterrupted nor as of right" from 1999.

Background to the Earlier Application

- 3.1 In order to properly assess the current application it should be viewed within the context of those facts that were established from the previous public inquiry.
- 3.2 The relevant period was deemed to be 1973 – 1993 as a result of the challenge made by the previous owner of No. 3 Cwm Cottage who by then had acquired ownership of part of the land. The crossing points were either via the footbridge, or fording the stream, that is, either between points X and Y, or between points Z and Y, shown on Plan No. 3. The precise crossing points appeared to vary, but more significantly the river bank protection works undertaken at point X in 1985/1986 prevented riders from crossing between points X and Y from this date and so riders then resorted to the longer more diagonal route between points Z and Y. This route Z – Y followed a shingle pebble bank situated within the stream and still exists today.
- 3.3 The Inspector concluded, that from the user evidence, no 20 year period could be found, as use via points X – Y, fell between 1973 – 1985/86 and via points Z and Y, between 1985/86 – 1993. In addition that the obstruction in 1985/1986 could not count as a calling into question and therefore it was not possible to calculate a 20 year period counting retrospectively from this date. These were works to prevent the erosion of the river bank rather than an act to specifically challenge the use of the path by horse riders. The Inspector quoted case law on this point and therefore concluded the 20 year period between 1973–1993 was interrupted by these river bank protection works.
- 3.4 There was also additional evidence from some earlier residents, for example a previous resident of Pitt Cottage between 1954–1967 shown as P on plan no. 2. He recalled assisting a local authority employee in about 1961 to build a barrier across footpath no. 2 near the disused airshaft. That air shaft is located at point B1 on plan no.2 which blocked access for riders which according to this witness remained there for many years. This and the other accounts of these earlier periods were considered relevant as the Inspector took account of those witnesses comments on the likely use by horse riders from the 1960's into the 1970's.

Current Application

- 4.1 The periods of use alleged by the claimants shown in Appendix 3. Whilst the user evidence forms were completed in 2016 and the periods of use appear to reflect use up until this date, the five who were interviewed plus another who submitted a more detailed written account show their use had ceased some years before this date. Therefore any use quoted in Appendix 3 to 2016 is by those who were not interviewed and simply a record of what was implied in the user evidence forms. In addition it is evident that none from this current application can show use from 1973 – 1993, and even then that would have needed to have been solely via the crossing between points Z and Y.
- 4.2 There has not been a period of 20 years since 1999 to find a statutory presumption of a dedication of this path counting retrospectively from 2016, even if access had been possible which is denied by the objectors. Consequently the application must fail for that reason alone.

Details of the claimed use for the current application

- 4.3 Those 5 who were interviewed said they use the diagonal route Z-Y, given it was a shallower crossing than X-Y.
- 4.4 At the site inspection at the public inquiry in 1999 the Inspector noted “a post and rail fence about 1.5 metres high (point Y) preventing access to the river downstream immediately by the bridge”.
- 4.5 So whilst the claimed bridleway was called into question by 1993 access via fording the river at this location was prevented altogether by 1999. Furthermore given the objections remained outstanding until the public inquiry was held in 1999 any use between these two dates could not contribute to use “as of right.” Such use to be “as of right” would have to establish that the landowners acquiesced to that use, which clearly would not have been the case.
- 4.6 One of the current claimants (who was also in attendance at the public inquiry) has stated her use finished in 1999 due to the barrier at point Y. However, two other claimants from this present claim contest the 1999 date as they recall riding until 2005 and 2013 respectively. Both remember riding the paths at the time they moved house and said the barrier was not in being in May 2005.
- 4.7 The current owner of the land which contains this barrier and who was responsible for its installation stated that some riders were accessing his

land via the route shown approximately by the bold line Y-W by riding just to the south of the barrier as shown on plan no. 3. He then installed a wire fence along the boundary of his land and also placed two bollards across this route. However he disputes access was being enjoyed as late as the dates suggested.

- 4.8 Another person supporting the application, stated that the post and rail fence at point Y was lower when it was first installed and that it was possible for a horse to step over this fence. Also, that even when the fence was raised to its present height there was room between the fence and the bridge for a pony to pass through until the present fence was extended to abut the bridge. However whatever use was made as alleged, would have been for a limited period of time since 1999.
- 4.9 In any event any use after 1999, (denied by the owners of the land) was not continuous as two of the present claimants themselves would say they could not continue to use the path for at least the last 5 or 13 years (i.e. from 2005 or 2013).
- 4.10 In contradiction to this, another claimant has said the post and rail fence appeared in about 1998 but given she only rode ponies, being smaller than horses, was able to use the footbridge. This ceased when the Council arranged to install a tubular steel barrier at either end of the bridge into a “chicane” type structure, to prevent riders using the bridge. This was done in 1999 once the previous Inspector’s decision was made given complaints had been received that it was dangerous for riders to cross the bridge.
- 4.11 The fifth claimant who was interviewed also considered that access via the river was prevented in about 1998 when the timber and post rail fence appeared at point Y.
- 4.12 The person referred to 4.8 above said that she was also able to ride on the northern side of the bridge (X1-Y1) until approximately 6-8 years ago, but when the riverbank on the eastern side (Y1) was collapsing the owner constructed a substantial concrete wall to support the bank and thereafter it was too steep to ride from east to west. She indicated the current tubular steel barrier was then placed on the bank (Y1) only 5 - 6 years ago to prevent any further riding. This person said that she had been frequently confronted by some of the residents of the immediate area who objected to her riding along the path. Whilst this account of the last date of being able to cross the river conflicts with the accounts

given below, the amount of time spent riding would be insufficient to reflect a dedication of the path.

- 4.13 All those interviewed stressed that if this footpath was opened to horse riders then it would avoid having to ride along the A474 to Bryncoch village before reaching the bridleways on Mynydd Drumau. Those in support ride predominantly from Fforest Goch and the riding school at Banwen farm. They have also stated that there have been incidents of riders and horses being injured. Plan No. 4 provides a location plan.
- 4.14 The desirability or convenience of a path is not a factor in determining the validity of the claim. (Similarly the disadvantages or inconvenience of recognising a path as a public one is also not a relevant factor)

Details of the objections

- 5.0 In contrast to the above, accounts given by those who object are from five households who live in close proximity to the bridge and path, three of whom own part of the land containing the path and some of the adjacent land. The other two objectors make use of part of the path to access their properties.
- 5.1 The residents of the Bryncoch Farm provide a child minding service for many residents of Bryncoch, and have stated that since 1999 neither have seen a horse or rider on this path. They drive along this path between 3-4 times a day from Mondays to Fridays. In addition that up to 6 children aged up to 4 years old are taken along this path on scooters and small tricycles throughout the year.
- 5.2 A petition has been submitted and signed by 17 people, 15 of whom are parents of the children who they have taken to the Farm to use this child minding service. This petition reflects use of this service over a period of 15 years which states that none have seen a horse using the lane throughout this time. In addition two friends of the residents of Bryncoch Farm have also signed the form giving their periods of use to the Farm as 20 and 28 years stating the same.
- 5.3 The owner of the land immediately to the north of the bridge and who was responsible for installing the steel barrier at this point, contends the Inspector in 1999 concluded the path was never a bridleway and that the circumstances since the inquiry have not altered. Therefore there can be no legal justification to overrule that decision and that since the decision, there has been no horse riding along the route.

- 5.4 That the river protection work on his land (Y1) which was undertaken slightly upstream of the bridge was done to protect the integrity of the bridge as it was in danger of being undermined. (This was at a different location to the works referred to earlier undertaken in 1985/86 at point X). These works were done either by the River Authority or possibly this Council, between 2001 and 2003. There is a record of a meeting being held with that landowner with an officer of this Council to discuss his concerns. The steel barrier was then erected by this owner shortly after to mitigate any liability he may have incurred, should anyone have wandered close to the bank, given the works had increased the height of the drop into the river from his land.
- 5.5 On the odd occasion this owner saw a rider coming from the direction of the Dyffryn Arms he stated he would turn them back.
- 5.6 Another point made by this owner, is that the path forms part of the roadway to several properties, its width is restricted with no passing points and so it would be impossible for a vehicle and horse to pass each other safely. In addition that the path is popular with dog walkers and horses and dogs may react adversely in confined spaces.
- 5.7 All five households have raised similar concerns regarding the threat posed to the safety of those wishing to use the path whether this be small children, pedestrians or those in vehicles. One resident of the last 12 years has provided examples including the incoming and outgoing vehicles not just for the 6 properties, but also as an entrance and exit for those accessing the Farm, as well as those making use of the child minding service. In addition the path is used by tractors and also large vehicles which empty the septic tanks. Furthermore vehicular traffic uses the eastern end of the path to park at the Duffryn Arms Public House at point A.
- 5.8 Whilst these are legitimate concerns, the issue when determining an application, is whether such a right exists, (in this case if it can be shown there has been a minimum period of 20 years uninterrupted use,) as opposed to consider the beneficial or adverse consequences of the path being upgraded.
- 5.9 Another objector wished to point out that there is a pedestrian gate located near to point G, shown on plan no.2 which is too narrow for some horses and so some riders are deviating slightly to the west into the adjacent Bryncoch Rugby ground. If this were the case any deviation

to the route would undermine the validity of the claim. However this section of the path is registered as a public bridleway and so any horse rider would have the right to deviate as much as is necessary in order to proceed. The resolution of this would involve replacing the gate with a more suitable structure.

Conclusion

- 6.1 Only one of the current supporters who also supported the earlier application, can show use from at least 1973, but has stated she did not use the diagonal route from 1973, but crossed via X-Y and then changed her route once the works in 1985/1986 prevented her from using the X-Y crossing.
- 6.2 All the other current supporters would say they have only used the route Z-Y, but none can show use extending as far back as 1973.

Common Law Dedication

- 6.3 Under common law there is no specific requirement to show a minimum period of 20 years, but it is necessary to establish the owners of the land wished to dedicate the way. This clearly would not apply due to the works undertaken in the about 1961 which obstructed the path for an undetermined period, and the works in 1985/1986 which had the effect of preventing the crossing X-Y. Objections and actions by the owners of the land from 1993 until 1999 and lastly of course the objections now made to this current application. Appendix 4 explains more fully the basis upon which common law dedication could be inferred.
- 6.4 **Recommendation** that no modification order be made as stated in paragraph 4.2 and the application therefore be refused.

6.5 **Reasons for the Proposed Decision**

- (a) At the previous public inquiry held in 1999 the appointed Inspector concluded there had been no dedication of a public bridleway by that date.
- (b) None of the evidence submitted in support of the current and outstanding 2017 application has established otherwise.
- (c) There has been no 20 years uninterrupted use since 1999 to satisfy the provisions of section 31 of the Highways Act 1980.
- (d) No dedication under common law can be shown to have occurred since 1999

Consultation

The item has been subject to extensive consultation.

Appendices

Plan No's 1- 4
Appendices 1- 4

List of Background papers

M08/70

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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 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	1960 – 1985 and 1985 – 1999
B	Early 1970's – 2016
C	1989 – 1998 (used bridge until narrowed by this Council)
D	2001 – 2016
E	1993 – 2013
F	2001 – 2016
G	1978 – 1998
H	2001 – 2016
I	1990 - 2014
J	1984 – 2014 (wooden fence appeared 2005)
K	1996 – 2016

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.

