



Cyngor Castell-nedd Port Talbot
Neath Port Talbot Council

NEATH PORT TALBOT COUNTY BOROUGH COUNCIL

Regeneration and Sustainable Development Cabinet Board

6th September 2019

Report of the Head of Legal Services : Craig Griffiths

Matter for Decision

Wards Affected:

Tonna

Report Title Alleged public footpath from Parkfield to the adopted footpath linking Dulais Fach and Park Street. Community of Tonna.

1.1 Purpose of the Report:

To determine an application which alleges the existence of a public footpath commencing at its eastern end on Parkfield, Tonna, between the properties of No. 14 Parkfield and Cysgodfa, (a residential home) to join another footpath already on the list of streets, shown A-B-C on the attached plan. If agreed the Council would make a modification order to add the path to the Definitive map and Statement which is the record of public paths.

The alleged public footpath is 24 metres in length but the steps which enabled people to walk down a slope from points B-C became buried under stone and rubble between the two adjacent walls in March 2018. A retaining wall approximately 2 metres was also built across the entrance to the steps at point C, the result of which meant that the path became unsafe to use.

2.1 Executive Summary:

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The Board is under an obligation to make a decision upon the impartial analysis of the evidence before it. The report initially considers the legal tests that have to be applied before looking at the evidence in support of the application as well as the objections made by Tai Tarian. Further information is provided as to why the public say they use the path, before the reasons are listed as to why it is recommended that a modification order is made to recognise the path as a public right of way.

3.1 Background

The application has been made under the provision of the Wildlife and Countryside Act 1981 and a copy of the relevant provisions of the Act are reproduced in Appendix 1 of this report.

3.2 There are 22 people who have submitted user evidence forms in support of this claim, 9 of whom have been interviewed. The average length of use is 33 years with 19 having claimed to have walked this path for at least 20 years.

3.3 There are specific legal tests that have to be satisfied in order for the application to be agreed.

3.4 The Law

For the purpose of this report it should always be noted that under Section 31 of the Highways Act 1980 (the relevant extract of which is reproduced at Appendix 2) any minimum period of 20 years of uninterrupted use, 'could give rise to the presumption that the owner or owners of the land has dedicated the path to the public.'

3.5 In addition to the statutory provisions referred to above, there may be common law provisions to take into account, where any period of use, whether it be less or more than 20 years could be deemed sufficient to

establish there has been a dedication of that path to the public. Whilst there is no minimum period required to infer common law dedication, there would nonetheless have to be a reasonable period of use to be able to conclude that the way has been dedicated to the public. In addition there needs to be evidence of positive actions by the landowner/s that shows there was an intention to dedicate and that the public have used the way which is consistent with an acceptance of that dedication (further details of the application of the principals of common law are found in Appendix 3)

- 3.6 The ownership of the path between points A and B is unregistered but the steps between points C and B are partly owned by Tai Tarian who own and manage Cysgodfa, and partly by the owners of No. 14 Parkfield, the adjacent property.
- 3.7 The path was closed by Tai Tarian and the reasons given were that the path was in poor and dangerous condition, was steeply inclined and had no lighting. In addition, that there would be a cost to improve and maintain the path.
- 4.1 The tests to be applied in determining this application are as follows:
 - (a) Whether there has been a minimum period of 20 years uninterrupted use prior to the first occasion the public's alleged right to use the way was challenged. This is known as the relevant period and is calculated by counting retrospectively from the date. If there is no clarity on this date, then the date of the application will be deemed to be the end of the 20 year period.
 - (b) Whether as outlined in paragraph 1.5 there is evidence of common law dedication.
- 1.2 Issues such as the convenience of the path to users or whether it would provide a useful amenity of use of recreational value to the public are not grounds for recognising the path as a public one. Conversely, if the registration of the path were to prove inconvenient or problematic to the owners, this would not be a relevant consideration. It is a question as to

whether the public have the right to pass and re-pass on foot via the route concerned.

1.3 The relevant tests are:

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 (a) it would require weighing up the evidence and deciding that it is more likely than not, such a public right exists. In the case of (b) this means that the Council has to conclude there is sufficient evidence to justify making a modification order rather than have to conclude a public path exists. It is therefore a less onerous test. The latter test is explained more fully in Appendix 4.

5.1 **The Evidence**

From the information provided by the 9 people interviewed the first occasion the alleged path was closed was in March 2018. House numbers 1-3 at Parkfield appear on the 1964 edition of the Ordnance Survey plans although no worn or marked paths appear on this edition. By the 1984 edition all the houses that exist today in Parkfield are shown on this later plan. It includes the residential home of Cysgodfa as well as the claimed public path including a series of lines denoting steps.

5.2 The applicant stated his house (No. 12 Parkfield) was completed in 1980 although the work on Cysgodfa was started in 1975 and all other houses were completed by 1980. Furthermore, the applicant alleges that the steps have been open since 1976 and were therefore installed as a short cut and of benefit to the residents of Parkfield.

5.3 Tai Tarian dispute this and contend as they were built for the residents of Cysgodfa. The steps provide access to the rear lane which is adopted providing access to local facilities.

- 5.4 The applicant has produced a copy of the plan produced by Neath Borough Council, showing the plots for the proposed development at Parkfield dated November 1974 (ref A283/1) which includes the footpath A-B-C.
- 5.5 However, this path was never adopted even though the much earlier footpath between Park Street and Dulais Fach Road, (shown as D-E) to which it connects, is included in the list of streets.
- 5.6 The applicant also wishes to point out that consent was granted to Neath Port Talbot Homes (the former owners of Cysgodfa) under reference 15/0040 in January 2015 for the 'renewal and alteration of existing supported housing unit with creation of 4 new units and new entrance.' That in the planning application form there was the question 'do the proposals require any diversion / extinguishment and / or creation of rights of way' to which the answer "no" was given. However, the path under consideration is not a registered public path and so at that time Tai Tarian would have been under no obligation to have sought such an order.
- 5.7 The creation of this path in 1976, would be interpreted as either initially to have been for the benefit of the new residents of Parkfield, or solely for the residents of Cysgodfa. Nonetheless, if the public subsequently make use of a path and there is sufficient evidence of uninterrupted use, then this can lead to the presumed dedication of that way.
- 5.8 There are only 6 households from Parkfield that have submitted user evidence forms. 11 households from other roads and streets have also claimed to have made long term use of this path. These streets are highlighted on plan No. 2, with the numbers of those who have provided evidence in support of the application quoted alongside the names of the streets.
- 5.9 Tai Tarian dispute the claim from a number of those living in Parkfield given the applicant can access the adopted path from the rear of the

applicant's property. 5 of the residents of Parkfield can access this lane from the rear of their properties and it is arguable that for 3 the claimed public path would not provide a shorter route.

- 5.10 The relevance of distinguishing between a limited number of residents confined to only one street as opposed to others who live further afield, is to ensure the claim does not reflect a special user group. It is necessary to be satisfied that the path is used by the public at large, rather than confined to a more limited number for whom it is solely a useful short cut. Appendix 5 contains a more detailed explanation. It can be seen from plan No. 2 that this path is used by the general public who as the forgoing account shows make use of it for a variety of reasons.

Reasons for using the path

- 6.1 The 9 people interviewed were able to provide a more detailed account of why they would wish to use the path particularly those who do not live in Parkfield.
5 said it had been a useful path to take their dogs for walks, either as part of a circular walk via the streets or more particularly to access the canal towpath. None of the persons live in Parkfield, one said her use extends over a period of 36 years having owned 3 dogs throughout this time. Another said she had owned dogs for 20 years. The access to the canal towpath is shown at point C.T.
- 6.2 Another 3, one of whom live in Parkfield, uses the path to access the towpath and the river for general walking; all claim to have done so in excess of 20 years.
- 6.3 3 people, who do not live in Parkfield said it has been useful to use the alleged path to visit friends or relatives, one of whom stated that she has a sister in Parkfield.
- 6.4 5 people, who also do not live in Parkfield said they used it as a short cut to go to what is now a Thai restaurant, formerly the Railway Tavern, (RT) also to go to the British Legion which is opposite this restaurant, or to go

to the former Dulais Rock public house (DR) on the A465. Another person who does live in Parkfield, stated that he has used the path regularly to go to the Tonna Rugby (RC) club and the Whittington Arms (WA) situated on Park Street. All such destinations are marked on plan No. 2.

- 6.5 2 people recalled a gate from some 20-30 years ago at the entrance to the alleged path at Parkfield but stated it was never locked. One recalled a notice requesting users be quiet for the sake of residents of Cysgodfa. The applicant wished to clarify that the gate was at point C at the lower end of the steps but agreed there was a notice as described.
- 6.6 2 people wished to point out that as far as they are aware there have never been any accidents on the path, nor acts of vandalism, and no evidence of any graffiti and so would challenge the suggestion the path had to be closed for safety reasons. (Their use spans the periods 1980-2018 and 1994-2018.)

Other Evidence

- 7.1 Tai Tarian who closed the path have not provided any evidence that challenges the basis of the claim. One of the reasons given for its closure was that it was no longer safe, or needed, thus an acknowledgement it had been in use but no suggestion it was only used by the residents of Cysgodfa.
- 7.2 Tai Tarian deny they have ever taken any measures to encourage the public to use their path since their ownership of part of the path and the residential home. Their actions to close the path in 2018 being a further indication of their position. It is their view that the path would have been set out for the residents of Cysgodfa, and the provision of a handrail supports this view.
Secondly, that the fact the steps were never adopted by the Council supports their view it was never intended for use by the public only for residents of Cysgodfa.

Financial Impacts

8.1 No implications

Integrated Impact Assessment.

9.1 A first stage impact assessment has been undertaken to assist the Council in discharging its legislative duties (under the Equality Act 2010, The Welsh language Standards (No.1) Regulations 2015, the Well-Being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.

The first stage assessment has indicated that a more in depth assessment is not required. A summary is included below.

Valley Communities Impacts

10.1 No Implications

Workforce Impacts

11.1 No Implications

Legal Impacts

12.1 Section 53 of the provisions of the Wildlife and Countryside Act 1981 places an obligation on the Council to continually review the entries in the Definitive Map and Statement. It must take into account any evidence not previously considered that shows the Map and Statement need to be modified. As part of that duty the provisions of Section 31 of the Highways Act 1980 also apply in this report, where the applicant relies on the presumed dedication of the way due to a minimum period of 20 years uninterrupted use.

Risk Management Impacts

13.2 There are no risks associated with implementing this Council's statutory obligations. There are risks in not doing so, as the applicant could either refer the Council to the Welsh Ministers for failing to determine this

application or complain to the Ombudsman.

Consultation

14.1 This item has been subject to external consultation.

Recommendation

15.1 It is recommended that a modification order be made under the provision of the Wildlife and Countryside Act 1981 to add that length of footpath A-B-C to the Definitive Map and Statement and if no objections to confirm the same as an unopposed order.

Reasons for the Proposed Decision

16.1

- (a) There is no counter evidence to question the application or to challenge that residents have been able to walk the path for the periods claimed.
- (b) The reasons for using the path are varied and supported from sufficient numbers who can be said to represent the public at large.
- (c) The map evidence shows the path has been in existence since at least 1984, taken together with the accounts of those in support of the application, shows the path has been available and in use since at least this date.
- (d) The photographs taken of the path before it was filled with stone and concrete, show a series of steps and handrail evidently supports the claim that these steps were intended for use whether;
 - (i) Exclusively for the residents of Cysgodfa or,
 - (ii) Intended for use by the wider public when the houses at Parkfield were completed.

Due to the supporting evidence it should be agreed that a public path exists on the balance of probability as referred to in paragraph 3.3 (a) and a modification order made to add this path to the definitive map and statement.

The decision is proposed for implementation after the three day call in

period.

Appendices

- Appendix 1:** Wildlife and Countryside Act 1981
Appendix 2: Highways Act 1980
Appendix 3: Dedication under Common Law
Appendix 4: The test under 53(b)(i) to the Wildlife and Countryside Act 1981

List of background papers

File M08/72

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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:-

(a) 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;

(b) 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 a 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:

- (i) The physical nature of the path must be such as is capable of being a public right of way
- (ii) The use must be 'brought into question' i.e. challenged or disputed in some way

- (iii) Use must have taken place without interruption over the period of 20 years before the date on which the right is brought into question
- (iv) Use must be *as of right* i.e. without force, without stealth or without permission and in the belief that the route was public
- (v) There must be sufficient 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

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 a right and for so long a time that it must have come to the knowledge of the owners that the public were 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.

Appendix 4

The test under 53(b)(i) to the Wildlife and Countryside Act 1981.

The second test under 53(b)(i) is whether it is **reasonable to allege a public path exists**. The Court of Appeal decision concerned R v Sec. of State for Wales ex parte emery of 1997, held this will depend on the circumstances. If the evidence from witnesses as to user conflicts with the evidence of the landowner/s on objections, but it would be reasonable to accept the evidence of uninterrupted use, and it would also be able to reject the evidence against the allegations, then it would be reasonable to allege such a right. So unless the objector can provide convincing evidence that it was not possible to conclude the paths had become dedicated then a modification order should be made and the evidence tested at a public inquiry.

However, in this example the landowners have not provided any evidence to challenge the claim.