



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:

Bryn and Cwmavon

Report Title Alleged public Bridleway from Dan-Y-Bont (Pontrhydyfen) to Main Road, (Efail Fach) Communities of Pelenna and Cwmavon.

1.1 Purpose of the Report:

This Council is required to determine this application that has been made to recognise and thereby register a public Bridleway in its Definitive Map and Statement.

2.1 Executive Summary:

The Board is under an obligation to make a quasi-judicial decision on the application and by definition come to an impartial decision. The report initially considers the legal tests that have to be applied, the user evidence in support of the claim and the evidence against the application.

3.1 Background

3.1.1 An application was made in 2017 to register a public bridleway along the disused railway cutting shown between points A and D on the attached plan. Towards

its southern end at point A1, some 75 metres north of the B4286 in Pontrhydyfen at point A, access is via a kissing gate, field gate and motorcycle barrier. The path varies in width along its length between 3 and 7 metres. At the northern end of this path access to point D is obstructed by a pig wire fence and one strand of barbed wire at point C, although an alternative entry and exit point has been provided from E-F. There is also a motorcycle barrier and kissing gate at point F.

- 3.1.2 The majority of the land containing the route is under the management of Natural Resources Wales.(NRW) The National Assembly for Wales (NAW) hold a lease of the land between points A and B which they acquired on the 30th March 1960. In addition the NAW obtained the freehold between points B and C on the 15th September 1970 The section between points C and D is under the ownership of the owners of a nearby property which was purchased by them in 2008.
- 3.1.3 The claim has been supported by 21 people, 10 of whom stated they have each ridden horses for at least 20 years. 18 claim to have also walked the route as well as ride and 9 who state they have only walked the route.
- 3.1.4 The application is therefore based on there having been a sufficiently long period of uninterrupted use which would imply the route has been dedicated to the public. Usually with such applications it is necessary to determine whether a minimum period of 20 years uninterrupted use has been enjoyed by the public to satisfy the provisions of Section 31 of the Highways Act 1980. (The relevant extract is contained in Appendix 1 of this report)

4.1 The Legal Tests

- 4.1.1 The provisions of the Wildlife and countryside Act 1981 places an obligation on this Council to keep its record of public rights of way up to date. (Appendix 2). This requires the Council to investigate any evidence that is submitted which shows the status claimed is reasonable as well as any other rights that may exist from the evidence that has been submitted. There are two tests to consider in relation to a possible bridleway in the first instance and additionally a possible footpath.

- (a) Is it reasonable to allege such a public right exists or
- (b) Whether on the balance of probabilities such a public path exists

The distinction between (a) and (b) above is set out in Appendix 3

5.1 The Relevant Twenty Year Period

5.1.1 Given the application is based on long term use the provisions of section 31 of the Highways Act 1980 would usually apply. The applicant must be able to show there had been a minimum period of 20 years which has been continuous and uninterrupted. That 20 year period is calculated by determining the first occasion the alleged right of the public's use of the path was called into question. That occasion could be identified for example by:-

- (a) The placing of an obstruction such as a locked gate or fence across the way.
- (b) A notice clearly stating that the landowner has no intention to dedicate the path as a public one.
- (c) The date of the application unless one of the above two examples can be shown to have arisen prior to the application date.

5.1.2 Section 31 of the Highways Act 1980 does not apply to Crown Land and NRW object on the basis that this is the case here. Section 57(2) to the provisions of the Government of Wales Act 2006 states that the Welsh Ministers functions are exercisable on behalf of Her Majesty. Furthermore, that under Section 293 to the Town and Country Planning Act 1990, the Crown's interest is defined as belonging to Her Majesty. Consequently, the freehold and leasehold interest is held under the Welsh Ministers and so the provisions of Section 31 of the Highways Act 1980 cannot apply to this particular application from 1960. Therefore any use that can be claimed under section 31 of the Highways Act

1980 would have to be able to show uninterrupted use from 1940-1960, this being defined as the relevant period.

5.1.3 With regard to the land that is under a lease, the previous Forestry Commission was an example of a Crown Body responsible for the management of the Estate. In 2013 N R W was formed from what was the Forestry Commission for Wales, the Countryside Council for Wales and the Environment Agency for Wales, so that even the land under a lease to NRW on behalf of the Welsh Ministers would be exempt from the provisions of Section 31 of the Highways Act 1980.

5.1.4 In addition the land under the ownership of the Welsh Ministers B-C, was also dedicated in 2005 as Access Land under the provisions of the Countryside and Rights of Way Act 2000. This also prohibits the application of Section 31 of the Highways Act 1980.

6.1 The user Evidence

6.1.2 Of the 6 people interviewed none can claim to have ridden this route throughout the relevant period. In addition two stated that they used a key to open an earlier gate at the southern end up until approximately 2010. A third person estimated this earlier locked gate was removed sometime between 1993 and 1998 and the fourth could not provide an estimate as to when this earlier gate was replaced by the current set of barriers. He stated that it was many years ago. N R W have not been able to make any comment on this earlier gate as to when it was installed or removed.

6.1.3 The only other means by which this application can be considered valid is to consider whether under common law there would be sufficient evidence to show that the land has been dedicated to the public as a bridleway. Appendix 4 provides a summary of the relevant tests to be considered. The period of use can be greater or less than 20 years and whilst there is no minimum period required, there should be a reasonable period of use to be able to conclude that the way has been dedicated. There should also be evidence that the landowners concerned have taken specific measures to encourage and facilitate use so it is not sufficient to simply infer the owners have acquiesced to that use.

7.1 Possible dedication of a public bridleway under Common Law

- 7.1.2 The land is managed and under the ownership of two bodies. NRW being one, who provide structures to enable horse riders, pedestrians and cyclists access to access the southern end of the route. After the route became obstructed by a fence at point C, they also provided an alternative exit via point F using the similar arrangement of structures.
- 7.1.3 One person claimed that the NRW made provision for riding and walking according in 1995. According to another person the structures at point A1 were installed after the gate at Dan y Bont was removed in about 1993.
- 7.1.4 After 2005 the continued provision of these structures would have been in compliance with the Access Agreement, and so from this date it cannot be interpreted as evidence of a dedication under common law.
- 7.1.5 The owners of the land between the fence at point C and the road at point D, landscaped the site along with demolishing the former railway bridge. As a result access was blocked to the public highway from point C/D. According to the owners of the land immediately north of point C, the fence at this point was placed there by N R W However these two owners of the land wished to point out that they replaced the fence numerous times as it was being vandalised . It is evident therefore the current owners of this parcel of land had no wish to dedicate the route as a public bridleway.
- 7.1.6 In addition these two owners have submitted documents showing the conditions of the sale of the land in 1980 to their predecessors which required a fence be installed at point C. The previous owner confirmed that her husband (deceased) maintained this fence from their ownership of the land in 1980 until it was sold to the current owners. The previous owner also confirmed that the fence was periodically vandalised but that her husband repaired the fence as and when necessary. She stressed that they never allowed or gave permission to anyone to pass over their land. .
- 7.1.7 NRW evidently wish to ensure an alternative means of access and egress was made available for the public at the northern end of the path. Once this alternative was completed it appears this was used by the public, given the complaints over the loss of access from point C-D ceased.

- 7.1.8 Whilst the structures at either end of the path may imply NRW were willing to dedicate the route, the land under their management has also been the subject of a permissive access agreement between themselves and the British Horse Society, initially reviewed in 2006 and subsequently in 2013 with their predecessors the Forestry Commission Wales. This agreement has permitted access into their woodlands for non-commercial horse riders conditional upon there being no requirement to regulate access or restrictions as a result of title constraints, forest operations, environmental or any other issues. The concordat, as it is titled, requires the British Horse Society to publicise their open access schemes to its members through their newsletter, web sites and any other means that are available with links to the Forestry web site. It also provides a code of practice for horse riders using Welsh Government Woodland.
- 7.1.9 NRW has a web site which informs the public that horse riding is permitted in some of the woodlands managed by them. Certain woodlands are specified but do not include this particular route. Neither the British Horse Society Cymru nor the British Horse Society have anything on their current web notes regarding this concordat.
- 7.1.10 Use of a way can be “by right” on account of the public having been given permission to use the route or alternatively that use could be “as of right” if that use is deemed to have been dedicated by the owners of the land. Consequently much depends on whether those users were aware they were riding as a result of the existence of this concordat, even though there is no specific reference to this area of woodland in the web sites referred to above.
- 7.1.11 Two of the six people interviewed said they were aware of this concordat but five said they were not. However five had permits to ride in other areas of forestry land one of whom thought her permit also included the route being claimed. One of these five said he did not consider he needed permission to ride this path.
- 7.1.12 As indicated in paragraph 6.1.2, two people stated that up until 2010 there was a locked gate at point A1 for which they were given a key. Another person however estimated the locked gate was replaced by the current set of barriers and gates around 1993. Whilst a fourth person agreed there had been a locked

gate at this point many years ago, they could not provide an estimate of when it was replaced.

- 7.1.13 This highlights that access was only possible by permission if keys were needed to pass through this earlier gate. Secondly the issuing of permits and the existence of the concordat would throw some doubt as to whether it is possible to conclude there has been a dedication under common law.

Possible dedication of a public footpath only under Section 31 of the Highways Act 1980

- 8.1 There are 9 people who have also claimed to have walked this route as pedestrians for an average of 33 years two from as early as 1976.
- 8.2 As indicated above, due to the acquisition of the land in 1960 and becoming Crown land, irrespective of the access agreement also made of 2005, would result in the relevant period terminating in 1960. This means that any statutory claim under section 31 of the Highways Act 1980 would require continuous use from 1940-1960. There is no user evidence for this earlier period.

Possible dedication of a public footpath under common law

- 9.1 Finally there is the question of whether a dedication can be inferred under common law for a public footpath.
- 9.2 Whilst section 31 of the Highways Act 1980 does not apply to Crown Land it is still possible to consider a dedication under common law.
- 9.3 The issues concerning permits to ride would not preclude a dedication under common law of a public footpath, but the designation of Access Land would, as a result of S12 of the Countryside and Rights of Way Act 2000. That section stipulates that no claim under section 31 nor under common law will apply to designated Access Land.
- 9.4 Therefore any claim under common law for a public footpath would have to include a period after the locked gate at Dan Y Bont road was removed up until the designation of Access land in 2005.

- 9.5 Regarding this “window” of use there are conflicting accounts, two who stated the gate was there until 2010, another who estimated it was 1993 when it was removed and another who could not be specific.
- 9.6 Six people who claim to have walked this path were sent letters on two occasions and a seventh on four occasions in the hope that they would be able to clarify some of these details as part of the investigative process, but none responded.
- 9.7 Given the potentially limited period or “window” of use that could reflect such a dedication and the lack of response it is difficult to conclude that such a dedication under common law has taken place during this earlier period and therefore it should be concluded that any recognition of such a public footpath must be rejected.

Financial Impacts

10.1 “No implications”

11.1 Integrated Impact Assessment

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 Environment (Wales) Act 2016.

12.1 Valley Communities Impact

No Implications

13.1 Workforce Impacts

No Implications

14.1 Legal Impacts

Any appeal lodged against a refusal to make a modification order would entitle the applicant to appeal to the Welsh Ministers. A decision to make a modification order would entitle any member of the public, including landowners to object, which would result in the order being referred to the Welsh Ministers for determination.

14.1 Risk Management Impacts

There are no risks associated with determining the application. There are however, risks if the matter is not determined as the applicant could either refer the application to the Welsh Ministers to seek a decision from them, or make a complaint to the Ombudsman.

15.1 Consultation

This item has been subject to external consultation.

16.1 Recommendation

That the application be rejected.

17.1 Reasons for the Proposed Decision

1. No claim can be made out for a public bridleway under section 31 of the Highways Act 1980 given the route has been on Crown land since 1960. There is no user evidence throughout the relevant period from 1940-1960.
2. No claim can be made out for a public bridleway under common law, due to the presence of a locked gate at the southern end of the route, the provision of keys for that gate to certain individuals and that permissive access has been granted since the removal of this locked gate.
3. Equally to point 1 above, no claim can succeed for a public footpath on the user evidence presented under section 31 of the Highways Act 1980 due to that use taking place on Crown land.
4. Lastly, for the reasons given in point 2 above, claims to establish the existence of a public footpath under common law would also have to show

the owner of the land took specific measures to expressly dedicate the path to the public. The existence of a locked gate and granting consent to users on foot does not establish such a presumption.

18.1 Implementation of Decision

The decision is proposed for implementation after the three days call in period.

Appendices

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

List of background papers

File M08/69

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APPENDIX 1
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 2

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 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 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 3

The second test under (b) is whether it can be concluded the allegation of a P.R.O.W is reasonable.

The Court of Appeal decision concerning R v Sec of State for Wales ex parte Emery 1996, held this will depend on the circumstances. So that if the evidence from witnesses as to user conflicts with the objector's evidence, but it could be reasonable to accept evidence of uninterrupted use and also be able to reject the evidence against the allegation, then it would seem reasonable to allege such a right. In other words unless the objector can provide evidence that it was not possible to conclude the way had become dedicated, then an order should be made and the evidence tested at a public inquiry.

In example, in addition to the existence of the Access Agreement and Crown Land from 2005, the evidence from even those who interviewed indicated the route was obstructed by a locked gate for much of the time before 2005. Therefore it cannot be reasonable to allege a public bridleway or public footpath exists.

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.