

CITY AND COUNTY OF SWANSEA

NOTICE OF MEETING

You are invited to attend a Meeting of the

RIGHTS OF WAY AND COMMONS SUB COMMITTEE

At: Committee Room 3, Civic Centre, Swansea

On: Wednesday, 23 April 2014

Time: 2.00 pm

AGENDA

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| 1 | Apologies for Absence. | |
| 2 | Disclosures of Personal and Prejudicial Interests. | 1 - 2 |
| 3 | Minutes.
To approve and sign as a correct record the Minutes of the Meeting of the Rights of Way and Commons Sub Committee held on 26 February 2014. | 3 - 5 |
| 4 | Active Travel Plan Progress Report. | 6 - 8 |
| 5 | An Anomaly at the Junction of Bridleway and Footpath No.10 - Community of Ilston. | 9 - 20 |
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Patrick Arran
Head of Legal, Democratic Services & Procurement
15 April 2014

Contact: Democratic Services: - 636016

RIGHTS OF WAY & COMMONS SUB COMMITTEE (12)

Councillors

Labour Councillors: 8

Ann M Cook (Vice Chair)	Jennifer A Raynor (Chair)
Joe A Hale	Robert V Smith
Jane E C Harris	Des W W Thomas
Yvonne V Jardine	T Mike White

Liberal Democrat Councillors: 2

Paul M Meara	John Newbury
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Independent Councillor: 1

Keith E Marsh	
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Conservative Councillor: 1

Linda J Tyler-Lloyd	
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Officers:

Phil Roberts	Director of Place
Phil Holmes	Head of Regeneration & Planning
Janine Townsley	Directorate Lawyer, Legal, Democratic Services & Procurement
Sandie Richards	Principal Lawyer
Kim Flanders	Planning Policy & Environment Manager, Regeneration & Housing Department
Chris Dale	Countryside Access Team Leader (Rights of Way), Regeneration & Housing Department
Mike Workman	Rights of Way Officer, Legal & Democratic Services & Procurement
Democratic Services	
Planning Services	
Archives	
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Disclosures of Interest

To receive Disclosures of Interest from Councillors and Officers

Councillors

Councillors Interests are made in accordance with the provisions of the Code of Conduct adopted by the City and County of Swansea. You must disclose orally to the meeting the existence and nature of that interest.

NOTE: You are requested to identify the Agenda Item / Minute No. / Planning Application No. and Subject Matter to which that interest relates and to enter all declared interests on the sheet provided for that purpose at the meeting.

1. If you have a **Personal Interest** as set out in **Paragraph 10** of the Code, you **MAY STAY, SPEAK AND VOTE** unless it is also a Prejudicial Interest.
2. If you have a Personal Interest which is also a **Prejudicial Interest** as set out in **Paragraph 12** of the Code, then subject to point 3 below, you **MUST WITHDRAW** from the meeting (unless you have obtained a dispensation from the Authority's Standards Committee)
3. Where you have a Prejudicial Interest you may attend the meeting but only for the purpose of making representations, answering questions or giving evidence relating to the business, **provided** that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise. In such a case, you **must withdraw from the meeting immediately after the period for making representations, answering questions, or giving evidence relating to the business has ended**, and in any event before further consideration of the business begins, whether or not the public are allowed to remain in attendance for such consideration (**Paragraph 14** of the Code).
4. Where you have agreement from the Monitoring Officer that the information relating to your Personal Interest is **sensitive information**, as set out in **Paragraph 16** of the Code of Conduct, your obligation to disclose such information is replaced with an obligation to disclose the existence of a personal interest and to confirm that the Monitoring Officer has agreed that the nature of such personal interest is sensitive information.
5. If you are relying on a **grant of a dispensation** by the Standards Committee, you must, before the matter is under consideration:
 - i) Disclose orally both the interest concerned and the existence of the dispensation; and
 - ii) Before or immediately after the close of the meeting give written notification to the Authority containing:

- a) Details of the prejudicial interest;
- b) Details of the business to which the prejudicial interest relates;
- c) Details of, and the date on which, the dispensation was granted; and
- d) Your signature

Officers

Financial Interests

1. If an Officer has a financial interest in any matter which arises for decision at any meeting to which the Officer is reporting or at which the Officer is in attendance involving any member of the Council and /or any third party the Officer shall declare an interest in that matter and take no part in the consideration or determination of the matter and shall withdraw from the meeting while that matter is considered. Any such declaration made in a meeting of a constitutional body shall be recorded in the minutes of that meeting. No Officer shall make a report to a meeting for a decision to be made on any matter in which s/he has a financial interest.
2. A "financial interest" is defined as any interest affecting the financial position of the Officer, either to his/her benefit or to his/her detriment. It also includes an interest on the same basis for any member of the Officers family or a close friend and any company firm or business from which an Officer or a member of his/her family receives any remuneration. There is no financial interest for an Officer where a decision on a report affects all of the Officers of the Council or all of the officers in a Department or Service.

CITY AND COUNTY OF SWANSEA

MINUTES OF THE RIGHTS OF WAY AND COMMONS SUB-COMMITTEE

HELD AT THE CIVIC CENTRE, SWANSEA ON WEDNESDAY 26 FEBRUARY 2014 AT
2.00 P.M.

PRESENT: Councillor J A Raynor (Chair) presided

Councillor(s):	Councillor(s):	Councillor(s):
A M Cook	R V Smith	L J Tyler-Lloyd
J E C Harris	D W W Thomas	T M White
J Newbury		

Officers:

S Richards	-	Principal Lawyer
C Dale	-	Countryside Access Team Leader (Rights of Way)
M Workman	-	Rights of Way Officer
S Collins	-	Democratic Services Assistant

28. **APOLOGIES FOR ABSENCE**

Apologies for absence were received from Councillors Y V Jardine and K E Marsh.

29. **DISCLOSURES OF PERSONAL AND PREJUDICIAL INTERESTS**

In accordance with the provisions of the Code of Conduct adopted by the City and County of Swansea there were no interests declared.

30. **MINUTES**

RESOLVED that the Minutes of the Meeting of the Rights of Way and Commons Sub-Committee held on 8 January 2014 be accepted as a correct record.

31. **ALLEGED PUBLIC FOOTPATH FROM LANDOR DRIVE TO THE CROFT - COMMUNITY OF LOUGHOR**

The Rights of Way Officer presented a report which considered whether to make a Modification Order to record the amendment to the current position of footpath No. 43.

Minutes of the Rights of Way and Commons Sub-Committee
(26.02.2014) Cont'd

The report provided the evidence to show the claimed route had been used as of right and without interruption for the requisite minimum period of 20 years. Evidence was also provided also to show that footpath No. 43 should be shown in a different alignment and that part of this path should be deleted.

The Committee discussed and considered the recommendation made within the report.

The Officer requested that an amendment be recorded to the recommendation to state; that a Modification Order should be made to delete that length of footpath between points E-G -J as shown on Plan No. 3, but to add that length E-F as shown on the same plan.

RESOLVED that:

- (1) that a Modification Order be made to record the path as a public footpath;
- (2) the wording of the recommendation in paragraph 5.8 of the report be amended as reported by the Officer;
- (3) the amended text be included in a revised report to the next scheduled meeting.

32. **PRIORITIES FOR DEALING WITH OBSTRUCTIONS ON PUBLIC PATHS**

The Countryside Access Team Leader (Rights of Way) presented a report which informed the Committee about the current obstruction issues and policy for prioritising The Countryside Access Plan 2007-2017.

The Committee were updated on the current situation, measures taken to reduce obstructions and the implications for health and tourism.

A discussion took place in respect of the current financial climate and its relation to Category two paths which are still blocked by legacy obstruction. Members questioned that funding should be spent on improving well used paths rather than opening up long abandoned paths. The Committee asked further questions in relation to obstructions on the path network to which the Officer responded accordingly.

Minutes of the Rights of Way and Commons Sub-Committee
(26.02.2014) Cont'd

RESOLVED that:

- (1) the contents of the report be noted;
- (2) the Transport Strategy Officer provides a progress report on the Active Travel Plan to the next scheduled meeting of the Committee;
- (3) the Chair writes a to the Head of Economic Regeneration and Planning to request clarification on Section 106 arrangements within developments;
- (4) a report detailing the Rights of Way budget and grant funding for the next financial year be placed on the agenda for the next scheduled meeting of the Committee.

33. **DATE OF NEXT MEETING - 2PM ON WEDNESDAY, 23 APRIL 2014**

RESOLVED that the date of the next meeting be noted.

The meeting ended at 3.00 pm.

CHAIR

Agenda Item 4

Report of the Director of Place

To Rights of Way and Commons Sub-Committee – 22 April 2014

ACTIVE TRAVEL (WALES) ACT PROGRESS REPORT

Purpose:	To provide an update on the works associated with the Active Travel (Wales) Act.
Policy Framework:	Active Travel (Wales) Act
Reason for Decision:	To inform the Sub-Committee of progress.
Consultation:	Legal, Finance
Recommendation(s):	1. To note the progress being made with the Active Travel (Wales) Act

1. Introduction

- 1.1 The Active Travel (Wales) Act received royal ascent in November 2013. The Act, which is considered to be a world first, makes it a legal requirement for local authorities in Wales to map and plan for suitable routes for active travel, and to build and improve their infrastructure for walking and cycling every year. It creates new duties for highways authorities to consider the needs of walkers and cyclists and make better provision for them. It also requires both the Welsh Government and local authorities to promote walking and cycling as a mode of transport.
- 1.2 By connecting key sites such as workplaces, hospitals, schools and shopping areas with active travel routes, the Act will encourage people to rely less on their cars when making short journeys.¹

2. Requirements

- 2.1 The legislation contains three principal requirements to which Local Authorities must conform.
- 2.2 First, that the Local Authority will provide a map of currently available Active Travel Routes. The routes contained in the map must either conform to the Active Travel Standard (discussed below), or where it does not provide a link to a key service such as schools, hospitals, places of employment and/or retail. The maps will cover all communities with a population of 2,000 or greater and the communities considered to conform to this threshold have been identified by the Welsh Government in a Consultation document published in November 2013. Whilst the Local

¹ Welsh Government, November 2013. "Active Travel Wales Act"

Authorities are now awaiting the outcome of this consultation and the formal list of communities, it is expected that largely the whole of the City & County of Swansea area will be included, with the possible exclusion of Gower.

- 2.3 This map is to be published as a hard copy and distributed to the public.
- 2.4 The second element of the legislation requires that the local authority will prepare a second map which sets out all of the programmed and anticipated Active Travel schemes which may be delivered over the next five years (2014 – 2018). These routes also need to be publically accessible, but does not need to be published in hard form and can therefore be presented electronically if appropriate.
- 2.5 The final element of the Act is to make good progress against realising the elements defined in the second map to ensure that the routes are continually improved and built upon. This does not therefore require simply that new routes will be constructed each year, but that the network will be improved in some way.
- 2.6 Whilst these are the principle requirements of the Act there is a further significant implication. The Active Travel (Wales) Act also interfaces directly with the Highways Act and principally with sections 3, 4, 9 and 12. These sections deal with the 'Creation', 'Improvement', 'Maintenance' and 'Interference' of the Highway and require that when any works are undertaken that consideration be given as to how measures which promote Active Travel could be incorporated.

3. Guidance

- 3.1 The Welsh Government is currently preparing a draft guidance document to advise on the Active Travel (Wales) Act standard infrastructure. The guidance will therefore describe best practice and the forms of route which are required in order to conform to the expectations of the Act. This draft guidance document is due to be published in May 2014 and will be subject to a 12 week public consultation prior to being revised and formally published in the autumn of 2014.

4. Financial Implications

- 4.1 The Welsh Government has allocated funds to each Local Authority in Wales to aid with the development of the Network Maps in 2014/15. The City & County of Swansea has therefore been allocated £26,000 for the production of "*Existing route maps as per the requirement of Sections 3 of the Active Travel (Wales) Act 2013.*"
- 4.2 Work is yet to commence on this item, as the precise form will depend upon the outcome of further guidance from the Welsh Government but it is expected that it is likely that Local Authorities will collaborate either

nationally or regionally on the production of the maps and therefore will pool the available funds.

5. Legal Implications

- 5.1 The Local Authority will need to ensure compliance with the Active Travel Wales Act. Whilst there are no defined punitive sanctions against non-compliant local authorities, it is expected that it would lead to public challenge and potential legal challenge if compliance cannot be evidenced.

6. Recommendations

- 6.1 The Rights of Way and Commons sub-committee is asked to note emerging requirements of the Active Travel (Wales) Act.

Contact Officer: Ben George (Transport Strategy)
(01792 636343

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee - 23 April 2014

AN ANOMALY AT THE JUNCTION OF BRIDLEWAY AND FOOTPATH NO. 10 - COMMUNITY OF ILSTON

Purpose:	To consider the justification for either upgrading footpath No. 10 to a bridleway or downgrading bridleway No. 10 to a footpath.
Policy Framework:	The Countryside Access Policy No. 4.
Reason for Decision:	No Modification Order can be made given the lack of specific user evidence by those who allege to have ridden footpath No. 10.
Consultation:	The Open Spaces Society, British Horse Society, The Ramblers Association, Community Council, The Local Member, the previous representative of the Ramblers Association, Somerset Trust, Gelli Deg (Local Resident), Nicholaston Farm, Gower Commoners Association, Parc Le Breos Riding School, previous local representative of the British Horse Society.
Recommendation(s):	It is recommended that no Modification Order be made.
Report Author:	Mike Workman
Finance Officer:	S Willis
Legal Officer:	S. Richards.
Access to Services Officer:	K. Roderick.

Introduction

- 1.1. The current Definitive Map shows this public path as part footpath and part bridleway. (Shown A-B-C-D-E) The junction of the two coincides with the boundary of the former Parishes of Penmaen and the area described as "Land common to the communities of Llanrhidian Higher, Lower, Nicholston, Penrice and Reynoldston".

- 1.2. The junction of these paths does not connect to any other public highway equal to or above that of a public bridleway. Consequently there is no reason why the status of this highway should change at the junction of this boundary. Point E connects to public bridleway No. 8 and point A joins the adopted highway.
- 1.3. This Council therefore is obliged to resolve this anomaly and the basis and justification for doing so is governed by the provision of Section 53(2)(b) and Section 53(3)(c)(ii) (as set out in Appendix 1).
- 1.4. The two most probable options are to either upgrade one or downgrade the other.

The History of the Path No. 10

- 2.1. The path commences at its eastern end on Bridleway no. 8 at point E and is described as a bridleway in the parish of Penmaen. At point C the path becomes a footpath but passes into what was described as “Lands Common to the Communities of Llanrhidian Higher, Lower, Nicholston, Penrice and Reynoldston”. As such there was no Parish Council for this area. The former Parish of Nicholston did not record this footpath between points A and C as being in their Parish and so it was correctly omitted from their Parish Map and Card. However when the Draft Map was published in 1955, it was included as a footpath although never described in any statement as there was no Parish Council for this area of land. This footpath was then retained in all the subsequent editions of the maps until the present day. The history of the way in which the current Definitive Map came into being is set out in Appendix 2.
- 2.2. There is a footpath No. 10 which was recognised by the Parish of Nicholston, but its most eastern point commences at point A on the plan, and proceeds west to Perriswood. It appears the additional footpath No. 10 between A and C was “added on”, but by whom and why is unknown.

- 2.3. With regard to Bridleway No. 10 in the former Parish of Penmaen, this was originally described as a footpath by that Parish Council when they included the path into their Parish Map and Survey. It was described as commencing on Talbot Road (at point F) and terminating at the Parish Boundary at (point C).
- 2.4. When the Draft Special Review map was published in 1972, the former Glamorgan County Council added the length E-D as a result of previous objections to there being no record of this path being shown on the First Definitive map of 1970. As such it was added as a spur to footpath number 10.
- 2.5. Objections were then made to the Draft Special Review Map because the length D-E was not shown as a public bridleway. An inspector was appointed to hold the subsequent public inquiries to consider objections to the Draft Special Review which were held in 1980

At the inquiry two people gave user evidence and this Council's predecessor also submitted a user evidence form.

The inspector concluded footpath No. 10 between points C-D-E should be upgraded to a public bridleway. However the Inspector did not consider the path west of point C and so his decision created the present anomaly.

The Current Evidence (Documentary)

- 3.1. The Ordnance Survey were not responsible for cataloguing public highways, even though many are shown on their plans. Their remit was to survey features, including tracks and paths irrespective of whether they may have been public ways, private ways, or even routes that simply were in existence at the time of the survey, but which became lost before the next survey.

- 3.2. The first, second and third editions of the ordnance survey dated 1878, 1899 and 1915, respectively all show path No. 10 from points A to E which confirms the path has been a long established feature.
- 3.3. The Tithe Map and Apportionment dated 1836, was intended to show land which was in production and of some value to the owners. Any land that was of little or no value was omitted from these records particularly if they were showing linear routes that were non-titheable. These have sometimes been interpreted as public ways. In this example the tithe map does not show this track.
- 3.4. The Beaufort Estate Plans of 1903 were also checked, but equally do not identify this path.
- 3.5. As such there is no documentary evidence that assists in resolving this anomaly.

Rural Common CL8

- 4.1. All of path No. 10 passes across what is common land and has now been designated as access land under The Countryside and Rights of Way Act 2000. This provides the public with a right to wander over land on foot only for the purposes of open - air recreation.
- 4.2. Whilst the Law of Property Act 1925 gave the public similar rights of access to all urban or metropolitan commons, this did not extend to Rural Commons. The exception being unless an Order of Limitation was made to specifically provide the public with such access. In this example, no such deed was made for CL8. Consequently there was no pre-existing right to ride across this common. As such, any use made on horseback would have been without the consent of the owner, nor under any licence.
- 4.3. Section 13 of the Countryside and Rights of Way Act 2000 prevents use of a route over access land giving rise to a claim under Section 31 of the

Highways Act 1980. Therefore the question is whether there is sufficient user evidence prior to the coming into force of the Countryside and Rights of Way Act 2000.

User and Other Evidence

- 5.1. As a result of the existence of this anomaly the usual informal consultations were undertaken and responses received by individuals of the Community Council.
- 5.2. The Community Council stated that footpath No. 10 should be upgraded to a public bridleway but did not provide any evidence.
- 5.3. A letter was received by the Parc Le Breos Riding School stating their clients use the path to ride, but no names of the individuals were forwarded as requested on three occasions. The previous representative of the British Horse Society has provided evidence of his use from between the period 2005 - 2013
- 5.4. The previous local representative of the British Horse Society stated there are many people who ride along this path, but again no names were provided.
- 5.5. Consequently there is only one individual upon whom this Council could rely and that is insufficient to justify making a Modification Order. The use referred to by the riding stables is anecdotal. There is no information on the precise periods and circumstances of their use, nor information as to whether they rode the path concerned as opposed to any other tracks in the immediate vicinity of this public footpath.
- 5.6. Two residents of nearby houses , one of whom has moved away from this location, stated they live within sight of footpath No. 10 (throughout the periods 1973 - 2009 and 1992 - 2009). One stated they see horse riders passing almost on a daily basis. However only one of the properties would be able to view the use by horses on the public footpath, that is west of point C.

In addition the landowners from one of the nearby farms have stated that they can see riders on this route.

Summary of User/Other Evidence

- 5.7. Whilst there are those who say footpath No. 10 is used by horse riders, only one person has been identified to have provided evidence and that is for a period of less than twenty years. As such there is insufficient user evidence upon which this Council could depend should it wish to make a modification order.
- 5.8 An alternative resolution is to downgrade bridleway no.10 to a public footpath but the Inspector who considered the objection at the special review was satisfied there was sufficient evidence to be able to upgrade the length of footpath C-D-E to a bridleway.

Conclusion

- 6.1. It is not possible to justify upgrading the footpath due to the lack of any individuals who can provide their own accounts of what their periods and frequency of use has been. It is also difficult to know whether they followed the footpath along its entire length. Nor can the bridleway between points C-D-E be downgraded given the previous decision referred to above.
- 6.2. As there is insufficient evidence to warrant making a modification order for the present time the anomaly will have to remain. An alternative option would be to consider making a public path order to regularise this anomaly. This could be pursued at a later date.

Recommended - that no modification can be made to correct the anomaly existing at point C on the plan attached to this report.

7.1. Equality and Engagement

The procedure and tests that are applicable to determine the anomaly do not require an equality and engagement assessment.

8.2. Legal Implications

There are none other than those contained in the report.

9.1. Financial Implications

There are no financial implications to making a modification order.

Appendices:

Appendix 1 - Relevant extract from the Wildlife and Countryside Act 1981.

Appendix 2 - History of the compilation of the Definitive Map and Statement.

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.

**HISTORY OF THE COMPILATION OF THE DEFINITIVE MAP
AND STATEMENT**

1. The National Parks and Access to the Countryside Act of 1949 placed an obligation on all Councils to produce a Definitive Map and Statement. Parish Councils were given the task of surveying all routes they considered may have legal status. This resulted in the production of what has come to be known as the Parish Map (at the scale of 6" to one mile) and the all too often rather brief description of the path contained on small cards also known as the Parish Card. Some of the descriptions on these cards were more comprehensive than others but in combination with the paths' depiction in the "Parish Map", provide a useful record of what routes were considered to have public path status by 1954.

2. The information was passed to the former Glamorgan County Council who collated the information and produced the first Draft Definitive Map which in their opinion reflected routes considered to be public rights of way on 14th September 1954 which became the "relevant date" of the first Definitive Map published in 1970.

3. The legislation required that the information gathered should be the subject of a series of reviews, which would allow the public and landowners to make representations or objections to the inclusion or absence of routes in the various editions of these earlier Draft Maps. The result was the production of the initial Draft Map and Statement published in 1955. Objections to the inclusion or omission of routes were considered in 1956 and the results of those decisions were again subject to further objections which resulted in a further series of hearings which took place in the 1960s. The Provisional Map and Statement published in 1964 was the effect of those objections so determined. Once published, landowners were given another opportunity to object and these were heard in the Quarter Sessions in around 1968. The result was the production of the first Definitive Map and Statement published

in 1970. The passing of the Countryside Act 1968 required all Councils to reclassify routes they had designated as roads used as public (R.U.U.Ps) into either footpaths, bridleways or byways open to all traffic. This resulted in the production of the Draft Special Review of 1971, published in 1974, to which objections could be made. Those inquiries were mainly held in 1980 which when determined lead to the production of the current Definitive Map and Statement published in 1988.

Report of the Head of Legal Democratic Services and Procurement

Rights of Way and Commons Sub-Committee - 23 April 2014

ALLEGED PUBLIC FOOTPATH FROM FOOTPATH NO. 11 TO FOOTPATH NO. 10 - COMMUNITY OF ILSTON

Purpose:	To consider whether a public footpath exists between points A-B-C
Policy Framework:	The Countryside Access Policy No. 4.
Statutory Test	Section 53(2) and 53(3)(b) of the Wildlife and Countryside Act 1981
Reason for Decision:	There is insufficient evidence of continuous use by the public at large.
Consultation:	The Open Spaces Society, The British Horse Society, The Ramblers Association, Community Council, Previous Local Representative of the Ramblers Association, The Local Member, Somerset Trust, Nicholaston Farm, Gelli Deg (two residents), Gower Commoners Association.
Recommendation(s):	It is recommended no Modification be made.
Report Author:	M. J. Workman.
Finance Officer:	S. Willis
Access to Services Officers:	P.Couch
Legal Officer:	S Richards

1.0 Introduction

- 1.1 An application was submitted in 2000 to register the path shown on Plan No. 1 as a broken line between points A-B-C. The claim was supported by seven user evidence forms although only two people from that number are still remaining in support. An additional nine people submitted user evidence forms in 2009. The eleven people all claim to have used this path in excess of twenty years up until 2009.
- 1.2 The basis of the claim is that there is sufficient long term use to raise the presumption the path has been dedicated to the public. Appendix 1 includes

the relevant provisions and tests that the Council is required to consider under the Wildlife and Countryside Act 1981. They are twofold in that an order could be made on the balance of probability that there is sufficient evidence to show the path exists. Alternatively, that it is only reasonable to allege such a public path exists. If the latter test is to be satisfied, then those alleging the status of the path, must initially satisfy the contention that the path could have become dedicated. To rebut this presumption the objector must provide irrefutable evidence that such a presumption could not have taken place. If that cannot be done then an order should be made and the evidence tested before an Inspector, who would then have to satisfy him or herself of the higher test, that the path does exist on the balance of probabilities.

- 1.3 Appendix 2 includes Section 31 which sets out the tests which are required to satisfy the twenty years uninterrupted period of use under the Highways Act 1980.
- 1.4 Appendix 3 sets out the alternative means by which such a dedication could be inferred under common law.

2.0 The Path

- 2.1 The path appears for most of its length as a narrow worn earth track reflecting pedestrian use over a grassy slope. The claim was made as a result of earth being dumped over the path at approximately point B in 1999. However, it is not clear for how long this remained but evidently it was interpreted as a challenge to the public's use of the way. Even if it was not intended to be a challenge, it is unclear if this interrupted the use of the path. Consequently, due to the uncertainty as to how to interpret this event, the date of the application in 2000 could be taken to call the existence of the alleged public path into question, therefore the relevant period is 1980-2000.
- 2.2 Between points A and B, the path passes over a rural common registered as Unit CL8. The public had no access rights across the common until it was designated as part of the access land in May 2003, as a result of the Countryside and Rights of Way Act 2000. Plan No. 2 shows the extent of the access land in relation to the claimed public path. Any access enjoyed by the public after May 2005 would not count as being "as of right". Section 13(2) of the Countryside Act 2000 prevents use of a route across access land as giving rise to a claim. This includes claims based on common law or under section 31 of the Highways Act 1980. Nonetheless, as the date of the application precedes the designation of the access land, the earlier date must be taken to count as the first occasion the existence of the right of way was called into question.
- 2.3 Of the eleven, ten claim to have made use of this path from 1980-2000. Of these, four have said they first started making use of the path in the 1970s, one from in the early 1960s and another quoted 1946. This provides some evidence of the even longer term use of the path.

The Evidence

- 2.4 There are currently two people who reside at properties in close proximity to the path upon whom the Council could rely, in addition to another who lives within the area. Other than these three, all other eight claimants are long term visitors to the nearby campsite and use this path during their stay in the summer.
- 2.5 Two couples are from Cardiff, a family from Northampton and one person is from Derby. Use is therefore confined by them to a limited period each year. Whilst the two local residents referred to above live in close proximity to the path, it is questionable whether they could be said to represent the general public. The concept of special user is set out in Appendix 4. At the present time the Council has a signed statement taken from one of the more recent supporters in 2009, and three additional statements made in 2000, one of whom is the applicant, who has moved out of the area.
- 2.6 The issue is whether the degree and extent of use would satisfy the requirements of Section 31 of the Highways Act 1980. If the use by the two referred to above were discounted then, eight do not use the path for the majority of the year. Therefore the available evidence that the path would have been subject to continuous use by the general public can not be qualified. Even if that evidence could show otherwise there is the issue as to whether those who live away could be relied on to continue to support and provide additional evidence at any subsequent hearing or public inquiry.
- 2.7 There is no registered owner of the land crossed by the path, but representations have been received by the owners and occupiers of one of the nearby farms. They have stated they have an interest in the land and it is their view no such public way exists, their comments are as follows.
- (i) They have regularly cleared the field by cutting back the vegetation which is why the path remains accessible.
 - (ii) There is already a defined footpath to the north.
 - (iii) There was no Parish record of a right of way prior to 1954 (where any such record should have been kept) or subsequent to that time.
 - (iv) The First Definitive Map was produced in 1954 and there was nothing shown on that nor indeed on any subsequent maps of a bridleway or public right of way.
 - (v) In view of the fact that nothing has previously been recorded, they fail to see how any public right of way exists on what is public open space. Consequently, there is no existing statutory right of access.
- 2.8 Regarding points (ii),(iii) and (v), a public right of way can come into being after the relevant date of the Definitive Map. Regarding (iv) it is possible the claimed public path is a variation of that shown on the first Definitive Map as

discussed below. In addition and in respect of (v), only the section A-B crosses access land but the statutory right of access across only came into existence along the path via A-B since May 2005.

- 2.9 On a site visit in September 2013, one of the owners of the neighbouring farms identified the position of a former ditch that was excavated by his father sometime in the 1980's, to divert the water away from their fields to the south running off Cefn Bryn. In addition a ditch was similarly dug by a neighbouring property in 1999 to also divert the same run off away from their premises. It is suggested that these ditches made walking along the line of the path difficult if not prevented continued access. As such it is possible that these ditches could have interrupted use, but there has been no further evidence to support this contention.
- 2.10 Ilston Community Council have stated they consider this path is a public right of way, but have not provided any evidence.

3.0 Documentary Evidence

- 3.1 The process that was followed to produce the current Definitive map and Statement is contained in Appendix 5. The Parish Map as drafted by the Council of Penmaen identified a path A-C as a probable public one but it was never shown on any of the draft maps nor was it within that Parish. The path fell within the Parish called "Lands Common to the Communities of Llanrhidian Higher and Lower, Nicholaston, Penmaen, Penrice and Reynoldston" for which there was no Parish Council.
- 3.2 The bold line shown on the attached plan was however shown on all the four editions of the review Maps, that is the Draft, Provisional, First Definitive and Special Review Maps. It is difficult to say whether the claimed public path is that which is shown on these Maps, but it is possible, given the scale of 1:25000 that was used to draw these four Maps.
- 3.3 Both the path shown as a bold line and the Parish Route appear as surveyable features on the first, second and third edition of the Ordnance Survey. A site visit in November 2008 revealed a route via that shown on the Parish Survey, but in May 2013 it was noted to be overgrown with bramble, possibly as a result of the time of year.
- 3.4 From at least the 1878 Ordnance Survey until the 1913 the field containing the path shown on the earlier editions of the Ordnance Survey was divided into three. It was only after the two field boundaries were removed that the alignment of this earlier path appears to have been changed to that being claimed. Appendix 6 provides further details.
- 3.5 It is therefore possible that the claimed public path was that previously aligned via the route shown on the draft maps and / or that shown on the Parish Map, were intended to be recognised as a public path. However, there was no Parish Council for the area containing the path and no action was taken by the neighbouring Parish Councils of either Nicholaston or Penmaen to

determine which (if either) should be recognised. Further details on the involvement of these Councils can be found under Appendix 7.

- 3.6 The current landowners of the adjacent field and who object to the claim, consider there had been a dispute over the ownership of this field between the Somerset Trust and the Penrice Estate. That if the latter had an interest in the field they would have objected to the path being shown on the drafts to the Definitive Map. There is no record that any objections were made to these earlier draft maps. Also the Penrice Estate plans dated 1782 and 1814 would appear to rule out it ever fell within the curtilage of their Estate

4.0 Consultations

- 4.1 All the usual organisations, individuals and the Local Member have been contacted but the only responses received are referred to in paragraphs 2.2 and 2.3. A site meeting was held with those who have managed and maintained the field containing the path concerned.

5.0 Summary

- 5.1 There is evidence that the claimed public path has been in use since at least the 1940s and that the path appears to have been available for twenty years prior to 2000 by at least ten people.
- 5.2 It was not the path identified by the Parish Council of Penmaen, although they were not responsible for surveying the paths in this neighbouring Parish. However it is possible it was the path shown on all four editions of the earlier drafts to the Definitive map and on the three earlier editions of the ordnance survey.
- 5.3 The objector who has expressed an interest in the land has not provided any conclusive proof to show why the path could not have become dedicated since 1954.
- 5.4 To make a Modification Order the lower test is whether it is reasonable to allege a public way subsists (see paragraph 3(c)(i) of Appendix 1). This would be on the condition the general public have enjoyed a minimum period twenty years uninterrupted use and that use has been widespread. Secondly, that the landowner has not been able to adduce any irrefutable evidence that he or she had no intention to dedicate the path throughout the relevant period, in this case 1980-2000.
- 5.5 The issue therefore is whether:
- (a) a modification can be made based on the user evidence of a path that came into existence from approximately the 1940's; or
 - (b) on the possibility it is the same path which has been shown on the earlier reviews of the Definitive Map and Ordnance surveys and was simply omitted from the last edition.

- (c) on the basis the use of the later path was enjoyed on the premise that such a right always existed and so the public accepted the variation to that earlier path.

6.0 Conclusion

- 6.1 (1) It is possible this route was that shown on all the earlier drafts of the Definitive Map but for some unknown reason, was never included into the current one.
- (2) It is also possible the path that is claimed, reflects a variation of the route that was shown on the earlier edition of the Definitive Map and was intended to have been shown on the current edition of the Definitive Map. However the path is not shown on the current Definitive Map and so there can be no presumption that its existence on the earlier drafts is conclusive evidence of its status of as public path.
- (3) Those who use the path and could be said to represent the public at large do not live in the vicinity of Gower and their use is confined to their visits whilst on holiday. Therefore in themselves they cannot establish continuous use. The two who live in close proximity and who can show the current path has been open and available for use throughout the relevant period do not represent use by the public at large.
- (4) The user evidence that is available and upon which this Council would be dependant, would not be sufficient to satisfy the provisions of Section 31 of the Highways Act 1980.
- (5) At this stage the objector has not provided any irrefutable evidence to show why the path, as claimed, could not have become dedicated during the period 1980-2000. However, the application has not shifted the burden of proof to the landowner (whoever that may be) to rebut the claim. So, accordingly the lesser test under Section 53(c) it is not possible to satisfy the lower test, which is that “it is reasonable to allege such a public path exists”.
- (6) The Council is therefore not obliged to make a Modification Order, on the evidence that can be relied upon. Should a fresh application be made with greater supporting evidence then the matter would have to be re considered.

7.0 Equality and Engagement Implications

- 7.1 The procedures and tests that are applicable to determine such an application do not require an equality and engagement assessment.

8.0 Legal Implications

- 8.1 There are none other than those contained in the report.

9.0 Financial Implications

9.1 There are no financial implications to making a Modification Order.

Background Papers:

ROW-000027.

Appendices:

Appendix 1 - Relevant extract from the Wildlife and Countryside Act 1981.

Appendix 2 - Highways Act 1980.

Appendix 3 - Dedication under Common Law.

Appendix 4 - Special User Group.

Appendix 5 - History of the compilation of the Definitive Map and Statement.

Appendix 6 - History of the Depiction of a path close to or along that being claimed.

Appendix 7 - Previous involvement of Nicholaston Parish Council.

Appendix 8 – Plan No.1

Appendix 9 – Plan No.2

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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.

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
- (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.

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 actually dedicated the route. User of right, is not of itself necessarily sufficient. 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, acquiesced to that use and 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.

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 actually dedicated the route. Use is not of itself necessarily sufficient as opposed to section 31 of the Highways Act 1980 where after 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, acquiesced to that use and took measures to facilitate public use.

This means the landowners have to be identified and that there is evidence to show they wished to have the route dedicated to the public.

SPECIAL USER GROUP

- (a) The Planning Inspectorate has produced advice on this matter in that they say there is no strict legal interpretation of the term 'public'. The dictionary definition being 'the people as a whole' or 'the community in general'. Arguably and sensibly that use should be by a number of people who together may be taken to represent the people as a whole/the community.

However, Coleridge L J in R -v- Residents of Southampton 1887 said that "use by the public' must not be taken in its widest sense - for it is a common knowledge that in many cases only the local residents ever use a particular road or bridge. Consequently, use wholly or largely by local people may be use by the public as depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community".

- (b) In contrast to this view was the decision made by Lord Parke in Poole -v- Huskinson 1834 who concluded: "there may be dedication to the public for a limited purpose...but there cannot be dedication to a limited part of the public". This case was quoted by an Inspector in 1997 appointed to consider an application to add a public bridleway to the Definitive Map for North Yorkshire County Council. Here the route had also been in use for 40 to 50 years. That Inspector concluded: "In the case before Lord Parke, residents of the same parish were held to constitute a limited part of the public and I therefore believe the inhabitants of the Parish of Cliffs should also be held to constitute a limited part". The Inspector refused to confirm the Order.

**HISTORY OF THE COMPILATION OF THE DEFINITIVE MAP
AND STATEMENT**

1. The National Parks and Access to the Countryside Act of 1949 placed an obligation on all Councils to produce a Definitive Map and Statement. Parish Councils were given the task of surveying all routes they considered may have legal status. This resulted in the production of what has come to be known as the Parish Map (at the scale of 6" to one mile) and the all too often rather brief description of the path contained on small cards also known as the Parish Card. Some of the descriptions on these cards were more comprehensive than others but in combination with the paths' depiction in the "Parish Map", provide a useful record of what routes were considered to have public path status by 1954.
2. The information was passed to the former Glamorgan County Council who collated the information and produced the first Draft Definitive Map which in their opinion reflected routes considered to be public rights of way on 14th September 1954 which became the "relevant date" of the first Definitive Map published in 1970.
3. The legislation required that the information gathered should be the subject of a series of reviews, which would allow the public and landowners to make representations or objections to the inclusion or absence of routes in the various editions of these earlier Draft Maps. The result was the production of the initial Draft Map and Statement published in 1955. Objections to the inclusion or omission of routes were considered in 1956 and the results of those decisions were again subject to further objections which resulted in a further series of hearings which took place in the 1960s. The Provisional Map and Statement published in 1964 was the effect of those objections so determined. Once published, landowners were given another opportunity to object and these were heard in the Quarter Sessions in around 1968. The result was the production of the first Definitive Map and Statement published

in 1970. The passing of the Countryside Act 1968 required all Councils to reclassify routes they had designated as roads used as public (R.U.U.Ps) into either footpaths, bridleways or byways open to all traffic. This resulted in the production of the Draft Special Review of 1971, published in 1974, to which objections could be made. Those inquiries were mainly held in 1980 which when determined lead to the production of the current Definitive Map and Statement published in 1988.

HISTORY OF THE DEDICATION OF A PATH CLOSE TO OR
ALONG THAT BEING CLAIMED

The bold black line is shown on all the precursor maps to the current Definitive Map and also appears on all the early editions of the Ordnance Survey. That is the first, second and third edition (1878, 1899 and 1915 respectively) at a scale of 25" to one mile. The 1973 edition at a scale of 1:2500 and the 1953 edition of 6" to one mile also shows this path, although both of these were based on a survey undertaken in 1913.

The earlier three editions recorded the land concerned being divided into three fields with a path passing through the field boundaries. It is not possible to say if they contained stiles, kissing gates or field gates or a combination of these, and if gates whether they were locked.

It is evident that once those who were utilizing this track no longer needed to pass through the available gaps in the field boundaries, then they would have been able to follow the more gradual slope of the field. Therefore it is possible this is the reason why the path changed (this is from the bold line to the broken line).

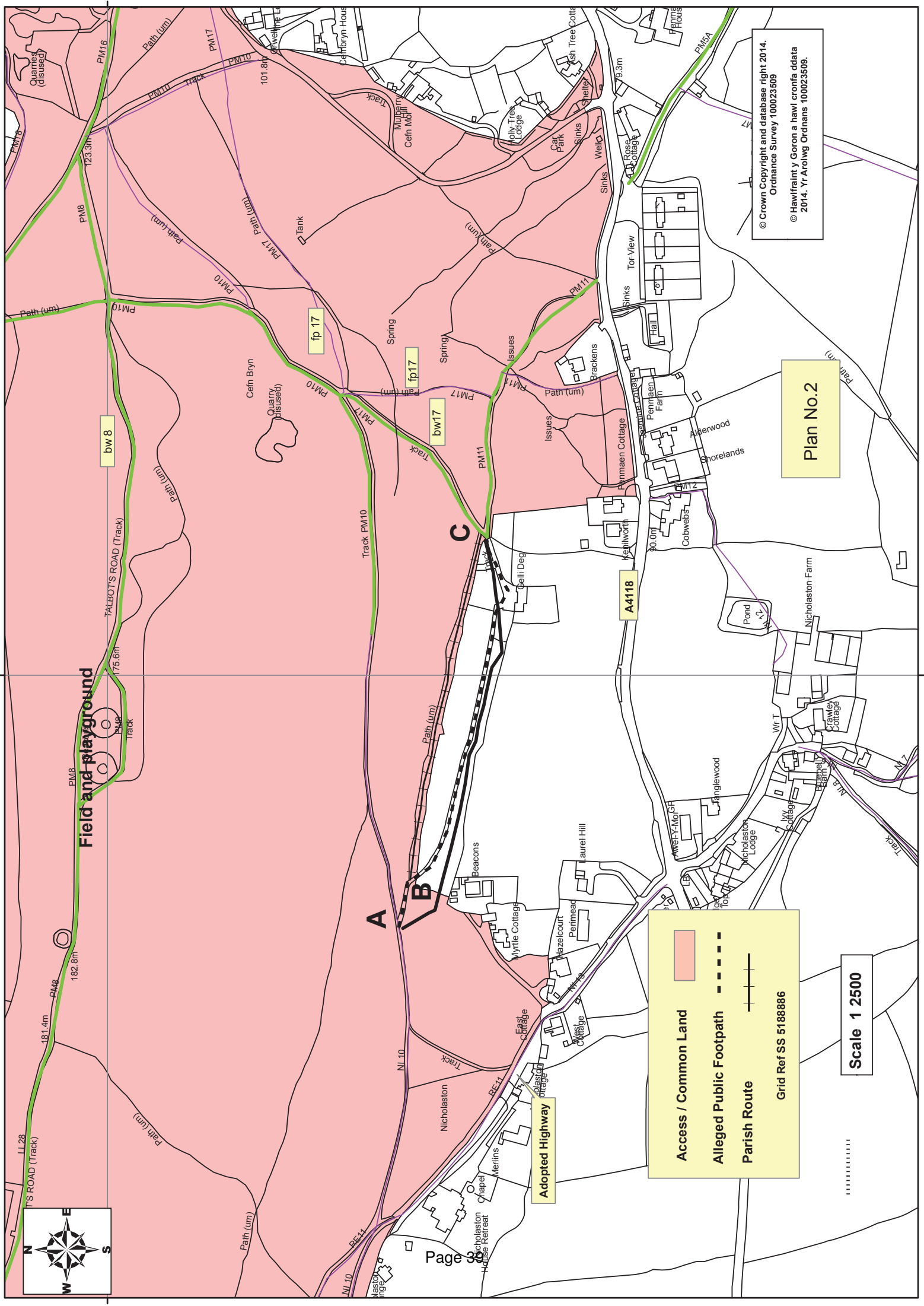
Two claimants have said they started using the path in the 1940s and the other in the 1970s, although it is uncertain which of the two paths at that time were in use.

The 1953 Ordnance Survey edition included additions made in 1948 and so one would presume the three fields were still in existence at that time. However by the 1973 edition no new survey had taken place and so it is likely at some point between 1948 and 1973 the field boundaries were removed and the "newer" path came into existence.

PREVIOUS INVOLVEMENT OF NICHOLASTON PARISH COUNCIL

There are no records of the Penmaen Parish Council having ever been formed and therefore no records of Council meetings until Local Government Re-organisation in 1974 disbanded Parishes and the new Community of Ilston was formed.

Nicholaston Parish did not form a Council although from 1900 until 1982, the ratepayers held meetings at irregular intervals to elect “officers” and to discuss issues of local importance. The National Park and Access to the Countryside Act of 1949 required the Local Authority to survey its public paths, and that this function was undertaken by the Parish Councils. Consequently, the minutes of the meeting were checked from 1949 until 1982. Reference was made to public paths at some meetings but there is no record of any discussions made in respect of the path having been consistently shown on all the editions of the earlier drafts of the Definitive Map. However, even though this path was never in the Parish of Nicholaston, the meeting did make representations on Bridleway No. 8 at the time the Draft Special Review Map of 1972 was being considered. This is was outside the Parish of Nicholaston being on the southern flank of Cefn Bryn. Consequently it is evident those in attendance were concerned with other paths in the vicinity of their Parish but seemingly had no concern over the path shown on the editions of the Definitive Maps.



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Plan No.2

Access / Common Land [Pink shaded area]

Alleged Public Footpath [Dashed line]

Parish Route [Solid line]

Grid Ref SS 5188886

Scale 1 2500

